IN THE

SUPREME COURT OF FLORIDA

ROBERT HAYES, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 79,997

INITIAL BRIEF OF APPELLANT

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ORIGINAL

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PRELIMINARY STATEMENT

Robert Hayes was the Defendant and the State of Florida was the Prosecution in the Circuit Court of the Seventeenth Judicial Circuit of Florida. In the brief, the parties will be referred to by name or as Appellant and Appellee.

The following symbols will be used:

"R" Record on Appeal

"3SR" Third Supplemental Record on Appeal

STATEMENT OF THE CASE

Robert Hayes was indicted on March 22, 1990, for first degree murder. He was tried from October 14, 1991, until November 29, 1991 R440-2101. He was convicted as charged R2100-2101.

A defense motion to release hair (found in the deceased's hands) for testing by a defense expert was filed on November 6, 1991 R2627-2628. A motion for new trial was filed on November 6, 1991 R2629-2630. A form order denying the motion was dated November 6, 1991 R2631. However, the clerk's stamp on the order reflects that it was filed on March 2, 1992 R2631. The penalty phase was held on November 14, 1991 R2216-2313. The jury recommended death by a vote of ten to two R2734. On January 9, 1992, the court ruled on Mr. Hayes' motion to release the hair found in the deceased's hand for independent testing by ordering the prosecution's expert (the Broward Sheriff's Department hair analyst) to test the hair R2758-2759. The defense filed a renewed motion for independent hair testing by its own examiner on February 12, 1992 R2760-2761. The trial court issued its order granting the renewed motion for testing of the hair evidence on March 16, 1992

R2765. The trial court sentenced Mr. Hayes to death on June 5, 1992 R2774-2776. The trial court found two aggravating factors (during a felony and heinous, atrocious, or cruel) and two mitigating circumstances (Robert Hayes' deprived background and his low I.Q. of 74) R2777-2785.

Mr. Hayes filed a second motion for new trial based upon the test results of Professor Walter Rowe, a professor of forensic sciences at George Washington University 3SR64-75. Professor Rowe's examination revealed that the Caucasian hairs in the deceased's hand had been forcibly removed and that "it is highly unlikely" that they were from the deceased 3SR74-75. This supported the defense that the hairs were forcibly removed in the struggle with the perpetrator. This would necessarily exonerate Mr. Hayes, who is Black. The trial court denied the motion 3SR95.

STATEMENT OF THE FACTS

The prosecution's case consisted of four general areas of testimony. (1) Forensic and law enforcement testimony concerning the investigation of the case and scientific testing. (2) Lay testimony concerning Robert Hayes' actions on the evening in question and his previous relationship with the deceased. (3) The testimony of a jailhouse informant. (4) Testimony concerning a collateral crime incident.

Monica Datz, an i.d. technician for the Pompano Beach Police Department, testified that she arrived at the room of the deceased at 7:14 a.m. on February 20, 1990 R1030-1032. She retrieved a Caucasian hair from the hand of the deceased R1181-1182. She took five latents from the room R1183-1184. There were three latents

of value R1185-1186. Two matched the deceased R1187. None matched Robert Hayes R1196. Lori Haberland testified that the deceased was found wearing only blue jeans and a red T-shirt R1174. There appeared to be feces in her jeans R1174-1175.

George Duncan, a serologist from the Broward County Crime Lab, testified that he took a vaginal swab from Ms. Albertson and cut out samples from a tank top that was laying on the floor of her room R 1045. Sandra Watson, a forensic serologist with the Broward County Sheriff's Office, testified that there was seminal fluid on the tank top and on the vaginal swab R1059-1062. This was revealed through the P30 protein test R1063-1064. Seminal fluids could probably last only twelve hours inside the vagina. She said the tank top stain could last longer, although she can't say how long R1064-1065. The deceased's clothing revealed no seminal fluid R1070. She tested several pieces of clothing from Mr. Hayes and none revealed blood R1542-1543. She tested fingernail scrapings from Mr. Hayes, which did not reveal blood R1544.

Joanna Squelgia, who formerly worked with Lifecodes Corporation, testified concerning her DNA testing in this case. She began testing the DNA materials in this case on September 4, 1990 R1083. The DNA from the vaginal swab had very marginal degradation. The DNA on the tank top found in the room was more seriously degraded. She claimed the DNA from the vaginal swab had a seven band match, R1124, and the tank top had a three band match R1124. She did all the testing on this sample alone without anyone watching her R1126. She ran one other case at the same time R1127.

Kevin McElfresh, director of identification testing at Lifecodes, testified R1140. He had a Ph.D. in population genetics. He never reviewed the original material here, but he reviewed the autoradiographs, chain of custody information, and the mathematics of the tester R1142. He stated that the probability of the vaginal swab match is 1 in 425 million R1148. He claimed the probability of the tank top matches is 1 in 50,000 R1149.

Dr. Steven Nelson, an associate medical examiner, testified that he arrived at the deceased's room at the Pompano Beach Harness Track, at about 7:30 a.m. on February 20, 1990 R1290. The deceased was fully clothed R1290. She had a lot of bruising on the neck R1290. She appeared to have been dead for six to twelve hours R1291. There was feces in the room R1294. There was no way to tell whether it was human or animal R1294. The deceased was killed in the room R1294. Her blood alcohol was .06 R1299. He ruled the case to be a homicide by manual strangulation R1299. He stated that he has no idea whether she was conscious when the strangulation occurred R1339. She had bruises on both sides of her head and her upper lip, but had no skull fractures R1303-1304,1309. He found no bruising to the vaginal or anal area R1310. He saw no sperm on the slide of the vaginal swab, but he can not rule this out R1311. He would have expected to see sperm if there had been intercourse immediately prior to death, but this is not an absolute rule R1316. He found no defensive wounds R1322. The deceased had Caucasian hair in her hand, which he considered valuable evidence in determining the perpetrator R1327. He expected the reddish material, which appears to be blood, on the door to be tested

R1338. He also expected the Caucasian hair in her hand to be tested R1339.

Officer Kevin Butler testified that he met Robert Hayes at the Pompano Beach Police Station at 9:00 a.m. on February 20, 1990 R1407. Mr. Hayes stated that he had a casual conversation with the deceased at 5:30 p.m. on February 19, 1990, and stated that he did not see her again the rest of the evening R1408-1409. He stated that he knew the deceased from work and had had sex with her once about three months before her death R1422. She was a very heavy drinker and had been drinking the time they had sex R1422. He stated that he had never been inside her room R1414. He also stated that on the night in question he had not been in the deceased's dorm R1414. He said this in response to their confronting him with an alleged witness seeing him visible in her room R1414. This conversation was taped.

Officer Butler claims that he spoke to Mr. Hayes for 1½ hours off tape after the taped conversation R1435-1436. He originally maintained the same version of events R1436. Officer Butler then claims the police changed their tactics and told him that they knew he wouldn't want to admit to talking to the deceased for fear he would be falsely accused of killing her R1437. Butler claimed that Mr. Hayes then said that he had spoken to the deceased in the hallway of her dorm, but that he had not gone in her room R1437-1439. He originally took rough notes about the pre-tape conversation, but took no notes about the post-tape conversation R1444-1445. Officer Gregory Flynn stated that Robert Hayes freely

allowed himself to be fingerprinted and photographed and his room to be searched R1465-1466.

Alfred Grenier was working for Pompano Harness Track in February, 1990 R1203. Robert Hayes had worked for Macomber Stables, at Pompano Harness Track, for about a year in February, 1990 R1205. On February 20, 1990, the deceased did not show up for work R1205. He went to her room and was able to push the door open a couple of inches even though the chain was on R1206. He saw her head on the floor and went to get the security guards who were able to force the door open R1209-1210. He stated that Mr. Hayes and Ms. Albertson had worked together for four months R1208-1209. He stated the deceased had complained that Robert Hayes had repeatedly asked her out on dates R1209-1210. He took her to Gate 5 to talk to the security guard R1209-1210. He stated that Robert Hayes was an excellent groom R1211. On February 19, 1990, Robert Hayes was supposed to water his horse at 9:00 p.m. and the horse was watered R1216.

Verlin Gray testified that he was a groom at the Pompano Harness Track in February, 1990 R1222. He had known Robert Hayes for about two or three years at this time R1222-1223. He stated that he saw Robert Hayes about 5 or 6 p.m. on February 19, 1990, outside his dorm R1224. Robert Hayes had been drinking and stated that he had an argument with his girlfriend R1225. He claimed that Hayes said he wanted to find a woman and have sex with her R1226. He later saw Robert Hayes about 9:00 or 10:00 p.m. while he was waiting for the eighth race to finish R1227-1228. Mr. Hayes said he was going to bed. The eighth race went off around 10:00 p.m.

R1231. He stated that Robert Hayes often talked foolishly about having sex with women R1231-1232. Dianne Fields stated that she saw Robert Hayes near Gate 5 between 8:45 and 9:00 p.m. on February 19, 1990 R1236. He asked her for a date and she said no R1236-1237.

Charles Bakley stated that he had quit working as a groom for Macomber Stables about 2-3 days before this incident R1242. He came through Gate 5 at about 8:00 p.m. on February 19, 1990, and saw Dianne Fields speaking with Robert Hayes R1242-1243. He could not hear what they said R1244. He had worked with Robert Hayes and the deceased R1246.

Anne Santariello stated that she lived in the dorm above Pamela Albertson R1253. She stated that sometime during the night of February 19, 1990, she heard what she thought was a muffled scream and some banging R1254. She is not sure of the time, but thinks it was about 10:00 p.m. R1255. She is not sure what room it came from R1255. She had originally told the police it was earlier R1255. She claimed that the deceased had told her she was afraid of Robert Hayes and he had allegedly threatened her R1255.

Joan Schmidt stated that she worked as a groom at Pompano Harness Track from September, 1989, to April, 1990 R1261. She lived three doors down from the deceased, but barely knew her R1262. Ms. Albertson was in the hallway of their dorm at about 8:45 p.m. on February 19, 1990 R1263. Ms. Albertson was standing in the doorway with a Black male who was between 5'4" and 5'6" and medium complexion R1265. The man had on a white T-shirt with some type of decal on the front and greenish sweat pants cut off into

shorts. The man was mumbling something and appeared disoriented R1266. He was leaning against a wall to support himself R1266. She went to her room and heard nothing further R1267. About 10:00 p.m. she walked back by Pamela's room and heard what she thought were "very muffled moans". She thought that it sounded like she had let the man in and they were having consensual sex R1268-1269.

On February 20, 1990, she identified Mr. Hayes from a photographic lineup, but she could not identify him at the time of trial R1270. She originally told the police that the man was wearing white pants, but later changed her mind R1278. She identified a shirt taken from Mr. Hayes' room as the shirt the man was wearing that night R1278-1279.

Elijah Owens, a groom from the Pompano Harness Track, stated that he had known Robert Hayes for two years R1365-1366. He stated that on February 19, 1990, he saw out on his front porch from about 6:00 p.m. to about 11:00 p.m. He drank two or three beers during this time R1367. He claims that Mr. Hayes came by between 10:00 and 10:30 p.m. and asked for a cigarette R1367. He stated that he was sure of the time because the television show Alien Nation was on R1367. He stated that it was on from 10:00 p.m to 11:00 p.m. R1367. He stated that Pamela Albertson came out of her dorm in front of his dorm R1368. Mr. Hayes yelled at Ms. Albertson and went to talk to her R1369. Both sides then stipulated that Alien Nation was actually on from 9:00 p.m. to 10:00 p.m. Mr. Owens stated that Robert Hayes was wearing a white hat, white shorts, white tennis shoes, and he things a white shirt R1370. He said

when he saw Mr. Hayes and Ms. Albertson they were laughing and seemed very friendly R1375.

Clyde Tate testified that in the fall of 1989 and winter of 1990 he worked with Pamela Albertson at Pompano Harness Track R1346-1349. He claimed that Robert Hayes frequently asked Ms. Albertson out R1350. She always declined R1350. He also claimed she was scared of Mr. Hayes R1350. He claimed about a month before the incident in question he had seen Robert Hayes straddling the deceased in a barn while she was on her back R1353. She told him to stop and Tate walked up and told Mr. Hayes to stop R1354. He stopped and they finished watering the horses R1354. Mr. Tate never reported this incident to anyone R1355. He also admitted that he had been convicted of two felonies R1355. He was fired about a month before this incident R1401. He was fired for not cooling down a horse properly R1401. He denied every having sex with Ms. Albertson even though on deposition he had stated that he "had romantic affairs" with her R1402-1403. He claimed that he thought this meant hugging. He stated that it takes an hour to cool down a horse properly R1403-1404. He has seen it done as quickly as thirty minutes R1404-1405.

Tracey Marchant worked as a groom at Pompano Harness Track and also at a bar named Murray's Pub R1471-1472. On February 19, 1990, she saw Ms. Albertson at about 7:00 to 7:30 p.m in Murray's Pub R1474. Albertson was there for 1 to 1½ hours and drank four or five beers R1475. She left at about 8:45 p.m. R1475. She said she had to water her horses at nine and then she would be back later R1475-1476. Marchant claimed Albertson's stable was five to eight

minutes away R1476. Watering her horses would take ten to fifteen minutes R1476.

Alan Elisk testified he worked as a security guard at Gate 5 at Pompano Harness Track R1481. On February 19, 1990, he worked there between 4:00 p.m. until midnight R1481. On that night, he saw Hayes at the public phone booth at the gate at about 8:00 p.m. R1484. Mr. Hayes was on the phone for fifteen to twenty minutes R1486. He stated that the fourth race was going on at the time R1486. He stated that he and Mr. Hayes spoke and Hayes left after the fifth race R1487. He went towards the racing side, which is also the general area of the women's dorm R1488. About twenty minutes after the race started he heard what he thought was a scream from the area of the women's dorm R1488. He looked and didn't see anything R1488. He went back to work because a lot of time the women in the dorm would make noise R1489. He stated that Mr. Hayes was wearing white shorts, white shirt and a black beret or handkerchief R1489-1490. He stated on deposition that it was the fourth race which they discussed betting on R1491. After reviewing his deposition, he was convinced that it was the fourth race which actually went off at 8:34 p.m. R1491. After reviewing his deposition he decided that Mr. Hayes was actually speaking on the phone at about 8:45 p.m. R1492. He stated that Mr. Hayes was in a good mood, but had been drinking R1492. He finally stated that he was confused and did not know whether Hayes left after the fourth race R1492.

George Goebel testified that he owned a horse at Macomber's Stable R1502-1503. He stated that he knew both Robert Hayes and

the deceased R1504-1505. Mr. Goebel thought that Robert Hayes was a good groom R1505. He stated that the post-race cool down of a horse varies from 30 minutes to three hours R1509. One hour is the average R1509. He claimed that Ms. Albertson had told him that she was afraid to go in a barn alone with Mr. Hayes about three weeks before her death R1507. He told her to talk to the trainer and security R1513. He did not make out a police report on this even though he had just retired from 21 years with the Pompano Beach Police Department R1513.

Janet Stevenson stated that she lived in the same dorm as Ms. Albertson and knew her R1564. She stated that while the fourth race was going on she and her boyfriend left his barn and walked back to her dorm R1566. She saw Albertson speaking to a Black male and heard her say "I'm going to my room. You can go to yours" R1568. She can not identify the Black male. She claimed that the man had on a green tank top, which was like a sweatshirt that had been cut off and white shorts which appeared to be sweat pants that were cut into shorts R1569. Robert Gill stated that he was with his girlfriend, Janet Stevenson, on February 19, 1990 R1575. They went to his barn to water the horses between 8:30 and 9:00 p.m. R1576. They watered for fifteen to twenty minutes and then went to the women's dorm R1576. He saw an unidentified Black male and unidentified White female talking R1577. He heard the woman say, "I think I'll pass tonight," and the man said "Oh, come on, baby" R1580.

Debra Lesko, formerly Debra Joseph, testified to an alleged collateral offense. In September, 1988, she was a groom at Garden

State Park Race Track R1585. She stated that they worked for the same stable R1586. They sometimes went to lunch or dinner together R1586-1587. She claimed that one day she went to a bar off track with Robert Hayes after they fed their horses R1587-1588. They ate and had a couple of drinks and left R1588. About eight or nine p.m. they went back to her room R1589. They talked for a while R1589-1590. She claimed that Mr. Hayes then came toward her and got her on the floor on her stomach and proceeded to choke her R1590). She finally said, "Yes" and he got up R1591. She claimed she then told him she needed to go down the hallway to the restroom R1591. She claimed that he let her leave R1591. She stated she then went to security R1591.

Cheryl Bell testified that she roomed with Debbie Joseph (now Lesko) in September, 1988. She had a conversation with Robert Hayes in 1988 about Ms. Joseph R1595. She claimed Mr. Hayes told her that he had a date with Ms. Joseph to go to supper. He then said "maybe I can get lucky with her" R1595. She asked him what he meant R1595. She claimed he said "maybe go to bed with her" R1595. She claimed that later that night Debbie came to her and said that Mr. Hayes had jumped on her and grabbed her R1597.

Steven Schomp, a police officer with the Cherry Hill, New Jersey Police Department, stated that he took a complaint from Debbie Lesko in September, 1988 R1599. He arrested Robert Hayes for simple assault R1601. The charges were later dismissed R1601.

Ronald Morrison, a jailhouse informant, testified concerning an alleged statement made by Robert Hayes. Morrison stated that he is currently in the Broward County Jail R1608. He stated that

he was on probation for robbery with a deadly weapon, aggravated assault, and resisting arrest without violence R1609. He was arrested on a violation of probation for failing a drug test and for being arrested on two charges of grand theft R1609. The grand thefts have been dropped but the violation of probation is pending R1609. He claimed he had a conversation with Robert Hayes about the incident R1616. He claimed Hayes told him that he was standing in the doorway outside the woman's room talking R1616. Mr. Hayes allegedly said he was trying to make a date and she said "she didn't date Black guys" R1617. He then allegedly said that he pushed her in the room, closed the door, and locked it R1616. Mr. Hayes supposedly said she screamed and he hit her R1616-1617. Morrison claimed he then threatened to kill her if she did not do what he said R1617. Robert Hayes allegedly said that he raped her and

> "she started screaming and he yoked her to shut her up and held her in the yoke until she went limp"

R1617. Morrison claimed that "yoking" means to grab someone in a choke hold R1617. Morrison claimed that Hayes then told him he put the woman down, locked the door and went out the window R1617.

Morrison stated that on May 8, 1990, he wrote a letter to the State Attorney R1618-1619. As a result of his working for the State on this case, he was given a plea bargain of a year and a day state prison and four years probation on his original charges of robbery with a deadly weapon, aggravated assault, and resisting arrest without violence R1620. His violation of probation hearing had been continued until after Robert Hayes' trial R1621. The prosecutor will speak on his behalf in his violation of probation

hearing. The prosecution rested. Mr. Hayes' motion for judgment of acquittal was denied R1628-1632.

The defense called Officer Gregory Flynn, lead investigator on this case R1641. He stated that there were no fingerprints or hair samples which matched Mr. Hayes' found in the deceased's room R1646. Howard Seiden, hair analyst with the Broward County Sheriff's Department, was called as a defense witness R1667. He stated that there were no Black hairs in the deceased's underwear R1674-1675. There were Caucasian hairs on Mr. Hayes' clothing and they were all inconsistent with the deceased's hair R1677. There were hairs in the deceased's right hand which were Caucasian R1678. He never compared this hair to the deceased's hair R1687. Sexual contact can result in hair transfer, but doesn't always R1698.

The defense called John Beatrice, security director of the Pompano Harness Track R1721. He stated that he never got any report of Ms. Albertson's alleged fear of Robert Hayes or of any harassment by Robert Hayes R1722. The track has a written policy that he is to receive any such reports R1726.

The defense then called Dr. Dan Garner, director of Cellmark Laboratories. He received his Ph.D. in medicinal chemistry in 1973 R1748. He then went to work for the Bureau of Alcohol, Tobacco and Firearms forensic laboratory for fourteen years R1748-1749. He was chief of their forensic laboratory for five years R1749. He also taught forensic science at George Washington University and Antioch Law School R1750.

Dr. Garner stated that Cellmark declined to test the original sample in this case because the local lab had been unable to find

sperm in the sample R1751. He stated that he reviewed the lab's report, bench notes, autorads, and depositions of Lifecodes personnel concerning this case R1752. He agreed that the seven banded pattern matched the suspect's DNA R1752. He stated that there are two possible explanations for this R1753. One is that the DNA is from Robert Hayes R1753. The other is that there has been accidental contamination with the known blood sample of Mr. Hayes R1753. He also agreed that there was a three band match on the other sample R1759-1760. He stated that Cellmark does not consider a three band match a match or an exclusion R1760. They consider that it may or may not be the suspect's DNA R1760. The DNA on the tank top is more degraded than that from the vaginal swab R1765. Normally one would expect DNA to degrade more rapidly in the vagina, if the samples were deposited at the same time R1765.

He testified that there are key differences between the procedures used by Cellmark and Lifecodes. Cellmark actually has someone watching the scientist transfer the DNA from one tube to another tube and the samples are double labeled R1770. LifeCodes does not follow either of these procedures R1770. Cellmark also processes the known samples at different times from the evidence to prevent accidentally mixing up the two R1770. Lifecodes does not follow this procedure R1770-1771. Cellmark's policies were implemented to avoid human error R1772-1773.

The defense then called George Duncan, DNA analyst for the Broward County Crime Laboratory R1853. He examined both Lifecodes

and Cellmark laboratories R1854. He adopted all of the Cellmark procedures to reduce the possibility of human error R1854-1855.

The defense then called Laura North, a groom at Pompano Harness Track R1896-1897. She worked with Pamela Albertson and lived in the room next to hers R1897. On February 19, 1990, she had a horse racing in the fourth race R1898. The fourth race went off at 8:34 p.m. R1898. After the race, she cooled off her horse, which takes anywhere from 45 minutes to an hour and a half R1898. She took her normal time and went back to her room about ten o'clock R1899. She had a conversation with Ms. Albertson there R1899. She did not see anyone else in the area R1900. Ms. Albertson did not appear distressed in any way R1900-1901 Four or five days later there was a police officer's card under her door R1900. She had a brief phone conversation with the officer, but does not remember his name R1900. The officer did not ask her to come in and make a statement R1910. She told him the same information as her trial testimony; although she is not certain whether she told him the time R1910. She stated that you can not cool down a horse in thirty minutes R1918. The defense then rested R1919.

The prosecutor recalled Dr. Robert McElfresh as a rebuttal witness R1819. He stated that he reviewed the bench scientist's data R1822. He did not see evidence of contamination R1829.

The prosecution recalled Gregory Flynn R1919. He left a card at Laura North's door R1920. She did call, but he does not know who spoke to her R1920. The prosecution recalled George Duncan, forensic serologist, as a rebuttal witness R1925. He stated that under pristine conditions, DNA would degrade more quickly in the

vagina than on cloth R1928. He stated that the condition of the cloth could affect this R1928-1929.

Both sides then rested R1947. A renewed motion for judgment of acquittal was denied R1947-1948. The jury returned a verdict of first degree murder R2100.

The prosecution recalled Dr. Nelson, the medical examiner, in the penalty phase. He stated that the deceased's blood alcohol was .06 R2223-2224. He stated that she suffered blunt force trauma which caused lacerations to her mouth and blows to both sides of the head R2225-2226. These could have been caused by blows from the fist or a fall R2226. The cause of death was manual strangulation R2228. He has no idea whether she was conscious at the time of strangulation R2230. The prosecution then rested R2231.

The defense called Bobby Jean Johnson, Robert Hayes' sister R2232. She stated that Robert was born in Madison County, Mississippi R2232. Their father was an alcoholic R2233. He had a stroke to the brain when Robert was about six or seven R2233. After that, the family had to survive on Social Security R2233. Neither one of their parents could read or write R2234.

She testified that Robert had tremendous problems in school and often spoke of quitting R2234. He stuttered badly and the other children often made fun of him R2234. Robert never learned how to read and write R2234. He quit school when he was thirteen and moved in with his uncle and began to train horses R2235.

The defense then called Dr. John Spencer, a clinical psychologist R2237. He testified that Robert Hayes has an I.Q. of 74, which is in the borderline range R2239. He stated that people in

this range are significantly limited in social skills and problem solving skills R2240. Both sides rested R2244.

The jury recommended death by a vote of ten to two R2271. The court imposed the death sentence R2299-2319.

SUMMARY OF THE ARGUMENT

1. The prosecution was allowed to comment, over objection, concerning the defense's failure to test scientific evidence.

2. The prosecution was allowed to make an improper, inflammatory remark in his closing argument, over objection.

3. The trial court erred in denying Mr. Hayes' motion for new trial when newly discovered scientific evidence pointed to his innocence.

4. The trial court erred in admitting irrelevant collateral crime evidence.

5. The trial court erred in admitting collateral crime evidence concerning a charge that had been dismissed.

6. The trial court erred in admitting the DNA test results in this case, when there was substantial dispute as to the reliability of the laboratory procedures employed.

7. The trial court erred in restricting the cross-examination of a key prosecution witness.

8. A prosecution lay witness was improperly allowed to give her opinion that Mr. Hayes was guilty.

9. Defense counsel was improperly restricted in questioning the jurors on the issue of racial prejudice.

10. The prosecution was improperly allowed to excuse a Black juror, over objection.

11. The trial court erred in refusing to suppress Mr. Hayes' police statements.

12. The trial court erred in failing to grant a judgment of acquittal as to premeditated murder.

13. The trial court gave undue weight to the jury's death recommendation.

14. The trial court erroneously applied a presumption of death if an aggravator exists.

15. The trial court erred in failing to consider and find a non-statutory mitigator that was proven.

16. The trial court erred in finding that this offense is especially heinous, atrocious or cruel.

17. Florida Statute 921.141(d) (the felony-murder aggravator) is unconstitutional on its face and as applied in this case.

18. Death is disproportionate.

19. The Florida death penalty statute is unconstitutional.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO COMMENT ON THE DEFENSE' FAILURE TO TEST SCIENTIFIC EVIDENCE.

The trial court allowed the prosecution to argue, over objection, the defense's failure to test scientific evidence. This denied Mr. Hayes due process of law pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. The prosecution repeatedly brought out, over objection, the failure of defense counsel to have independent testing of various

pieces of scientific evidence. This was harmful error that in that it could lead the jury to believe that Mr. Hayes had some burden of proving his innocence.

The prosecution called Sandra Watson, a lab technician in the Broward County Crime Laboratory, concerning certain scientific tests which she ran R1517. On redirect, the following colloquy took place:

> Q (Prosecutor): You gave a deposition to the defense attorney in this case, Ms. Barbara Heyer?
>
> A Yes, I did.
>
> Q When was that, do you recall?
>
> A I can look it up.
>
> MS. HEYER (Defense Counsel): Your Honor, may we approach?
>
> (The following was at side bar:)
>
> MS. HEYER: I may be wrong but I think Mr. Kern's next question is --....
>
> MS. HEYER: His next question is going to be did I ever request further testing?
>
> MR. KERN: Absolutely.
>
> MS. HEYER: That's not my burden.
>
> MR. KERN: That's not her burden but it's her request.
>
> THE COURT: It doesn't have to be a burden. You don't have a burden to do anything.
>
> MS. HEYER: That's correct. He's making a comment on my producing or presenting evidence.
>
> MR. KERN: I can certainly ask that; whether she asked for it.
>
> THE COURT: I won't object to that.
>
> R1549-1550.

The prosecutor went on to inquire as to the failure of the defense to request Ms. Watson to perform scientific tests R1551. Defense counsel subsequently moved for a mistrial and a curative instruction designed to tell the jury that the defense had no burden to produce any evidence R1736-1740. Defense counsel pointed out that the prosecution had done this with blood evidence, hair evidence and scientific evidence as a whole R1738. The trial court pointed out that it is analogous to the failure to state commenting in closing argument on the defense's failure to call a witness R1738. Defense counsel agreed and adopted this argument R1738. The trial court reserved ruling R1740. This issue was the subject of further discussion and the court ruled that the prosector could continue to argue that the defense had the opportunity to run various scientific tests but could not explicitly say that the defense had a burden to run these tests R1874-1878. Mr. Hayes again renewed the motion for mistrial and motion to prohibit the prosecution from arguing his failure to request certain scientific tests R1888-1891. This was overruled R1891. The prosecution argued, over objection, in closing argument that the defense had the opportunity to test hair evidence R2013.

It is well settled that, except for certain very narrow exceptions, it is improper for the prosecution to comment on a defendant's failure to call certain witnesses or introduce certain evidence. Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991); Lawyer v. State, 627 So. 2d 564 (Fla. 4th DCA 1993); Trinca v. State, 446 So. 2d 719 (Fla. 4th DCA 1993); Kirk v. State, 227 So. 2d 40, 42 (Fla. 4th DCA 1969). The violation of this rule has

often been held to be reversible error. Lawyer, supra; Trinca, supra.

The recent well reasoned case of Lawyer, supra, outlined the narrow exceptions to the general rule:

> The rule in this state is that the prosecution can comment on a defendant's failure to produce a witness only if: (1) the defendant puts on evidence of defenses which as alibi or self-defense which reflects the existence of a witness who could gives relevant testimony *and*, (2) that witness has a special relationship with the defendant.

627 So. 2d at 567.

It is clear that the defense in this case was not an affirmative defense such as alibi or self-defense. The defense consistently argued throughout the case that the prosecution had failed to prove beyond a reasonable doubt that Robert Hayes was the perpetrator. Defense counsel did point out the prosecution's failure to run certain scientific tests, especially to test Caucasian hair in the deceased's hand. However, this in no way involves assuming an affirmative defense such as alibi or self-defense. This is merely part of showing a reasonable doubt that Robert Hayes was the perpetrator. It is even more clear that the second prong of the test was not met. The prosecutor asked the questions concerning Mr. Hayes' failure to request scientific tests of an employee of the Broward County Sheriff's Crime Laboratory. Clearly, she had no special relationship to the defendant.

The references and arguments concerning the defense's failure to request scientific tests are reversible error. The only direct evidence in the case was the testimony of a jailhouse informer. The DNA evidence was in great dispute. The Caucasian hair in the

deceased's hand tended to point to a Caucasian perpetrator. The prosecutor's repeated questioning along this line could lead the jury to believe that Mr. Hayes had the burden of showing his innocence. A new trial is required.

POINT II

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE PROSECUTOR'S INFLAMMATORY CLOSING ARGUMENT.

The prosecutor had opening and closing argument in the guilt phase. In the prosecutor's final argument to the jury, he made the following argument:

> (Prosecutor): Counsel said that, next, that the hair in her hand is not Pamela Albertson's hair. You can look at it and determine that yourself.
>
> Howard Seiden spent all his working hours as a forensic scientist with the proper background and training and schooling for hair comparison and he looked at it up there and said he was asked. He was given state's exhibit number 67. He was given this exhibit. And he said and he had frankly he had the head hair samples to compare that were taken from Pamela Albertson by Dr. Nelson at the autopsy and he also had the benefit of these photographs too. And he said no, I can't tell you by looking at it. There's no way in the world I can tell you that that's her hair or not her hair. Of course not. And there's a man who works with hair.
>
> But counsel would make you all experienced experts in hair identification. Let you look at this hair and say oh, that's not her hair. From what? From what? I mean that is a challenge to your intelligence as jurors, I submit.
>
> MS. HEYER (Defense Counsel): I object. There's more.
>
> The COURT: Overruled.
>
> MR. KERN (Prosecutor): No way in the world that you could look at this hair or look at it visually without a microscope at the head hairs that were taken at autopsy of Pamela Albertson and say it's not her hair. I submit that's fictional evidence.

R 2047-2049.

This was an improper argument. Comments that defense arguments insult the jury's intelligence have been consistently held to be improper. Alvarez v. State, 574 So. 2d 119, 120 (Fla. 3d DCA 1991). See also Huff v. State, 544 So. 2d 1143, 1144 (Fla. 4th DCA 1989); Waters v. State, 486 So. 2d 614, 616 (Fla. 5th DCA 1986). This kind of inflammatory attack on the defense was clearly improper. This argument denied Mr. Hayes due process of law pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9 and 16 of the Florida Constitution and the unique need for reliability required in a capital case pursuant to the Eighth Amendment and Article I, Section 17 of the Florida Constitution.

The error in this case was harmful. The prosecution had been improperly allowed to argue that the defense had an opportunity to test the hair evidence. See Point I. This forced the defense into a posture of having to argue that a person could tell that the hairs were different by their appearance. The prosecution was then allowed to make the improper and inflammatory argument that this insulted the jury's intelligence. This was extremely prejudicial given the fact that the hair evidence was crucial evidence pointing to a White person as the perpetrator of this offense. Thus, a new trial is required.

POINT III

THE TRIAL COURT ERRED IN DENYING MR. HAYES' MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED SCIENTIFIC EVIDENCE.

Mr. Hayes had the hair which was in the deceased's hand tested after the trial The testing indicated that the hair had been forcibly removed and was inconsistent with those of the deceased.

This newly discovered evidence strongly supported the defense's theory of the case. The trial court's denial of this motion denied Mr. Hayes due process of law pursuant to Article I, Sections 2, 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the Untied States Constitution and the unique need for reliability required in a capital case pursuant to the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution.

A Caucasian head hair was found in the hand of the deceased R1327. Neither side had the hair tested prior to trial. A key element in the defense theory of the case was that this hair could have been removed in a struggle with the perpetrator. This would eliminate Robert Hayes as the perpetrator, as he was a Black man. The prosecution was allowed to argue, over objection, that the defense could have tested the hair pre-trial. This improperly shifted the burden of proof to Mr. Hayes to demonstrate his innocence. See Point I, supra.

Mr. Hayes was convicted on October 29, 1991 R2624. Mr. Hayes filed a timely motion for new trial on November 6, 1991 R2629-2630. On the same date, he filed a motion to release the hair evidence for independent testing by Professor Walter Rowe of George Washington University R2627-2628. The trial court denied the motion for new trial on November 6, 1991 R2631. On January 9, 1992, the trial court issued an order to allow Howard Seiden of the Broward County Crime Laboratory to test the hair evidence R2758-2759. Mr. Seiden's testing comparing the hair of the deceased with the hair in her hand. On February 12, 1992, Appellant again renewed his

motion for independent testimony by Professor Rowe R2760-2761. On March 16, 1992, the trial court finally granted the motion to allow independent testing R2765. On December 24, 1992, Appellant filed a renewed motion for new trial based upon Professor Rowe's affidavit 3SR64-75. His testing revealed that the hair in the deceased's hand was forcibly removed 3SR74. He also stated that it is "highly unlikely) that these hairs came from the deceased 3SR75. On March 12, 1993, the trial court denied the motion for a new trial 3SR95.

The post-trial hair testing by Professor Rowe raises a serious claim as to Mr. Hayes' innocence. This evidence supported the defensive theory of the case that a White person must have committed this offense. The prosecution had been previously improperly allowed to comment on the defenses's failure to test this evidence. In the interests of justice, the trial court should have granted Mr. Hayes' motion for new trial.

POINT IV

THE TRIAL COURT ERRED IN ADMITTING COLLATERAL CRIME EVIDENCE.

The trial court admitted collateral crime evidence, over objection, which was irrelevant and highly prejudicial. This evidence did not possess the unique points of similarity required by this Court's decisions and was merely introduced to show an alleged propensity to violence on the part of Robert Hayes. The introduction of this evidence denied Robert Hayes due process of law pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 2, 9, 12, 16 and 17 of the Florida Constitution, and Florida Statutes §§

90.404 (2)(a) and 90.403. The admission of this evidence was harmful error requiring a new trial.

Mr. Hayes filed a pre-trial motion in limine to exclude the collateral offense evidence at issue here R2332-2336. Defense counsel extensively argued the lack of similarity of the incidents, its lack of relevance and its prejudice. An evidentiary hearing was held on this motion, during trial R78-337,565-583,889-896,970-987,995-998. Orally counsel again reiterated the lack of similarity, lack of relevance and prejudice. The trial court finally ruled, after extensive evidence and argument, immediately prior to opening statement R997-998. The defense counsel objected when this issue was mentioned in opening statement R1023. Defense counsel also made a continuing objection to all of this testimony R1603. Mr. Hayes again raised this issue in his motion for new trial R2629-2630.

The issue in this case was the issue of identity. This Court has consistently held that the admission of collateral crime evidence under the mode of operating theory in order to prove identity is strictly limited. Drake v. State, 400 So. 2d 1217 (Fla. 1981); Peek v. State, 488 So. 2d 52 (Fla. 1986); Thompson v. State, 496 So. 2d 203 (Fla. 1986). This Court has stated:

> [a] mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant, the points of similarity must have some special character or be so unusual as to point to the defendant.
>
> Drake, supra, at 1219.

The application of the principles of Drake, Peek and Thompson to the present case clearly demonstrate that the collateral offense is inadmissible.

The only direct evidence concerning the present offense was presented by a jailhouse informer, Ronald Morrison, who testified for an original plea bargain on multiple violent felonies and an additional plea bargain on a pending violation of probation. Mr. Morrison testified as follows:

> Q What did he say in that regard?
>
> A Well, he said that he was standing talking to this girl.
>
> Q He was standing there?
>
> A He was standing in the doorway of where she was, her room.
>
> Q Did he say where it occurred?
>
> A At the Pompano Race Track....
>
> Q Go ahead.
>
> A And he was talking to her and he was making advances on her, trying to, trying to get a date and she kept on saying that they just wanted to be friends and that she didn't date Black guys and that's when he had shoved her into the room and closed the door, locked it behind him and she started to yell and he hit her.
>
> And he said if you don't do exactly what I tell you to do I'm going to kill you. And at that point he raped her, and she started screaming and he yoked her to shut her up and held her in the yoke hold until she went limp.
>
> Q Is that a commonly used term: Yoke?
>
> A Yes.
>
> Q What does it mean?
>
> A When you grab someone like this in a choke hold and held her there until she went limp and at that point he put her down and he went out the window but before he went out the window he put the lock of the door in a

particular manner that he can get back in and then he went out the window and he went to talk to a security guard at the Pompano Race Track and after that he went to his room and well --

R1616-1617. This incident allegedly occurred at the Pompano Harness Track in Pompano Beach, Florida, on February 19, 1990 R1367.

The only direct evidence concerning the alleged collateral offense was the testimony of the alleged victim, Deborah Lesko (formerly Deborah Joseph) in the offense. She stated that after work she and Robert Hayes had gone out for dinner R1587. She stated that after dinner they then went out to a bar and had drinks R1588. She stated that they then went to her room and talked R1588. She then testified that the following allegedly happened:

Q (Prosecutor): You got upstairs to your room. What did you do up there?

A (Ms. Lesko): Just sat in the room. Just sat.

Q What were you doing?

A Talking. That's all. Nothing else but talking.

Q What transpired?

A We sat there and talked for a while.

A Then he got up and come over and attacked me. Got me down on the floor, on my stomach....

Q Tell us what happened?

A He got me on the floor, on my stomach, and proceeded to choke me....

Q What transpired then?

A Well, I tried. I didn't panic. I tried not to panic and he -- (Sighs) He continued to choke me and I can't. I can't -- I finally said yes and he got up. Let me sit up. And then I told him I had to go to the ladies' room. So --

Q Where was the ladies' room in that door?

A Just down the hallway....

Q Did he let you do that?

A Yes.

Q What did he do then?

A I went down to where I worked and called security.

R1590-1591.

This incident allegedly took place in the dorm at Garden State Park Race Track in Cherry Hill, New Jersey in September, 1988 R1585.

There are numerous differences between the case on trial and the collateral incident. These differences rule out a finding of the unique points of similarity required by Drake, Peek and Thompson. There are at least eight major differences between the collateral offense and the case on trial. (1) The current case involves a homicide; while the collateral offense involves almost no physical injuries and a charge of simple assault. The police officer who took the complaint in the collateral offense testified:

Q (Defense Counsel): Do you recall anything, any physical injuries on Ms. Joseph-Lesko?

A (Officer Schomp): No, I didn't.

Q And you arrested Mr. Hayes for simple assault; is that correct?

A That's correct.

R1601. (2) The present case involved an alleged sexual battery, after an alleged sexual rejection, whereas in the collateral offense there was no sexual activity at all. Indeed, there is absolutely no evidence as to what prompted the alleged attack in

the collateral offense. (3) The present offense allegedly began as a chance encounter. Elijah Owens testified that he and Robert Hayes were talking outside his dorm and Ms. Albertson happened to come by R1368. Mr. Hayes then allegedly went to speak to her R1369. The alleged collateral incident involved a planned dinner and going out for drinks afterward. (4) In the current incident Mr. Hayes allegedly forced his way into the room after sexual rejection and racial remark by Ms. Albertson. In the collateral incident, Mr. Hayes was invited into the room and there was no sexual rejection or racial remarks. (5) In the current incident, there was a completed sexual battery and homicide. In the collateral offense, the victim was allowed to leave. (6) These incidents are widely separated in time. They were 18 months apart. (7) They are widely separated geographically. They occurred over 1,000 miles apart, in different states, and different regions of the country. (8) There is no showing of any similarity in the age or physical appearance of the alleged victims.

These differences mandate the exclusion of this evidence under this Court's analysis in Drake, Peek and Thompson, supra. In Drake, this Court analyzed a similar issue as follows:

> *Williams v. State* holds that evidence of similar facts is admissible for any purpose if relevant to any materially issue, other than propensity or bad character, even though such evidence points to the commission of another crime. The material issue to be resolved by the similar facts evidence in the present case is to identify, which the State sought to prove by showing Drake's mode of operating.
>
> The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situations being compared. A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable

points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant. The only similarity between the two incidents introduced at trial and Reeder's murder is the tying of the hands behind the victims' back and that both had left a bar with the defendant. There are many dissimilarities, not the least of which is that the collateral incidents involved only sexual assaults while the instant case involved murder with little, if any, evidence of sexual abuse. Even assuming some similarity, the similar facts offered would still fail the unusual branch of the test. Binding of the hands occurs in many crimes involving many different criminal defendants. This binding was not sufficiently unusual to point to the defendant in this case, and it is, therefore, irrelevant to prove identity.

Drake, supra, at 1218-1219.

In Peek, supra, this Court held:

In applying the *Williams* rule and its progeny to this case, we find that the principal similarities between the two crimes were that they occurred in Winter Park within two months of each other and that both victims were white females and were raped. The dissimilarities greatly outnumber the similarities. In this rape and murder case, the victim was elderly, and the assailant (1) strangled and severely beat the victim; (2) tied the victim to a bedpost; (3) gained entry by cutting a screen door; (4) cut the telephone wires outside the victim's home; and (5) committed the crime during darkness. In the collateral crime, the victim was a young woman, and Peek (1) did not strangle or beat the victim; (2) failed to bind the victim; (3) did not force entry into the victim's home; (4) left the telephone lines outside the house intact; and (5) committed his crime during daylight. We find fewer similarities in the compared factual situations of this case than were evidence from the record in *Drake*, and we conclude, as we did in *Drake*, that significant dissimilarities exist between the collateral crime and the charged crime. In so holding, we are finding that the crimes common points are not so unusual as to establish "a sufficiently unique pattern of criminal activity to justify admission of [the collateral crime] evidence." *Chandler v. State*, 442 So. 2d 171, 173 (Fla. 1983).

Peek, supra, at 55.

In Thompson, supra, the Court analyzed a similar issue as follows:

> To be admissible under the *Williams* rule, the identifiable points of similarity pervade the compared factual situations, and, if sufficient factual similarity exists, the facts must have some special character or be so unusual as to point to the defendant. In the instant case, the primary similarities between the two crimes were (1) both victims were women of approximately the same age and build; (2) both crimes occurred near St. Helen's Church parking lot; and (3) Thompson was having domestic difficulties on both occasions. On the other hand, there are substantial dissimilarities. In the instant offense, the victim was badly beaten and there was no substantial evidence of sexual abuse. The collateral crime involved a sexual battery without any bodily harm or beating to the victim, and, in fact, the defendant established enough rapport with his victim that she seriously considered not reporting the sexual assault. We find as few similarities and as many dissimilarities in this case as we did in *Drake* and *Peek*, and conclude that admission of the collateral crime evidence was prejudicial error, particularly in view of the conflicting evidence presented to the jury.
>
> 492 So. 2d at 204-205.

The present case involves as few similarities and more dissimilarities than Drake, Peek and Thompson. Most significantly, the current case involves a homicide and sexual battery allegedly triggered by sexual rejection and a racial remark. The collateral incident involves and attack without any explanation as to the motive and with virtually no physical injury.

The district courts of appeal have also strictly followed the unique similarity rule. Flowers v. State, 386 So. 2d 854 (Fla. 1st DCA 1980); Davis v. State, 376 So. 2d 1198 (Fla. 2d DCA 1979); White v. State, 407 So. 2d 247 (Fla. 2d DCA 1981); Edmond v. State, 521 So. 2d 269 (Fla. 2d DCA 1988); Vaughn v. State, 604 So. 2d 1272 (Fla. 4th DCA 1992). The analysis in Flowers, supra, is instructive here. The Court stated:

> Here, as in *Davis v. State*, 376 So. 2d 1198 (Fla. 2d DCA 1979) there are not enough similarities between the two crimes to justify admission of the collateral evidence even though both crimes involve burglary and sexual battery. The only similarity between the two cases is that the apartment which were entered were located on the second floor of the apartment building, both had balconies next to the livingrooms into which entry could be accomplished through a sliding glass door. There the similarities end. In one case the victim was sexually assaulted, in the other she was not. Moreover, the incident occurred approximately six weeks apart, in locations four-five miles apart. During one assault the attacker used profanity, but not during the other. One assailant took money from the victim, the other did not. In order for evidence of one offense to be admissible on the issue of identity in a prosecution for another offense, the circumstances surrounding the commission of the two offenses must be more than just similar. *Duncan v. State*, 291 So. 2d 241 (Fla. 2d DCA 1974).
>
> 386 So. 2d at 855.

The Court's analysis in Davis, supra, is equally instructive.

> While we agree with the learned trial judge that the facts of this case present a close question, we conclude that there were not enough similarities between the two crimes to justify admission of the collateral crime. Both crimes involved a burglary and sexual battery. A window was used to gain entry into the homes of young women living alone. The crimes were committed within three weeks of each other and took place at about the same time of night. Money was taken in both cases. There were significant dissimilarities, however. Not only did the crimes occur in different parts of the city, but the manner in which the sexual assaults were committed and the attitude of the assailant toward the victim varied substantially. Moreover, in addition to taking money, the assailant in the collateral crime ransacked the house for objects of value.
>
> We reverse and remand for a new trial.
>
> 376 So. 2d at 1199.

The present case involves far fewer similarities and more differences than Flowers or Davis. The trial court also erred in allowing this evidence to become a feature of the case. Williams v. State, 117 So. 2d 473, 475-476 (Fla. 1960). Three witnesses

testified concerning this incident; the alleged victim, Deborah Lesko; her friend, Cheryl Bell; and the police officer who took the complaint, Stephen Schomp R1584-1603. This undue repetition of the incident is an independently ground for reversal as it was made a feature of this case.

Assuming arguendo, this Court finds some marginal relevance to this evidence, the prejudice from the evidence outweighs any probative value. Fla. Stat., § 90.403.

The admission of this evidence is harmful error. Any error must be shown to be harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1979). When dealing with collateral crime evidence, this Court has consistently held its admission as

> presumed harmful error because of the danger that the jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.
>
> Straight v. State, 397 So. 2d 903, 908 (Fla. 1981).

The evidence here is clearly harmful in light of the fact of the weakness of the evidence. The only direct evidence was from a jailhouse informer who made a deal for his testimony. The scientific evidence in the case was in great dispute. Fingernail scrapings were taken from Mr. Hayes which did not reveal any blood R1544. No fingerprints or hair samples were found in the deceased's room which matched Mr. Hayes R1646. The DNA evidence in the case was in great dispute.

Finally, it must be noted that the deceased had a Caucasian head hair in her hand which was never tested R1339. The medical examiner testified that he considered this evidence to be poten-

tially significant and expected it to be tested R1339. Given the disputed nature of the evidence in the case and the highly inflammatory nature of the collateral offense, the error can not be held to be harmless beyond a reasonable doubt.

Assuming arguendo, this Court feels the error is harmless in the guilt phase, it is clearly harmful error in the penalty phase. This evidence constituted non-statutory aggravation. The prosecution only sought two aggravating circumstances in the case. One of these was the underlying felony which is inherent in the offense itself. There was substantial uncontroverted mitigation presented. Bobby Jean Johnson, Robert Hayes' sister R2232. She stated that Robert was born in Madison County, Mississippi R2232. Their father was an alcoholic R2233. He had a stroke to the brain when Robert was about six or seven R2233. After that, the family had to survive on Social Security R2233. Neither one of their parents could read or write R2234.

She testified that Robert had tremendous problems in school and often spoke of quitting R2234. He stuttered badly and the other children often made fun of him R2234. Robert never learned how to read and write R2234. He quit school when he was thirteen and moved in with his uncle and began to train horses R2235.

Dr. John Spencer, a clinical psychologist, testified that Robert Hayes has an I.Q. of 74, which is in the borderline range R2239. He stated that people in this range are significantly limited in social skills and problem solving skills R2240.

This case must be reversed and remanded for a new trial, or at least a new penalty phase.

POINT V

THE TRIAL COURT ERRED IN ADMITTING COLLATERAL OFFENSE EVIDENCE AS THE CHARGE HAD BEEN DISMISSED.

The trial court erred in admitting collateral offense evidence as the substantive charge had been dismissed. This denied Mr. Hayes due process of law pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 12 and 16 of the Florida Constitution. It also would subject him to cruel and unusual punishment pursuant to the United States Constitution and cruel or unusual punishment pursuant to the Florida Constitution.

In the present case, collateral offense evidence was admitted in which the charges were dismissed R1601. (Mr. Hayes has separately argued that this evidence was inadmissible on other grounds. See Point IV.) Appellant recognizes that this Honorable Court has previously held that charges that have been dismissed can be admitted as collateral offense evidence. Holland v. State, 466 So. 2d 207 (Fla. 1985). However, this Court has specifically noted that it had not reached this issue in the capital context. Burr v. State, 576 So. 2d 278, 279 n.2 (Fla. 1991). Mr. Hayes would urge this Court to overrule Holland. Assuming arguendo, this Court does not overrule Holland it should reach the issue left open in Burr and hold that in a capital case collateral offenses which have been dismissed are inadmissible.

Both the United States Supreme Court and this Court have recognized that capital cases implicate a unique need for reliability pursuant to the United States and Florida Constitution. Gardner v. Florida, 430 U.S. 349, 358-359, 51 L.Ed.2d 393, 97 S.Ct.

1197 (1977); Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). The admission of collateral offense evidence which has been dismissed is unreliable. Once a governmental authority makes a decision to charge an individual and then decides to terminate the prosecution, this immediately brings into question the reliability of the evidence concerning the underlying incident. It also denies the accused from an opportunity to answer the charges in a court of law. Appellant would urge this Court to overrule Holland.

In a capital case, the case for excluding this evidence is even stronger. The higher standard of reliability required by Tillman and Gardner is called into question. Additionally, this evidence is always a non-statutory aggravating circumstance. Thus, regardless of any relevance it may or may not have in the guilt phase, it inevitably skews the penalty phase in favor of death. This violates both the Florida and United States Constitutions. Assuming arguendo, that this Court does not overrule Holland, it should reach the question left open in Burr and prohibit this evidence in capital cases.

POINT VI

THE TRIAL COURT ERRED IN ADMITTING DNA TEST RESULTS.

This issue involves the admissibility of the DNA test results produced by Lifecodes Laboratory. This evidence was introduced over defense objection, despite the fact that there was expert testimony that Lifecodes lacked the minimal quality assurance standards to prevent contamination, had inadequate controls for band shifting, and lacked necessary scientific caution in determining matches.

The admission of this evidence denied Mr. Hayes due process of law required by Article I, Sections 2, 9, and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendment to the United States Constitution and the unique need for reliability in a capital case required by Article I, Section 17 of the Florida Constitution and the Eighth Amendment to the United States Constitution.

Mr. Hayes filed a motion in limine to exclude the DNA evidence in this case R2553-2580. The motion was premised on defects in Lifecodes' testing procedure. The defects in Lifecodes' procedures include the following: (a) Running more than one case at one time. (b) Removing the DNA from the evidence and the known sample was at the same time. (c) No one witnessed the bench scientist performing the procedures. (d) Dual numbering of the pipette was not utilized. (e) Lack of adequate scientific caution in pronouncing a match. (f) Pronouncing a match based on band shifting.

An evidentiary hearing was held on this issue. The prosecution introduced the testimony of Joanne Sgueglia, Lifecodes' bench scientist on this case, and Kevin McElfresh, the director of their identification laboratory. Ms. Sgueglia testified that she receiving six cuttings from a white t-shirt, two vaginal swabs, blood from Robert Hayes and blood from the deceased R398. She stated that on the vaginal swab, there were seven matching bands with Mr. Hayes' blood R392. She claimed that three bands from the tank top matched Mr. Hayes' blood R398-399. However, she stated that none of the bands were identical. She claimed they were a match because she believed the variations were due to band shifting

R400-401. She claimed to have run a monomorphic probe to account for band shifting R406. After her testing, there was not enough material left for anyone else to run it R406-407.

She stated that she found degradation in both samples R409. She stated that she did all of the extraction from Mr. Hayes' sample, the deceased's sample and both evidentiary samples at the same time R409. She stated that no one watched the extraction process. She stated that each vial is marked with one number; there is no dual numbering R409. She testified that she was working on another case while she was working on this one R410. She was the only one handling any of the evidence R410. She stated that Lifecodes is the only laboratory which relies on the monomorphic probe to account for band shifting R411-412. She stated that the possibility of contamination occurs when touching a pipette tip in the wrong area R413.

Dr. McElfresh testified that he was the director of identity testing at Lifecodes R419. He stated he read over the work of the bench scientist R421-422. He claimed that the probability of a seven band match is 1 in 425 million R424. He claimed that there was a one in 50,000 chance of a match on the three band match R426. He stated it was possible to contaminate evidence from a known sample, but that it did not happen here R428.

The prosecution also called George Duncan, director of the Broward County Crime Laboratory R544. He stated that in his lab, he has adopted the procedure of always having two serologists inspect the tube when there's a transfer of DNA material R548. He also stated that his lab required dual labeling of the pipettes

R554. He stated that he had adopted these procedures to avoid human error R555.

The deposition of Dr. Dan Garner, director of Cellmark Laboratories, was introduced on behalf of the defense, by stipulation R435-437. Dr. Garner testified that he has been the director of Cellmark Laboratories for 4½ years SR4. He received his Ph.D. in Medicinal Chemistry SR6. He worked in the Bureau of Alcohol, Tobacco and Firearms (ATF) laboratory for fourteen years, including five years as director SR7. He testified that he reviewed the lab notes and procedures of Lifecodes in this case SR13-14. He has testified as an expert on DNA approximately thirty times SR18-19.

He testified concerning the defects in Lifecodes' procedures. He stated:

> Q (Prosecutor): Summarize why you believe -- I assume it's your opinion that the Lifecodes testing and their results are fallible or have error and cannot be relied upon, is that correct?
>
> A (Dr. Garner): Basically, and partially correct. They analyze -- or to summarize my findings they've analyzed two pieces of evidence in addition to two known samples. The two pieces of evidence they obtained and reports that they have matches on, one being vaginal swabs, one being a tank top, being they do, in fact, have a seven band pattern match between the vaginal swab and the known sample from the suspect, however, in the tank top they only have a three band pattern or two or three band pattern match on the tank top, two of seven bands or three of seven bands.
>
> That is not what you call a match. That would be at best a partial match. It's a type of result where you can't really exclude someone as a donor of that particular DNA but you also cannot identify them as a donor of that DNA and that's on the tank top.
>
> Then the other issue is I had no -- or the information I had was concerning the quality assurance, quality control procedures that I would look for in inspecting the lab for accreditation....

Q Where were theirs lacking?

A The quality assurance procedures. The most vulnerable area I think that you have with DNA testing is the front end part, the front end part being basically everything from the evidence to the gel. I think if you can get the DNA loaded into the gel without messing it up and without contaminating it, I think you're in good shape and there is very little you can do to it after that.

So I was looking for the quality assurance, quality control steps and procedures that they would have guaranteeing that there couldn't be contamination, sample mix up at that point in time.

Q What's failing in their quality assurance or quality control that you in your opinion is material?

A Basically I didn't find any procedures to address that. Either in their SOP's or in their controls, they certainly use controls in their system to monitor other aspects.

SR20-22.

Dr. Garner then went on to describe the risks from the lack of quality assurance procedures at Lifecodes.

Q (Prosecutor): What I'm saying, what, if anything, do you list as errors that she did do or could have done wrong or -- I mean, I want the total answer to that question?

A (Dr. Garner): Well, the things that can go wrong in this is in manipulating the DNA from once you extracted it and you're having to go through all these various procedures. It involves a lot of manipulating of handling of that DNA.

You're purifying it, cutting it with an enzyme, quantitating it, and every time you do that with a number of samples, you run the risk of mixing up samples or contaminating one sample with another, and in this case also the risk is compounded somewhat because apparently she was handling two cases at the same time.

So you not only have her handling the four samples in this case, the two questions and the two known at the same time, we have her also handling samples from a totally different case at the same time.

So she's handling a large volume of tubes which means she's doing a large number of pipetting procedures and in doing that you can contaminate. It doesn't mean that you will, you can contaminate one sample with another.

The most serious risk that runs in a forensic setting is if you contaminate an evidence sample with a known sample from either or especially from a suspect, and that would result in a false positive identification. That's the most serious risk you run and I don't see any quality assurance procedures used at Lifecodes to try and prevent that particular event.

Q What procedures does Cellmark have that would prevent this?

A Well, the procedures we use include primarily a witnessing step. Any time there is a possibility of this type of a sample mix-up during one of these transfer type of procedures, we have one person that actually is doing the work while we're double labeling the tubes to make sure that the labels can be read, and we also have a second person witness that transfer and actually read the labels on the tubes to make sure that the DNA is being put from the right tube and into the other right tube or the right -- well, wherever that transfer is supposed to occur.

SR23-25.

He also explained the other quality assurance procedures which he felt were necessary.

The other quality assurance procedure we take is that we do not run the known samples in a case at the same time as we run the questioned samples. We just physically separate them in time and space. That then prevents the worse case scenario where you're contaminating a questioned sample with a suspect's known DNA.

So we process though at two different times, by the same person but two different times, so we don't have that contamination and we certainly don't process two cases at the same time.

So those are just steps that we take, and with the witnessing step we have written documentation of who witnessed which step so that there is a paper quality assurance documentation you need to go back and then review and see if the various steps were followed. That increases your ability to look at the results and interpret them without having to be overly concerned with the possibility of contamination.

SR26-27.

Dr. Garner then went on to describe the dangers of contamination.

> A (Dr. Garner): Well, you just have a pipette transfer, just a little carry over. If she forgot to change the pipette tip and when she's doing the extraction procedure or any of the quantitative procedures, if she carried over on one pipette tip that she had in the suspects DNA and just carried over a small droplet on that pipette tip, it would certainly be sufficient to contaminate the sample and it's not like you have equal quantities of DNA in there, you don't.
>
> It could very well be contamination problem and that's all you need is for her to carry over a little bit to forget to remove one pipette tip to subsequently touch the top of one of the tubes with a dirty pipette tip and have it contaminated that way. You can actually get aerosol contamination sometimes but in this particular analysis --
>
> Q (prosecutor): What do you mean?
>
> A Airborne, but I don't think that's likely with this particular type of analysis due to the lack of sensitivity of the test.
>
> There are multiple ways that we know you can contaminate and have contamination arise at that stage. And, yeah, that's critical and that's what you would have to have to get this type of a pattern. You would have to have contamination from his known sample to your question sample and that's the nightmare that all forensic laboratories want to avoid.

SR35-36.

The trial court denied Mr. Hayes' motion in limine R564-565. Defense counsel renewed her previous objection at the time the DNA evidence was introduced R1080.

This court's opinion in Ramirez v. State, 542 So. 2d 352 (Fla. 1989) is instructive here. In Ramirez, the prosecution introduced the testimony of a tool mark technician to testify that a specific

knife was the knife that killed the victim. This court reversed for a new trial. It stated:

> In reviewing the record, we find that no scientific predicate was established from independent evidence to show that a specific knife can be identified from the marks made on cartilage. The only evidence received was the expert's self-serving statement supporting this procedure.

542 So. 2d at 355.

The prosecution also pointed out that the technician had co-authored a scholarly article which supported this technique. Id. at 355. This court rejected this as an insufficient predicate. It stated:

> ... The real issue is the reliability of testing methods which form the basis of the witness's conclusion.
>
> This Court, as most other courts, will accept new scientific methods of establishing evidentiary facts only after a proper predicate has first established the reliability of the new scientific method. This point is illustrated by recent decisions of this Court. In Ramos v. State, 496 So. 2d 121 (Fla. 1986), we reversed the appellant's conviction and remanded for a new trial because we found that no proper predicate was presented to establish the reliability of dog scent discrimination lineups. As in the instant case, the only evidence concerning the scent discrimination lineups's reliability was the testimony of the dog handler. We have previously rejected, because of an improper predicate of scientific reliability, hypnotically recalled testimony, Bundy v. State, 471 So. 2d 9 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986), and polygraph tests, Delap v. State, 440 So. 2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984)....
>
> Clearly, in the instant case, insufficient evidence exists to establish the requisite predicate for the technician's positive identification of the knife as the murder weapon.

In the present case, the only evidence supporting the contention that Lifecodes' testing procedures had adequate quality assurance methods, had exercised proper scientific caution in

declaring a match and properly controlled for band shifting was the self-serving testimony of its own employees. No independent expert supported their analysis. Dr. Garner criticized them on all these counts. The director of the Broward County Sheriff's Crime Laboratory supported this testimony on the quality assurance issue and expressed no opinion on the other two issues.

This Court recently reaffirmed the test for the admissibility of scientific evidence in Flanagan v. State, 625 So. 2d 827 (Fla. 1993). This Court stated:

> We begin our analysis of the admissibility of this testimony with the basic principle that novel scientific evidence is not admissible in Florida unless it meets the test established in *Frye v. United States*, 293 F.2d (D.C. Cir. 1923). *See Stokes v. State*, 548 So. 2d 188, 195 (Fla. 1989). Under *Frye*, in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." 293 F.2d at 1014.

625 So. 2d at 828.

The First District Court of Appeal recently applied this test to exclude DNA evidence. Vargas v. State, ___ So. 2d ___, 19 Fla. L. Weekly D1187, 1189 (Fla. 1st DCA June 1, 1994).

Many of the courts around the country have expressed the same basic analysis as Ramirez in terms of a showing of the reliability of the laboratory procedures as a predicate to the admissibility of the DNA evidence in a given case. These courts have consistently held that even if the theory of DNA is acceptable, there must be a sufficient predicate as to the reliability of the scientific evidence. United States v. Two Bulls, 918 F. 2d 56, 61-62; rehearing en banc granted at 925 F. 2d 1127; appeal dismissed on death of the defendant Id.; Ex Parte Perry, 586 So. 2d 243, 249

(Ala. 1991); People v. Castro, 545 N.Y.S.2d 985, 999 (Supp. 1989); People v. Pizarro, 12 Cal.Rptr.2d 436, 449-450 (Cal.App. 5th Dist. 1992); State v. Houser, 490 N.W.2d 168 (Neb. 1992). Pizarro and Houser are particularly instructive here. In Pizarro, the only expert who testified to the validity of the two procedures run by the F.B.I. was their own expert (Dr. Adams). 12 Cal.Rptr. at 451. The Court rejected this and stated:

> Despite Dr. Adams' stellar qualifications, we do not believe his testimony standing alone establishes that the procedures employed by the FBI satisfy the requirements of Kelly/Frye. Prior to admitting testimony as potentially damaging as DNA forensic identification, the prosecutor should have been required to demonstrate through the testimony of at least one impartial expert witness that the protocols and/or procedures of the FBI were generally accepted within the scientific community as reliable.

Id. at 451.

The Nebraska Supreme Court followed a similar analysis in Houser, supra. The Court held that:

> The State failed to establish that the opinion testimony of the experts was based on accurate information and test results.

490 N.W.2d at 182.

Houser involved Lifecodes, the same lab as in the current case. The court reached this result even though the bench scientist and the lab director had testified concerning the procedures.

In the present case, the only testimony in support of Lifecodes' quality assurance methods was the self-serving testimony of its own employees. Dr. Garner testified to the risk of contamination from Lifecodes' procedures. George Duncan of the Broward County Crime Laboratory testified that his lab had instituted the additional safeguards that Cellmark had. Thus, the prosecution

failed to lay a proper predicate as to the laboratory procedures in this case. Dr. Garner testified that contamination could explain the seven band match on the vaginal swab. Thus, the evidence should have been excluded. The testimony concerning the tank top was equally problematic. Again, only Lifecodes' self-serving testimony supported the idea that a three band match should be called a match. Dr. Garner specifically testified that this should not be considered a match. The state failed to meet its burden that calling a three band match a match was accepted within the scientific community. The reliability of this evidence is further called into question by the use of band shifting. The case of People v. Keene, 591 N.Y.S.2d 733 (Supp. 1992) is instructive on this issue. The court in Keene excluded evidence from Lifecodes Corporation because of the band shifting problem. The court relied heavily on the recent report on DNA of the National Research Council (hereinafter referred to as NRC) of the National Academy of Sciences. The court stated:

> The report of the NRC directly addresses the problem of utilizing monomorphic probes to correct for band shift.
>
> Testing for band shifting is easy, but correcting it is harder.... Little has been published on the nature of band shifting, on the number of monomorphic internal control bands needed for reliable correction, and on the accuracy and reproducibility of measurements made with such correction. For the present, several laboratories have decided against attempting quantitative corrections; samples that lie outside the match criterion because of apparent band shifting are declared to be "inconclusive." The committee urges further study of the problems associated with band shifting. Until testing laboratories have published adequate studies on the accuracy and reliability of such corrections, **we recommend that they adopt the policy of declaring samples that show apparent band shifting to be inconclusive.** (emphasis supplied).

> NRC Report, DNA Technology in Forensic Science at 2-11 (1992).
>
> The People's witnesses and defendant's witnesses were in complete disagreement on whether correcting for band shift by using monomorphic probes was generally accepted in the molecular genetics community.
>
> The fact that Lifecodes was the only forensic laboratory engaged in the practice is significant.
>
> The report of the NRC is of greater impact on the issue.
>
> While the DNA principle and RFLP analysis are generally accepted in the scientific community, this Court cannot find that the practice of using monomorphic probes to correct for band shift is a generally accepted test among molecular geneticists.
>
> DNA profiling still comes under the category of novel scientific evidence, even though one appellate court in this state has finally considered its admissibility in criminal cases. Thus, at this stage of the DNA forensic experience it would be judicial foolhardiness to submit the issue of whether Lifecodes performed scientifically accepted tests to the jury to determine the weight of such evidence. This is especially so when the scientific community itself recommends that band shifting results be declared inconclusive until testing laboratories have published adequate studies on the accuracy and reliability of monomorphic corrections.
>
> If scientists have reservations the courts should exercise caution in moving in.

591 N.Y.S Supp.2d at 740.

In the present case, Dr. Garner testified that Lifecodes was the only laboratory that corrected for band shifting and no scientific literature existed which supports calling a match based on band shifting. This, the DNA testimony concerning the tank top should also have been excluded on this ground as well as lack of scientific caution in declaring a match.

The error in this case was clearly harmful. The only direct evidence in this case was the testimony of a jailhouse informer who received tremendous benefit for his testimony. All of the other

circumstantial evidence in this case was consistent with innocence. The danger in this case is that the jury would be overwhelmed by testimony concerning astronomical probabilities; when the "match" on the vaginal swab could have been caused by contamination and the tank top should never have been declared a "match." The prosecution relied heavily on the DNA evidence in both portions of his closing argument. In his original closing, he stated:

> How much time they spent on it. The seminal stain, the vaginal swabs. Tested in September of 1990, absolutely prove they are the defendant's blood DNA. Both items. A positive. As I say, a genetic fingerprint. It's just as good as a fingerprint. You know looking at these autorads it's like a fingerprint. A layman looks at a fingerprint. Says so every fingerprint matched with a person's fingerprint.
>
> That's not the case and autorads are the same way. An expert compares a fingerprint with an overlay. A messy, sloppy fingerprint. There it's a expert science in determining whether there's a match.
>
> You can look at these autorads. You will have that back light in there and you will have the autorad but don't try to be experts in this. That's an expert's field to read those things. Absolute match.

R2014-2015.

The prosecutor's last statement to the jury was:

> As I said in the beginning, I'll say now, the genetic fingerprint in this case is conclusive evidence of the defendant's guilt as charged.

R 2059.

The harmfulness of DNA evidence was explained by the Nebraska Supreme Court in Houser, supra.

> The concern expressed by other jurisdictions and the defendant and shared by this court is that juries may receive probability testimony as infallible evidence. At oral argument, counsel for the State advanced the position that if this court determined that the DNA evidence was inadmissible, the admission of that evidence was harmless error, because the remainder of the evidence

> was overwhelming as to the defendant's guilt. While we agree that the other evidence is sufficient to support defendant's conviction, we cannot say the DNA evidence was harmless. When the DNA evidence showed to a 99. 9999995 percentage of probability that the blood in the trunk of Patterson's car was Patterson's blood, it is probable that the jury considered that factual matter no longer open to question. Reception of the DNA evidence cannot be said to be harmless error. Ex parte Perry, 586 So. 2d 242 (Ala. 1991); Commonwealth v. Curnin, 409 Mass. 218, 565 N.W.2d 440 (1991); State v. Pennell, 584 A.2d 513 (Del.Super. 1989); People v. Mohit, 153 Misc.2d 22, 579 N.Y.S.2d 990 (1992).

490 N.W.2d at 183-184.

This case should be reversed and remanded for a new trial.

POINT VII

THE TRIAL COURT ERRED IN RESTRICTING THE CROSS-EXAMINATION OF A KEY PROSECUTION WITNESS.

Defense counsel was prevented from impeaching Clyde Tate, a key prosecution witness, with his prior inconsistent statements, under oath, regarding his felony convictions. He was a key prosecution witness, as he was the only witness to testify to an alleged altercation between Robert Hayes and the deceased one month before the alleged homicide. This restriction of cross-examination denied Mr. Hayes due process of law pursuant to Article I, Sections 2, 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the unique need for reliability required in a capital case pursuant to the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution.

Clyde Tate was the only prosecution witness to testify to an alleged altercation between the deceased and Robert Hayes about one

month before her death R1351-1354. The prosecution brought out on direct examination:

> Q (Prosecutor): Let me ask you this. Mr. Tate, have you ever been convicted of felony crime?
>
> A Yes, I have.
>
> Q How many times?
>
> A Two times.
>
> Q That was how many years ago?
>
> A Back in '81.

R1354-1355. Defense counsel then attempted to bring out that he had lied under oath to the Florida Racing Commission by previously stating that he had never been convicted of a felony R1356. The trial court refused to permit this line of questioning after extensive argument R1356-1363,1394-1400. This was reversible error.

This Court has specifically held that it is error not to allow impeachment of a witness with the witness' prior inconsistent statements concerning their prior felony convictions. Derrick v. State, 581 So. 2d 31, 34-35 (Fla. 1991). Thus, this testimony was clearly admissible.

The Florida courts have consistently held that:

> Whenever a witness takes the stand, he ipso facto places his credibility in issue.

Mendez v. State, 412 So. 2d 965, 966 (Fla. 2d DCA 1982).

It is well-settled that:

> "limiting the scope of cross examination in a manner which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony constitutes error, especially where the cross-examination

Stradtman v. State, 334 So. 2d 100, 101 (Fla. 3d DCA 1976).

The Florida courts have applied this rule to reverse convictions when there is a restriction of cross-examination directly relevant to the credibility of a key prosecution witness.

In Russo v. State, 418 So. 2d 483 (Fla. 2d DCA 1987), the defendant was charged with attempting to induce two witnesses (Anna Chisholm and John Tillis) to testify falsely. The trial court:

> Ruled that defense counsel could not ask Tillis about his own past attempts to testify falsely and to make himself unavailable as a witness in previous litigation.
>
> In addition, testimony of three witnesses who were involved in Tillis' past misconduct was excluded by the trial court on the basis that they would not be testifying as to any facts surrounding the instant case and that they were not character witnesses.

Id. at 483-484.

The Second District Court of Appeal reversed and stated:

> Omission of any evidence relating directly to his credibility was harmful and prejudicial to the defense.

Id. at 484.

In Clark v. State, 567 So. 2d 1070 (Fla. 3d DCA 1990), a husband was charged with contempt of an injunction during a divorce. Id. at 1071. Defense counsel was not allowed to cross-examine her concerning an allegation that she fabricated an unrelated incident. Id. at 1071. The Third District Court of Appeal reversed saying that this was an improper limitation on testimony relevant to the witness' credibility. Id. at 1071.

This Court has noted the broad scope of cross-examination in a capital case. Coxwell v. State, 361 So. 2d 148 (Fla. 1978).

> We only hold that where a criminal defendant in a capital case, while exercising his sixth amendment right to confront and cross-examine the witnesses against him, inquires of a key prosecution witness regarding matters which are both germane to that witness' testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error.

Id. at 162 (footnote omitted).

In Williams v. State, 386 So. 2d 25 (Fla. 2d DCA 1980), this Court reversed due to the restriction on cross-examination of a key prosecution witness, relying on Coxwell, supra. Id. at 26-27. Defense counsel attempted to cross-examine a prosecution witness concerning her allegedly lying to the police in an unrelated incident. Id. at 26. The Court held that this was directly relevant to the witness' credibility in this case and reversal is required. Id. at 26-27.

The impeachment at issue here is also relevant to show a possible motive for testifying. Clyde Tate's lying under oath on his required Florida Racing Commission application constitutes the crime of perjury. Fla. Stat. 837. This occurred in Broward County, Florida. Thus, he had every reason to please the Broward County State Attorney's Office to avoid being charged with perjury. See Livingston v. State, 565 So. 2d 1288, 1291 (Fla. 1988) (proper to impeach a state witness regarding a potential criminal charge which has not been filed).

Thus, this impeachment evidence was admissible in three respects. (1) This Court has specifically held that a prior inconsistent statement as to the number of felony convictions is proper impeachment. (2) The witness' lying under oath on his Florida Racing Commission application is directly relevant to his

credibility, a key issue in this case. (3) The impeachment was also relevant to his potential bias in favor of the state, as he had committed the crime of perjury and had never been charged with it.

The error here was clearly harmful. Clyde Tate was the only prosecution witness to testify to an alleged incident with the defendant approximately one month before her death R1351. He testified as follows:

> Q (Prosecutor): Did you do down with Pamela Albertson or did you just meet her down there or see her down there? How did you come upon her?
>
> A (Mr. Tate): We just talked earlier that day. We had both met at the barn at 9:00 o'clock that night.
>
> Q What happened on this particular occasion?
>
> A About 9:00 o'clock that night we was watering. I told Pamela to take the front end and I would take the lower end. So I went down on the lower and started watering. I got two horses watered and I heard this noise in the breezeway. Breezeway is halfway down the barn where the hay cubes and things were all stacked on skids, feed for the horses.
>
> So I runs up there and I seen I believe Robert Hayes had Pamela straddled over a hay cube bag. I told him to get away from her.
>
> Q What did you observe Pamela doing?
>
> A She was laying on her back.
>
> Q Was she fighting him?
>
> A She told him to stop it.
>
> Q What did you do?
>
> A I told Robert Hayes to let her alone. He had been drinking.
>
> Q Did he stop?

A Yes, he just went on back into his room and watched television.

R1352-1354.

He was the only witness to testify to this alleged incident. This was highly prejudicial testimony. Thus, his credibility was crucial. The restriction of cross-examination was harmful error.

Assuming arguendo, this Court finds this error to be harmless in the guilt phase, it was independently prejudicial as to penalty. This incident constituted non-statutory aggravation. The restriction of cross-examination of this witness could have led the jury to believe this testimony, and thus push the balance towards death. At the very least, a new penalty phase is required.

POINT VIII

THE TRIAL COURT ERRED IN ALLOWING A PROSECUTION WITNESS TO EXPRESS HER OPINION AS TO THE GUILT OF MR HAYES, OVER OBJECTION.

A lay witness, Anne Santariello, testified, over objection, that she knew that Robert Hayes committed this offense. In fact, she had no direct knowledge of who committed this offense. This was improper lay opinion testimony which invaded the province of the jury. This evidence was admitted in violation of Florida Statutes 90.604 and 90.701. It also denied Mr. Hayes due process of law pursuant to Article I, Sections 2, 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the unique need for reliability in a capital case required by Article I, Section 17 of the Florida Constitution and the Eighth Amendment to the United States Constitution.

Anne Santariello, another groom at Pompano Harness Track, testified for the prosecution. The following colloquy took place during her testimony:

> Q (Prosecutor): When was it found out that Pamela Albertson had been murdered?
>
> A I didn't find out until like it was about noon, somewhere around there.
>
> Q The police came to you? The detectives came to you and asked you ultimately what you had heard?
>
> A No, no. What happened was somebody told me that works for the track that Pamela has been murdered and I called John Beatrice, which is security, and told him I know who did it.
>
> Q Okay.
>
> MS. HEYER (Defense Counsel): Your Honor, I'm going to move to strike as being unresponsive to the question.
>
> THE COURT: Overruled.
>
> Q You gave Bob, a name of the defendant; is that correct?
>
> A Yes.
>
> Q Had Pamela Albertson spoken to you of Robert Hayes prior to her death?
>
> A Yes. A lot.
>
> Q What did she say?
>
> A She told me how afraid she was of him. How he kept threatening her. He was going to get her one way or another and I heard that a lot. She told me that.
>
> Q That's why you called when you heard that Pamela Albertson had in fact been killed?
>
> A Yes.

R1254-1255.

This line of testimony was entirely improper. Appellant's objection should have been sustained. Florida Statutes 90.604

specifically states that a witness may only testify to matters that the witness knows from personal knowledge. It is clear that this witness had no personal knowledge of who committed this offense, but was solely based on hearsay. This was also improper opinion testimony by a lay witness. Fla. Stat. 90.701. The prosecutor then exacerbated the error by bringing improper hearsay from the deceased concerning her alleged fear of the defendant. Fla. Stat. 90.802-803.

The Florida courts have consistently held that it is improper for a witness to express his opinion regarding the guilt of the accused; as it invades the province of the jury. Capehart v. State, 583 So. 2d 1009, 1013 (Fla. 1991); Gibbs v. State, 193 So. 2d 460, 463 (Fla. 2d DCA 1967); Spradley v. State, 442 So. 2d 1039, 1043 (Fla. 2d DCA 1983); Farley v. State, 324 So. 2d 662, 663 (Fla. 4th DCA 1975); Gianfrancisco v. State, 570 So. 2d 337, 338 (Fla. 4th DCA 1990). This is precisely what occurred here. The witness directly stated, over objection, that she knew that Robert Hayes committed this offense.

The prosecutor then exacerbated this error by bringing out improper hearsay that the deceased had supposedly said that she was scared of Robert Hayes. This type of testimony has consistently held to be inadmissible hearsay. Hodges v. State, 595 So. 2d 929, 931-932 (Fla. 1992); Correll v. State, 523 So. 2d 562, 565-566 (Fla. 1988); Hunt v. State, 429 So. 2d 811 (Fla. 2d DCA 1983); Bailey v. State, 419 So. 2d 721 (Fla. 1st DCA 1982); Kennedy v. State, 385 So. 2d 1020 (Fla. 5th DCA 1980).

These two errors, individually and cumulatively, were harmful error. The only direct evidence was from a jailhouse informant. The DNA evidence was hotly contested. All of the circumstantial evidence was equally consistent with innocence. This inadmissible testimony was extremely damaging. A direct statement from a witness that she "knew" that Robert Hayes is the perpetrator is clearly harmful. The testimony concerning the deceased's alleged fear of Mr. Hayes was also damaging. Thus, a new trial is required.

POINT IX

THE TRIAL COURT ERRED IN RESTRICTING QUESTIONING OF THE JURORS ON THE SUBJECT OF RACIAL PREJUDICE.

Defense counsel attempted to question the jurors concerning their attitudes on race. The trial court erred in refusing to allow defense counsel to question the jurors concerning racial attitudes. This was improper and denied Mr. Hayes due process of law and equal protection of the law pursuant to Article I, Sections 2, 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the unique need for reliability required in a capital case by the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution.

The United States Supreme Court has explicitly held that a capital defendant has a right to voir dire on race in a case involving interracial violence. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). This Court has also recognized the special danger of racial prejudice infecting a capital case involving interracial violence. Robinson v. State, 520 So. 2d 1,

6-8 (Fla. 1988). The Florida courts have consistently upheld the right to meaningful voir dire to ferret out potential biases. Lavado v. State, 492 So. 2d 1322 (Fla. 1986); Johnson v. State, 590 So. 2d 1110 (Fla. 2d DCA 1991); Moses v. State, 535 So. 2d 350 (Fla. 4th DCA 1988).

In the present case, the following colloquy took place:

> MS. HEYER (Defense Counsel): How many of you saw the Thomas hearings: Looks like everybody.
>
> Mrs. Rubin, did you think that had anything to do with race?
>
> MS. RUBIN (Juror): Excuse me, what?
>
> MS. HEYER: The Thomas hearings?
>
> MS. RUBIN: I didn't watch.
>
> MS. HEYER: You didn't watch it?
>
> MS. RUBIN: No.
>
> MS. HEYER: Ms. Foss, did you watch it?
>
> MS. FOSS (Juror): Yes.
>
> MR. KERN (Prosecutor): I'm going to object.
>
> THE COURT: Sustain the objection. I don't see what this has to do with it.

R921-922.

Defense counsel was attempting to use the well publicized confirmation hearings of Justice Clarence Thomas as a vehicle to talk about race. (Justice Thomas repeatedly claimed that he was being singled out because of his race. He described himself as a victim of a "high-tech lynching.") Turner, supra, gives a capital defendant the right to question the jurors about race. It was perfectly appropriate to use a contemporary event as a forum to explore racial attitudes. Indeed, the prosecution had previously

referred to the Thomas hearings in his own questioning of the jurors regarding their ability to resolve conflicting testimony R703. There was a unique need for extensive voir dire on racial prejudice in this case due to an earlier colloquy between the judge and a juror who was excused.

> THE COURT: Now what was it we discussed before we were supposed to come back to?
>
> MS. POTVIN: Police officer. I believe them automatically.
>
> THE COURT: You think they're better than anybody else?
>
> MS. POTVIN: No, sir, but I'm an avid reader. I read a lot of true crime stuff. Not that has everything. Unfortunately, I would consider Mr. Hayes guilty right now.
>
> THE COURT: Why is that?
>
> MS. POTVIN: Because he's Black and because it's a first degree murder charge.

R509.

Thus, one of the potential jurors had already expressed racial prejudice in front of the panel. There was a unique need for this sort of voir dire in this case.

Thus, this case must be reversed for a new trial. At the very least, a new penalty phase is required. Turner, supra.

POINT X

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO EXCUSE A BLACK JUROR OVER OBJECTION.

The prosecution was allowed to strike a black juror, over objection, based on a pretextual reason. This denied Mr. Hayes due process of law and the equal protection of the law pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9 and 16 of the Florida

Constitution and the unique need for reliability required in a capital case pursuant to Article I, Section 17 of the Florida Constitution and the Eighth Amendment to the United States Constitution. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); State v. Neil, 457 So. 2d 481 (Fla. 1984); State v. Slappy, 522 So. 2d 18 (Fla. 1988).

This case is a capital case, involving a Black defendant and a White victim. No other type of case carries such a possibility of racial prejudice infecting the proceeding. Turner v. Murray, 476 U.S. 28, 35, 106 S.Ct. 1683, 1687-1688, 90 L.Ed.2d 27 (1986). In the present case the following colloquy took place concerning Juror Mary Williams.

> MR. KERN (Prosecutor): Want to talk about juror number 8, Mary Williams. She's a Black female. She's I think the second Black person....
>
> MR. KERN: I'm not making any challenges for cause and I'm not at this moment exercising a peremptory challenge. I haven's made up my mind completely.
>
> I'm concerned about her nephew arrested last month for drug charges, having been in prison, this being the third time and she caring very much for him.
>
> THE COURT: I think the main part about her she's not getting paid.
>
> MR. KERN: She hasn't settled that issue.
>
> THE COURT: She says she can get by.
>
> MR. KERN: Those are the reasons I'm stating for a peremptory challenge.
>
> MS. HEYER: Judge, I asked her today whether she had checked with her employer. She did not and when questions by you she stated that she would do it. There would be no problems. Mr. Kern in fact asked her whether the fact that her nephew had been arrested and convicted would cause any problems and she said no. I don't see anything about her other than the fact that she is Black.

THE COURT: I think that in my opinion that's definitely not a racially motivated strike. I think she's given all the answers.

MS. HEYER: Are you striking her?

MR. KERN: I'll make a peremptory challenge.

The prosecutor's stated reason, her nephew's recent arrest for drugs, is irrelevant to this case. This case involved a homicide, with drugs having nothing to do with the case. Additionally, Ms. Williams specifically stated that her nephew's case would have no effect on her R741. Additionally, the prosecution left on the jury numerous people who had even closer relations arrested. The state made no attempt to strike the following White jurors: (1) Catherine Delin, whose son had been arrested and was still on probation R467-468. (2) John Rafferty had a son who was arrested R479. (3) Marjorie Osborn had a son who had been arrested on a drug case R479-480. (4) Kathleen Lakin had a son who was arrested and a daughter in the federal witness protection program R488-489. (5) Cynthia Fields' husband had been arrested twice and is on probation R523-524. (6) Bobbie Crawford's daughter had been arrested twice R699. (7) Cheryl Jalbert had two brothers who had been arrested R840.

The state's reasons here had nothing to do with the case and are clearly pretextual as is shown by the fact that it left numerous Whites on the panel with even closer family members who had been arrested. In Aldret v. State, 610 So. 2d 1386 (Fla. 1st DCA 1992), counsel attempted to strike a Black juror because of her brother's criminal justice contacts. The Court stated:

Aldret was being tried on counts of aggravated assault and simple assault, Zachary's brother's use of cocaine

> and his burglary of his mother's house are not relevant, especially in light of the fact that Zachary gave no indication that the incident would affect her ability to sit as a juror.
>
> Id. at 1388.

This Court has also recognized that the reason for the challenge must be related to the facts of the case. Slappy, supra, at 22. The Florida courts has consistently held that leaving similarly situated Whites on a panel is a strong indication that the reason is pretextual. Slappy, supra, at 22; Roundtree v. State, 546 So. 2d 1042, 1044 (Fla. 1989); Richardson v. State, 575 So. 2d 294, 295 (Fla. 1991). The reason given in this case is pretextual. The case must be reversed for a new trial.

POINT XI

THE TRIAL COURT ERRED IN DENYING MR. HAYES' MOTION TO SUPPRESS HIS STATEMENTS TO POLICE.

The trial court erred in failing to suppress Mr. Hayes' police statements. Some of these statements were made without the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and Traylor v. State, 596 So. 2d 957 (Fla. 1992). All of the statements were involuntary. The admission of this evidence denied Mr. Hayes due process of law pursuant to the Fifth, Sixth and Fourteenth Amendments and the unique need for reliability required in a capital case pursuant to the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution.

Mr. Hayes filed a pre-trial motion to suppress his statements R2529-2533. A hearing was held on the motion R251-283,289-304,337-

341. The trial court denied the motion R341,2581. The statements were admitted at trial R1406-1454.

The testimony at the motion hearing was primarily from Officer Kevin Butler of the Pompano Beach Police Department and Officer Gregory Flynn of the Pompano Beach Police Department. Officer Flynn stated that he approached Robert Hayes at 8:30 a.m. on February 20, 1990 R265. At that time, he stated that he had information that Robert Hayes had been trying to have sex with the deceased for a period of time and that she did not want to have anything to do with him R264. He also had information that Mr. Hayes was "kind of a violent person" R264. He and another officer then approached Mr. Hayes and asked him to come to the police station for an interview R266. Mr. Hayes agreed and was taken to the police station for interrogation R266-267. At the police station, his fingerprints were taken and he was photographed R267. He was interrogated without any warnings being given pursuant to Miranda and Traylor. This interrogation went on from 8:30 a.m. until 10:00 a.m. Mr. Hayes stated that he had last seen the deceased at about 5:00 or 5:30 p.m. the night before and had a brief conversation with her R268.

At 10:00 a.m. Mr. Hayes was finally given the warnings required by Miranda and Traylor R273-274. Officer Kevin Butler continued the remaining interrogation R290. He reiterated that he briefly saw Pamela Albertson between 5:00 and 5:30 p.m R294. He also indicated that he had consensual sex with Ms. Albertson about two or three months previously, but not more recently R294. He gave a taped statement to this effect R302-303. After this

statement, he was confronted with the fact that a witness had identified him speaking to Ms. Albertson outside her room at about 8:30 p.m. R295-296. The following took place.

> Q (Prosecutor): Did you persist in your inquiry in regard to this matter?
>
> A (Officer Butler): Yes. We did persist, myself and Sergeant Gooding, and in fact we basically -- what we basically did, we approached it in a different way.
>
> We said, listen, we understand that you probably feel if you admit to being at her door speaking with her that you are going to thing we think you killed her, and at that point he goes yeah, you are right. I was there and that's why I was lying and not telling the truth.
>
> Q So then he told you a different account; is that correct?
>
> A Yes. Basically, he said he did speak to her. That he wanted to go into her dorm and she said no and he said he basically left. He said he never went into her room and that was basically it.

R296.

The statements made prior to 10:00 a.m. must be excluded as the required warnings were not given. All of the statements must be excluded as involuntary. It is well settled that an individual who is the focus of the investigation, must be given Miranda warnings, even if not formally in custody. Jenkins v. State, 533 So. 2d 297, 300 (Fla. 1st DCA 1988); Mosely v. State, 503 So. 2d 1356 (Fla. 1st DCA 1987). Here, the police had information that Mr. Hayes had allegedly been pressuring the deceased to have sex and she had been refusing. Additionally, they had information that he was violent. He was fingerprinted and photographed. This clearly showed that they considered him a suspect and not a witness. They had no information pointing to anyone else. Thus, he should have been given warnings from the beginning.

All of Mr. Hayes' statements are involuntary.

> If the attending circumstances or declarations of those present be calculated to delude the accused as to his true position and exert an improper and undue influence over his mind, then the confession is unlawfully obtained.

Harrison v. State, 12 So. 2d 307, 309 (Fla. 1942).

In the present case, all of the techniques of the police were designed to delude Mr. Hayes as to his true position. First, he was not given Miranda warnings and was led to believe that he was only a witness and not a suspect. This continued when Mr. Hayes was badgered into changing his statement. He was led to believe this was actually beneficial to him. These techniques were employed on a man with virtually no education and who has a 74 I.Q., which is only four points over the cut off for retardation. Thus, all of Mr. Hayes' statements must be suppressed as involuntary.

The admission of this evidence was harmful error. The change in Mr. Hayes' statement was used as an indicia of guilt. Additionally, his statement that he had only had sex with the deceased two or three months earlier was used to exclude the possibility of consensual sex as explaining the DNA evidence. Thus, this case must be reversed for a new trial.

POINT XII

THE TRIAL COURT ERRED IN FAILING TO GRANT A JUDGMENT OF ACQUITTAL AS TO PREMEDITATED MURDER.

The trial court erred in denying Mr. Hayes' motion for judgment of acquittal as to premeditated murder. This error denied Mr. Hayes' due process of law pursuant to Article I, Sections 2,

9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The defense moved for a judgment of acquittal at the close of the prosecution's case R1628-1632. This motion was denied R1632. A renewed motion for judgment of acquittal was denied at the close of all the evidence R1947-1948. Mr. Hayes' counsel also filed a written memorandum of law in support of his motion for judgment of acquittal R2583-2594. The jury was instructed on both premeditated murder and felony murder R2602-2603.

The evidence was legally insufficient to support premeditation. There was only one witness who provided any direct evidence concerning this case. The prosecution introduced the testimony of Ronald Morrison, a jailhouse informant. He testified concerning an alleged statement made by Robert Hayes R1616. He claimed Hayes told him that he was standing in the doorway outside the woman's room talking R1616. Mr. Hayes allegedly said that he was trying to make a date and she said "she didn't date Black guys" R1617. He then allegedly said that he pushed her into the room, closed the door and locked it R1616. Mr. Hayes supposedly said she screamed and he hit her R1616-1617. Morrison claimed he then threatened to kill her if she did not do what he said R1617. Robert Hayes allegedly said that he raped her and

> "she started screaming and he yoked her to shut her up and held her in the yoke until she went limp"

R1617. Morrison claimed that "yoking" means to grab someone in a choke hold R1617. Morrison claimed that Hayes then told him he put the woman down, locked the door, went out the window, went to talk to a security guard and went out the window R1617.

The prosecution's own evidence is inconsistent with premeditation. Premeditation:

> is a fully formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit a reflection ...
>
> It must exist for such time before the homicide as will enable the accused to become conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of the victim is concerned.

Jackson v. State, 575 So. 2d 181, 186 (Fla. 1991). Here, the prosecutions' own evidence showed that the homicide was not premeditated. The state's own witness stated that Hayes' intent was sexual and when she started screaming, he "yoked her to shut her up". In other words, the State's own evidence showed an instant reaction to the screaming and that the only possible intent was to stop the screaming and not to kill.

The State is bound by it's own evidence; if that evidence creates reasonable doubt, a judgment of acquittal must be granted. D.J.S. v. State, 524 So. 2d 507 (Fla. 1st DCA 1975); Hodge v. State, 315 So. 2d 70 (Fla. 1st DCA 1972); Weinstein v. State, 269 So.2d 70 (Fla 1st DCA 1972); Majors v. State, 247 So. 2d 446 (Fla. 1st DCA 1971). The conviction also violated the due process requirements of the Eighth and Fourteenth Amendments. Jackson v. Virginia, 443 U.S. 307 (1979).

The denial of the judgment of acquittal as to premeditation is harmful error. One or more of the jurors may have relied on the theory of premeditation in reaching a verdict. This error cannot be considered harmless beyond a reasonable doubt. Thus, a new

trial is required in which the prosecution is not allowed to pursue a premeditation theory.

POINT XIII

THE TRIAL COURT ERRED BY GIVING UNDUE WEIGHT TO THE JURY'S DEATH RECOMMENDATION.

This issue involves the trial judge giving virtually complete deference to the jury's death recommendation. This issue is controlled by Ross v. State, 386 So. 2d 1191, 1197-1198 (Fla. 1980). Resentencing is required as in Ross, supra. The death sentence in this case was imposed in violation of Florida Statute 921.141, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9 and 16 of the Florida Constitution.

Before jury selection the trial judge made the following statement to the jury panel.

> Then the court sentences the defendant to either life imprisonment or to death and the Court, although it's not one hundred percent required to follow the recommendation of the jury as to a sentence, probably 99 percent of the time the Court is going to follow the recommendation. So the jury's advice as to what sentence should be rendered by the Court is extremely important and persuasive to the Judge. And will probably almost always be the sentence meted out. That's how important your advice is.

(Emphasis supplied) R607-608.

The trial judge made similar comments later in jury selection.

> I would say probably 99 per cent of the time the Judge is going to go along with your recommendation. It's not just a whimsical and a procedural thing that we set up here. There's a lot of weight that's given to your advisory sentence and the Judge almost always will go along with it.

R793.

In the penalty phase jury instruction the judge instructed the jury as follows:

> Your advisory sentence as to what sentence should be imposed on Mr. Hayes is entitled by law and will be given great weight by this Court in determining what sentence to impose in this case. It is only under rare circumstances that I could impose a sentence other than what you recommend.

R2293 (emphasis supplied).

This case is controlled by Ross, supra. The trial court's comments here are far stronger than in Ross, supra. In Ross, this Court stated:

> It appears, however, that the trial court gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether or not the death penalty should be imposed. This error requires that the sentence be vacated and that the cause be remanded to the trial court for reconsideration of the sentence. Citing this Court's decisions in *Tedder v. State*, 322 So. 2d 908 (Fla. 1975) and *Thompson v. State*, 328 So. 2d 1 (Fla. 1976), which held that the trial court should give great weight and serious consideration to a jury's recommendation of life, the trial court reasoned that it was bound by the jury's recommendation of death. As appears from its "Findings of Aggravating and Mitigating Circumstances" the trial court felt compelled to impose the death penalty in this case because the jury had recommended death to be the appropriate penalty. It expressly stated, "[T]his Court finds no compelling reason to override the recommendation of the jury. Therefore, the advisory sentence of the jury should be followed."

386 So. 2d at 1197.

In Ross, supra, this Court reversed as the trial judge's statements that he found "no compelling reason" to override the jury indicated that the trial judge did not perform the independent weighing of aggravating and mitigating circumstances required by Fla. Stat. 921.141 the this Court's opinion in Dixon. Here, the trial judge's comments were far stronger. He stated that "99 percent of the time" the jury's verdict would be his verdict. He

also stated that the jury's sentence would "almost always be the sentence." He also stated that it is only under "rare circumstances" that he could impose a different sentence. These comments are far stronger than in Ross, supra, and indicate a lack of independent weighing of aggravating and mitigating circumstances.

This Court was recently faced with a similar issue in King v. State, 623 So. 2d 486 (Fla. 1993). This Court reversed on other grounds, so it did not have to reach the issue. Yet, it stated:

> King also argues that the trial judge deferred to the jury's death recommendation of the appropriate sentence and that the findings in support of the death sentence are not unmistakably clear. We remind the judge that, even though a jury determination is entitled to great weight, "the judge is required to make an independent determination, based on the aggravating and mitigating factors." *Grossman v. State*, 525 So. 2d 833, 840 (Fla. 1988), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989); *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

623 So. 2d at 489 (footnote omitted).

This Court has recently stressed the uniquely important role of the trial judge in the sentencing process. In Corbett v. State, 602 So. 2d 1240 (Fla. 1992), this Court noted the:

> very special and unique factfinding responsibilities of the sentencing judge in death cases. The trial judge has the single most important responsibility in the death penalty process.

Id. at 1243.

In Spencer v. State, 615 So. 2d 688 (Fla. 1993), this Court noted the importance of the judge.

> It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed.

615 So. 2d at 690-691.

The trial court violated the principles of Ross, Dixon and Fla. Stat. 921.141. Resentencing is required.

POINT XIV

THE TRIAL COURT ERRONEOUSLY APPLIED A PRESUMPTION OF DEATH.

The trial court erroneously presumed that death is the proper penalty when any aggravator is found unless outweighed by the mitigating circumstances in violation of Florida Statutes 921.141 and the Florida and United States Constitutions. The imposition of the death sentence in this case violates Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The trial judge made the following statement in his sentencing order:

> Death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances.

R2309.

This is a misstatement of Florida law, as well as an improper death presumption in violation of the Florida and United States Constitutions. Florida Statutes 921.141(3) requires the judge to find "sufficient aggravating circumstances" to justify the death penalty before he can even begin the weighing of aggravating and mitigating circumstances. There is absolutely nothing in the judge's order that indicates he performed this required first step.

This Court has implicitly recognized the importance of this initial step in Rembert v. State, 445 So. 2d 337 (Fla. 1989). In Rembert, supra, this Court reduced a sentence of death to life imprisonment even though the trial court had found no mitigating

circumstances and this Court had upheld one aggravating circumstance. 445 So. 2d at 340. Thus, this Court implicitly recognized that the aggravating must be sufficiently weighty to justify death, regardless of the mitigation.

The Eleventh Circuit Court of Appeals has held the use of the death presumption employed by the judge in this case to violate the Eighth Amendment. Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). In Jackson, supra, the court struck down a jury instruction identical in formulation utilized by the trial judge in this case. The court stated:

> In the present case, the terminology that death is presumed appropriate seeped into the sentencing instructions given by the trial judge. The jury was instructed:
>
> > When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.
>
> Jackson contends that such an instruction amounts to constitutional error. We agree....
>
> In this case, however, the *jury* was instructed that death was presumed to be the appropriate penalty. Justice McDonald of the Florida Supreme Court has astutely pointed out the problems created when such a presumption is relied upon by the sentencing authority:
>
> > I would also like to comment on the reference in the majority opinion in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 [94 S.Ct. 1950, 40 L.Ed.2d 295] (1974). I do not embrace the language from that opinion recited in this majority opinion as "when one or more of the aggravating circumstances is found death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances." If that language is restricted to the role of this Court in reviewing death sentence imposed by the trial court, it is acceptable. But I fear that it is construed by the trial judges as a directive to impose the

> death penalty if an aggravating factor exists that is not clearly overridden by a statutory mitigating factor. The death sentence is proper in many cases. But it is the most severe and final penalty of all and should, in my judgment, be exercised with extreme care. I am unwilling to say that a trial judge should presume death to be the proper sentence simply because a statutory aggravating factor exists that has not been overcome by a mitigating factor.

Randolph v. State, No. 54-896 (Fla. Nov. 10, 1983) (LEXIS, States Library, Fla. file) (McDonald, J., dissenting), *withdrawn*, 463 So. 2d 186 (Fla 1984), *cert. denied*, 473 U.S. 907, 105 S.Ct. 3533, 87 L.Ed.2d 6565 (1985).

> Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eight Amendment.

837 F.2d at 1473 (emphasis supplied).

The Eleventh Circuit correctly held that when the sentencer employs such a death presumption it violates the Eighth Amendment. In the Florida scheme both the judge and jury play a constitutionally significant role in sentencing. The judge employing such erroneous presumption is also constitutional error. Thus, resentencing is required.

POINT XV

THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND FIND THE NON-STATUTORY MITIGATING FACTOR THAT THIS WAS AN OFFENSE WITH LITTLE OR NO PREMEDITATION.

It was undisputed in this case that this was an offense with little or no premeditation. The trial court failed to consider and/or find this in mitigation in violation of the dictates of Campbell v. State, 571 So. 2d 415 (Fla. 1991) and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 972 (1978). Thus, this death sentence is in violation of Article I, Sections 2, 9, 16 and

17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

A trial court's duty to evaluate mitigation is clear.

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, is it truly of a mitigating nature. *See Rogers v. State*, 511 So. 2d 526 (Fla. 1987) *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence.

Campbell v. State, 571 So. 2d 415, 419 (Fla. 1991).

Here, it is undisputed that this is a killing with little or no premeditation. The only direct evidence as to what happened is the testimony of Ronald Morrison, a jailhouse informer. He claimed Hayes told him that he was standing in the doorway outside the woman's room talking R1616. Mr. Hayes allegedly said he was trying to make a date and she said "she didn't date Black guys" R1617. He then allegedly said that he pushed her in the room, closed the door, and locked it R1616. Mr. Hayes supposedly said she screamed and he hit her R1616-1617. Morrison claimed he then threatened to kill her if she did not do what he said R1617. Robert Hayes allegedly said that he raped her and

> "she started screaming and he yoked her to shut her up and held her in the yoke until she went limp"

R1617. Morrison claimed that "yoking" means to grab someone in a choke hold R1617. Thus, it is clear that this is an offense with little or no premeditation.

This Court has recognized that if the "killing, although premeditated, was most likely upon reflection of a short duration"

is a mitigator. Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985). The trial court erred in failing to consider and find this mitigator. This error is clearly harmful. The trial judge only found two aggravators and had already found two mitigators. The trial court's failure to consider and find this mitigating circumstance can not be held to be harmless beyond a reasonable doubt. Thus, a resentencing is required.

POINT XVI

THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The trial court erred in finding that the capital felony was especially heinous, atrocious or cruel (HAC) as there was no evidence that the killing was designed to be extraordinarily painful. Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990); Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990); Shere v. State, 579 So. 2d 86, 95-96 (Fla. 1991); Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926 (1992). The state's own evidence shows that this was an impulsive reaction to a person's screaming. There was no evidence whatsoever of any intent to make the offense painful. Thus, this aggravator must be struck. The application of this aggravator violates Florida Statute 921.141; Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This Court has consistently struck down a finding of HAC if there is no intent to make the crime extraordinarily painful. In Porter, supra, the Court struck a finding of HAC and stated:

> This record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful.
>
> Porter, supra, at 1063 (emphasis supplied).

In Cheshire, supra, the Court struck the HAC and stated:

> As his third issue, Cheshire argues that the trial court improperly found the aggravating factor of heinous, atrocious or cruel. We agree. The factor of heinous, atrocious or cruel is proper only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. *State v. Dixon*, 283 So. 2d 1 (Fla. 1973). The physical evidence simply does not support such a finding here. At best, we can only conjecture as to the exact events of the murder. Since the evidence at hand is entirely consistent with a quick murder committed in the heat of passion, we believe the state has failed to prove beyond a reasonable doubt that the factor of heinous, atrocious or cruel existed.
>
> 568 So. 2d at 912.

In Shere, supra, this court reaffirmed this requirement. 579 So. 2d at 95. This Court applied this rationale to strike the HAC aggravator. This Court stated:

> Likewise, there is no evidence to suggest that Shere desired to inflict a high degree of pain. Four of the wounds were potentially fatal, which is an indication that they tried to kill him, not torture him.
>
> Id. at 96.

The application of Porter, Cheshire and Shere to the present case requires the striking of the HAC aggravator. The only direct evidence as to what happened here is the testimony of jailhouse informant, Ronald Morrison. He claimed Hayes told him that he was standing in the doorway outside the woman's room talking R1616. Mr. Hayes allegedly said he was trying to make a date and she said "she didn't date Black guys" R1617. He then allegedly said that he pushed her in the room, closed the door, and locked it R1616.

Mr. Hayes supposedly said she screamed and he hit her R1616-1617. Morrison claimed he then threatened to kill her if she did not do what he said R1617. Robert Hayes allegedly said that he raped her and

> "she started screaming and he yoked her to shut her up and held her in the yoke until she went limp"

R1617. Morrison claimed that "yoking" means to grab someone in a choke hold R1617.

There is absolutely no evidence of any intent to torture or cause extraordinary pain. The evidence shows a spontaneous reaction to a scream and an attempt to stop the screaming. Thus, this aggravator must be struck. The trial court only found two aggravators (HAC and the offense occurred during a felony). The elimination of this aggravating circumstance leaves only one aggravating circumstance. This Court has long held that if there is only one aggravator death is disproportionate unless there is virtually nothing in mitigation. Songer v. State, 544 So. 2d 1010 (Fla. 1989); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984). In Rembert, this Court reached this result even though the trial judge found no mitigating circumstances. 445 So. 2d at 340-341.

In the present case, the trial court found two mitigating circumstances. The trial court stated:

> 1. ROBERT HAYES' background and difficulties.
>
> In support of this non-statutory mitigating circumstance the defense offered the testimony of the defendant's sister, Bobby Jean Johnson.
>
> Ms. Johnson testified that she, the defendant and five other siblings were born in Madison County, Mississippi, the defendant being the youngest. Both of the defen-

dant's parents are deceased. The defendant's father worked as a laborer, fixing machines, and cleaning until he became ill. Mr. Hayes had a "stroke of the brain" when the defendant was six or seven years old. From this time until his death in 1987, the defendant's father received social security and the defendant's mother, who dies in 1990, did ironing in the home to support the family.

Additionally, Bobby Johnson testified that their father had been an alcoholic and that neither parent could read or write. The defendant attended school until he was about thirteen years old, but he could not learn to read or write. The defendant stuttered and was hardly understandable causing the other children at school to tease him.

Upon quitting school at age thirteen (13), the defendant left home and went to live with his uncle and grandmother on their farm where he learned to work with horses. He left his uncle's farm at age nineteen (19) and began a nomadic career as a groom.

R2781-2782. The trial court found this in mitigation. The trial court went on to state:

2. ROBERT HAYES' limited mental abilities and borderline intelligence.

In support of this factor, the defendant offered the testimony of psychologist, John Spencer. Dr. Spencer testified that he limited his examination of the defendant to determine only his functional I.Q. and verbal I.Q., which he placed at 74 -- a borderline range of intelligence level, which should not be considered retarded.

The trial court found two significant mitigating factors. Thus, a life sentence is required pursuant to Rembert, Caruthers and Songer.

POINT XVII

FLORIDA STATUTE 921.141(d) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

Florida Statute 921.141(5)(d) violates both the Florida and United States Constitutions. The use of this aggravator renders Mr. Hayes' death sentence unconstitutional pursuant to Article I,

Sections 2, 9, 12, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Hayes filed a motion to declare this aggravator unconstitutional R2720-2726. The trial court denied the motion R2165-2167. The jury was instructed on this as an aggravating circumstance and the trial court found it as an aggravator R2758-2759,2301-2303.

Aggravating circumstance (5)(d) states:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Fla. Stat. 921.141.

All of the felonies listed as aggravators are also felonies which constitute felony murder in the first degree murder statute. Fla. Stat. 784.04(1)(a)2.

This aggravating circumstance violates both the United States and Florida Constitutions. The decisions of the United States Supreme Court have made clear that under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two requirements before it is constitutional. (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 863, 877, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235, 249 (1983). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Zant, supra, at 2742, 77 L.Ed.2d at 249-250.

It is clear that the felony murder aggravator fulfills neither of these functions. It performs no narrowing function whatsoever. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill. However, persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with "heightened premeditation." See Fla. Stat. 921.141(5)(i). Rogers v. State, 511 So. 2d 526 (Fla. 1987). It is completely irrational to make a person who does not kill and/or intend to kill automatically eligible for the death penalty whereas a person who kills someone with a premeditated design is not automatically eligible for the death penalty. It is clear that this aggravating circumstance violates the Eighth and Fourteenth Amendments pursuant to Zant, supra.

This aggravating circumstance also violates Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. This Court's analysis of Article I, Section 17 shows that this aggravator violates the Florida Constitution. In Tillman v. State, 591 So. 2d 167 (Fla. 1991) this Court emphasized the fact that Article I, Section 17 of the Florida Constitution prohibits "cruel or unusual punishment". Id. at 169. It noted the distinction to the Eighth Amendment to the United States Constitution which only prohibits "cruel and unusual punishment". It went on to hold that if a death sentence is unusual it violates the Florida Constitution.

Three different state supreme courts have held this aggravator to be improper under state law, their state constitution, and/or federal constitutional grounds. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979); Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317, 341-347 (Tenn. 1992); Tennessee v. Middlebrooks, 113 S.Ct. 1840 (1993) (granting certiorari); Tennessee v. Middlebrooks, 114 S.Ct. 651 (1993) (dismissing writ of certiorari as improvidently granted). This Court should follow these courts and declare this aggravator unconstitutional pursuant to the Eighth Amendment to the United States Constitution and Article I, Section 17, of the Florida Constitution.

Assuming arguendo, that this Court does not hold this aggravator unconstitutional in all cases, it is unconstitutionally applied in this case. There was virtually no evidence of premeditation in this case. Additionally, it is clear that the jurors in this case relied upon felony murder in order to reach their verdict. When the jurors were polled as to whether first degree murder was their verdict five of the jurors spontaneously said felony murder first degree R2100. The other seven jurors gave no indication as to whether their verdict was based on premeditation or felony murder R2100-2101. Additionally, there were several jury notations on the felony murder instructions, while there were none on the premeditated murder instruction R2602-2603. Thus, it is clear that some or all of the jurors relied on felony murder to reach a verdict of first degree murder.

It is also clear that this aggravating circumstance is essential to death eligibility in this case. The jury was only instructed on (and the jury only found) two aggravating circumstances R2259, 2777-2785. Florida law is clear that if there is only one aggravating circumstance, a death sentence must be reduced to life imprisonment, unless there is little or nothing in mitigation. Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984). Here, there is substantial mitigation, including Robert Hayes' low I.Q., growing up in poverty and with an alcoholic father. Thus, felony murder was essential to make this case first degree murder and for death eligibility.

This Court should declare the aggravator unconstitutional and reduce the death sentence to life imprisonment or at least remand for resentencing.

POINT XVIII

DEATH IS DISPROPORTIONATE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1989).

> Death is a unique punishment in its finality and its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.
>
> State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973).

Here, death is clearly disproportionate. This offense is rather standard felony-murder. The killing itself is an irrational

reaction to the deceased's screaming. There is no evidence of prolonged planning or any intent to cause suffering.

Mr. Hayes does not have any prior violent felony convictions. The trial court found only two aggravators (HAC and during the enumerated felony). The trial court found two mitigating circumstances. (1) Mr. Hayes severely deprived background. Robert Hayes grew in an alcoholic family. His father died when he was only six or seven. His family lived in extreme poverty. He was forced to leave home at a young age to work full time. (2) Robert Hayes' low I.Q. Robert Hayes has an I.Q. of 74. This is 26 points below normal and only four points beyond the retarded range. Robert Hayes never learned to read and write. Additionally, the trial court should have found the mitigator that this is an offense with little or no premeditation.

Analyzing the aggravating and mitigating factors in light of this Court's caselaw mandates a reduction to life imprisonment. The HAC aggravator should be considered weak at best as there was no intentional plan to inflict extreme pain, but merely a spontaneous reaction to a person's screaming. Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990); Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990); Shere v. State, 579 So. 2d 86, 95-96 (Fla. 1991). The underlying felony aggravator is the weakest aggravating circumstance of all, as it is inherent in every felony-murder prosecution. This Court has implicitly recognized this in Rembert v. State, 445 So. 2d 337, 340-341 (Fla. 1984) wherein this Court reduced a death sentence to life imprisonment where the underlying felony is the only aggravator, even though there were no mitigating

circumstances and the jury recommended death. This Court has consistently reduced to life cases where the underlying felony is the only aggravating circumstance even though the jury recommended death. Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Caruthers v. State, 485 So. 2d 496 (Fla. 1985); Menendez v. State, 419 So. 2d 312 (Fla. 1982). Thus, we are left with two relatively weak aggravators.

This is balanced against three recognized mitigators. Dull-normal I.Q. is a recognized mitigator. Meeks v. State, 336 So. 2d 1142, 1143 (Fla. 1976); Neary v. State, 384 So. 2d 881, 886-887 (Fla. 1986). Deprived background has been recognized by this Court as a mitigating circumstance. Brown v. State, 526 So. 2d 903 (Fla. 1988). This Court has recognized that if the "killing, although premeditated, was most likely upon reflection of a short duration" is a significant mitigator. Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986). See also Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985).

In Livingston v. State, 565 So. 2d 1288 (Fla. 1988) and Morgan v. State, ___ So. 2d ___, 19 Fla. L. Weekly S290 (Fla. June 2, 1994), this Court reduced the death sentence to life imprisonment despite two statutory aggravating circumstances and a death recommendation from a jury. Indeed, Morgan involved the same two aggravating circumstances and the HAC aggravator was substantially stronger. This Court's opinions in Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) and Wilson v. State, 493 So. 2d 1019 (Fla. 1986) also support a life sentence. Both of these cases are far

more aggravated than the present case; yet this Court reduced them to life.

In Fitzpatrick, the trial court found five aggravators. This Court did not strike any of them. The Court reviewed the mitigating evidence (noting the mental health evidence) and reduced the sentence to life. The Court stated:

> Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer. We do not believe that this is the sort of "unmitigated" case contemplated by this Court in Dixon. Indeed, the mitigation in this case is substantial. 527 So. 2d at 812.

In Wilson, supra, the trial court found three aggravating circumstances and no mitigating circumstances. Id. at 1023. This Court struck one of the aggravating circumstances. This left the aggravating circumstance of "heinous, atrocious, or cruel" and prior violent felony with no mitigating circumstances. Id. at 1023. This Court reduced the sentence to life imprisonment relying, in part, on the fact "that the killing, although premeditated, was most likely upon reflection of a short duration." Id. at 1023. This Court took this action even though there were no mitigating circumstances and the offense involved a first degree murder, a second degree murder, and an attempted first degree murder and (as Justice Ehrlich noted in dissent) Wilson "had a history of violent criminal behavior." Id. at 1024.

The present case is less aggravated and more mitigated than Wilson. Both have the HAC aggravator. The only other aggravator in this case is the underlying felony aggravator, perhaps the weakest of all; whereas Wilson involves extremely strong facts for the prior violent felony aggravator. (An additional second degree

murder and attempted first degree murder). This case also involves limited, if any, reflection. Thus, this Court should reduce the sentence to life imprisonment.

POINT XIX

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Florida's capital sentencing scheme, facially and as applied to this case, is unconstitutional for the reasons set forth below.

1. The jury

a. Standard jury instructions

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

i. Felony murder

The standard jury instruction on felony murder does not serve the limiting function required by the Constitution and arbitrarily creates a presumption of death for the least aggravated form of first degree murder. It applies an aggravating circumstance to every first degree felony murder. Further, the instruction turns the mitigating circumstance of lack of intent to kill[1] into an aggravating circumstance. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process clauses of the state and federal constitutions.

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[1] See Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (death penalty statute unconstitutional where it did not provide for full consideration of, inter alia, mitigating factor of lack of intent to cause death).

b. Florida allows an element of the crime to be found by a majority of the jury.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. See State v. Dixon, 283 So. 2d at 9. The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution.

2. Counsel

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's -- the defendant has no say in the matter. The defendant becomes the victim of the ever-defaulting capital defense attorney.

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through to the present. See, e.g. Elledge v. State, 346 So. 2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance).

Failure of the courts to supply adequate counsel in capital cases, and use of judge-created inadequacy of counsel as a procedural bar to review on the merits of capital claims, cause freakish and uneven application of the death penalty.

Notwithstanding this history, our law makes no provision assuring adequate counsel in capital cases. The failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution.

3. The trial judge

a. The role of the judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So. 2d 908 (Fla. 1975). On the other, it is considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored under, e.g., Smalley v. State, 546 So. 2d 720 (Fla. 1989). This ambiguity and like problems prevent evenhanded application of the death penalty.

That our law forbids special verdicts as to theories of homicide and as to aggravating and mitigating circumstances makes problematic the judge's role in deciding whether to override the penalty verdict. The judge has no clue of which factors the jury considered or how it applied them, and has no way of knowing whether the jury acquitted the defendant of premeditated murder (so that a sentencing order finding of cold, calculated and premeditated murder would be improper), or whether it acquitted him of felony murder (so that a finding of killing during the course of a felony would be inappropriate).[2] Similarly, if the jury found the defendant guilty of felony murder, and not of premeditated murder, application of the felony murder aggravating circumstance would fail to serve to narrow the class of death eligible persons as required by the Eighth Amendment.

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[2] See Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) (double jeopardy precluded use of felony murder aggravating circumstance where it appeared that defendant was acquitted of felony murder at first trial).

b. The Florida Judicial System

The judge was selected by a system designed to exclude Blacks from participation as circuit judges,[3] contrary to the equal protection of the laws, the right to vote, due process of law, the prohibition against slavery, and the prohibition against cruel and unusual punishment.[4] Because Appellant was sentenced by a judge selected by a racially discriminatory system this Court must declare this system unconstitutional and vacate the penalty.

4. Appellate review

a. Proffitt

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259. Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. Aggravating circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988)

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[3] This is demonstrated through the fact that none of Broward County's 43 circuit judges are black even though Blacks comprise 13.5% of the people in Broward County.

[4] These rights are guaranteed by the Fifth, Sixth, Eighth, Thirteenth, Fourteenth, and Fifteenth Amendments to the Federal Constitution, and Article I, Sections 1, 2, 9, 16, 17, and 21 of the Florida Constitution.

(eighth amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious, or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death eligible persons, or channel discretion as required by Lowenfield v. Phelps, 108 S.Ct. 546, 554-55 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So. 2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So. 2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So. 2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So. 2d 988 (Fla. 1989) (reinterring Herring).

As to HAC, compare Raulerson v. State, 358 So. 2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So. 2d 567 (Fla. 1982) (rejecting HAC on same facts).[5]

Similarly, the "great risk of death to many persons" factor has been inconsistently applied and construed. Compare King v. State, 390 So. 2d 315, 320 (Fla. 1980) (aggravator found where defendant set house on fire; defendant could have "reasonably foreseen" that the fire would pose a great risk) with King v. State, 514 So. 2d 354 (Fla. 1987) (rejecting aggravator on same facts) with White v. State, 403 So. 2d 331, 337 (Fla. 1981) (factor could not be applied "for what might have occurred," but must rest on "what in fact occurred").

The "prior violent felony" circumstance has been broadly construed in violation of the rule of lenity. A strict construction in favor of the accused would be that the circumstance should apply only where the prior felony conviction (or at least the prior felony) occurred before the killing. The cases have instead adopted a construction favorable to the state, ruling that the factor applies even to contemporaneous violent felonies. See Lucas v. State, 376 So. 2d 1149 (Fla. 1979).

The "under sentence of imprisonment" factor has similarly been construed in violation of the rule of lenity. It has been applied to persons who had been released from prison on parole. See

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[5] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L. Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L. Rev. 523 (1984).

Aldridge v. State, 351 So. 2d 942 (Fla. 1977). It has been indicated that it applies to persons in jail as a condition of probation (and therefore not "prisoners" in the strict sense of the term). See Peek v. State, 395 So. 2d 492, 499 (Fla. 1981).

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So. 2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[6] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So. 2d 719 (Fla. 1982).

c. Appellate reweighing

Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So. 2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So. 2d 1200 (Fla. 1986).

d. Procedural technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sen-

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[6] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 907, 926 (1989).

tencing.[7] See, e.g., Rutherford v. State, 545 So. 2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So. 2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of eighth amendment); and Smalley v. State, 546 So. 2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated eighth amendment). Use of retroactivity principles works similar mischief.

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[8] cases. As this Court admitted in Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

5. Other problems with the statute

a. Lack of special verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what

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[7] In Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Appellant contends that a retreat from the special scope of review violates the eighth amendment under Proffitt.

[8] Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

aggravating and mitigating circumstances the jury found because the law does not provide for special verdicts. Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the Eighth Amendment.

Our law in effect makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the Federal constitution.

b. Florida creates a presumption of death

Florida law creates a presumption of death where but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case[9]). In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first degree murders, Florida imposes a presump-

[9] See Justice Ehrlich's dissent in Herring v. State, 446 So. 2d 1049, 1058 (Fla. 1984).

tion of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[10] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the Federal Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988). It also creates an unreliable and arbitrary sentencing result contrary to due process and the heightened due process requirements in a death sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

6. Electrocution is cruel and unusual.

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel but equally effective methods of execution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eight Amendment Assessment of Methods of Inflicting Capital Punishment. 39 OHIO STATE L.J. 96, 125 n.217 (1978). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So. 2d 309 (Fla. 1990). It offends human dignity because it mutilates the

[10] The presumption for death appears in §§ 921.141(2)(b) and (3)(b) which requires the mitigating circumstances outweigh the aggravating.

body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

This unnecessary pain and anguish shows that electrocution violates the Eight Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977). A punishment which was constitutionally permissible in the past becomes unconstitutionally cruel when less painful methods of execution are developed. Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., concurring), 342 (Marshall, J., concurring), 430 (Powell, J., dissenting). Electrocution violates the Eighth Amendment and the Florida Constitution, for it has no become nothing more than the purposeless and needless imposition of pain and suffering. Coker, 433 U.S. at 592.

CONCLUSION

For the foregoing reasons, Mr. Hayes' conviction and sentence must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 21st day of July, 1994.

Richard B. Greene
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