IN THE SUPREME COURT OF FLORIDA

ROBERT HAYES,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 79,997

REPLY BRIEF OF APPELLANT

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AUTHORITIES CITED

OTHER AUTHORITY

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:

"IB"	Initial Brief of Appellant
"AB"	Answer Brief of Appellee
"R"	Record on Appeal
"3SR"	Third Supplemental Record on Appeal

Appellant relies on his Initial Brief for his Statement of the Case and Facts and argument in Points II, VIII, IX, X, XI, XIV and XVIII.

ARGUMENT

POINT I

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

Appellee argues that the defense opening statement that opened the door to the prosecutor's argument concerning the defense failure to perform scientific testing. However, a careful analysis of the defense opening statement and the caselaw reveal that the defense did not open the door to the prosecutor's argument. Defense counsel stated:

> When I first addressed you, I said there would be probative physical evidence that Robert Hayes did not commit the crime. While that poor woman, Pamela Albertson, was being murdered she grabbed on to something and when her hand was opened at the autopsy, her closed hand, not two or three strands of hair as Mr. Kern would like you to believe, but a clump of black hair was in her hand. Black hair belonging to a white person, not a black person. It was not her hair. And it was not Mr. Hayes' hair. You will learn that they did absolutely nothing with this evidence. They had the evidence. The did nothing. They knew it was Caucasian hair

> but they had already decided Mr. Hayes was the one that murdered Pamela Albertson and that was it. They ignored the evidence that it was a white person with black hair that committed this crime.
>
> R1029.

Defense counsel never stated that she would present scientific testing evidence of the hair. Indeed, in her closing argument, she explicitly argued that it was clear from visual inspection, not scientific testing, that the hair found in the deceased's hair was not Robert Hayes' hair and not deceased's hair. It was undisputed that the hair in the deceased's hand was not Robert Hayes' hair due to their different races. The only question is whether the hair could be the deceased's hair. The defense argument concerning this was that a layperson could tell visually that the deceased's hair was different from the hair in her hand. Defense counsel stated (in closing argument):

> There was hair found clutched in Pamela Albertson's right hand. The prosecutor has suggested to you that it could have been her own hair. I put these in baggies so that you could look at them and look at them carefully. Mr. Kern, the prosecutor, whose job it is to seek justice, did into do that. The hair found in Pamela Albertson's hand is not her own hair. Loot at it.
>
> R2030.

Comments that hairs visually appear different do not open the door to comments concerning the failure of the defense to call witnesses concerning scientific testing. This case is distinguishable from the cases relied on by Appellee. In Dunbar v. State, 458 So. 2d 424 (Fla. 2d DCA 1984), the defense attorney indicated that specific witnesses would be called. Id at 425. The court held that this opened the door to comment on the failure to call "those witnesses." This is very different from the situation in this case.

A more properly limited view of "door opening" is reflected by two cases from the Fourth District Court of Appeal. In Williams v. State, 619 So. 2d 1044 (Fla. 4th DCA 1993) the court stated:

> In our case, Williams did not file a notice of alibi, nor did he testify at trial. In a statement to investigators, he indicated that he was at home at the time of the crime, watching television and talking on the telephone. Williams' mother testified at trial that Williams was indeed at home watching television, but at no time did Williams ever make his telephone conversations part of his defense. During its closing remarks, the state nevertheless commented on Williams' failure to produce as a witness the person at the other end of this telephone conversation. As explained recently by Judge Klein:
>
> > "When a prosecutor refers to a defendant's failure to call certain witnesses, it may violate the right to remain silent. It is also inconsistent with the presumption of innocence and the state's burden to prove guilt beyond a reasonable doubt."
>
> Lawyer v. State, No. 91-2768, 1993 WL 182516 (Fla. 4th DCA June 2, 1993) (citing Romero). We find that the trial court erred in overruling Williams' objection to the comment and in denying his motion for mistrial.

Id. at 1045-1046.

Defense counsel's comments concerning the hair appearing visually different does not open the door to argument concerning the defense's failure to conduct scientific testimony on the hair evidence.

Appellee also relies on United State v. Alvarez, 837 F.2d 1024 (11th Cir. 1988) for the proposition that these comments are harmless error. There is a crucial distinction between this case and Alvarez. In Alvarez the judge sustained the objection to the remarks. Id. at 1029. In this case, the objection was overruled. Here, the error was clearly harmful as the only direct evidence in the case came from a jailhouse informer who made a deal for his testimony and the DNA evidence was sharply contested. Thus, a new trial is required. Lawyer v. State, 627 So. 2d 564 (Fla. 4th DCA 1993).

POINT III

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

Appellee replies on a procedural bar to argue that the trial court could not consider the substantial newly discovered evidence of Mr. Hayes' innocence. However, the United States Supreme Court has consistently recognized that newly discovered evidence which raises "a colorable claim of actual innocence" is a ground to consider the merits of issues which are procedurally defaulted and/or presented in an untimely manner. Sawyer v. Whitley, ___ U.S.___, 112 S. Ct. 2514 (1992). (See cases cited at 2518.) This Court has recently implicitly recognized the same principle. Johnson v. Singletary, ___ So. 2d ___, 19 Fla. L. Weekly S337 (Fla. May 19, 1994). The present case fits directly under this doctrine.

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, IB. Appellee was then improperly allowed to argue, over objection that appellant's argument that the hairs appeared visually different "challenged" the jury's intelligence. See Point II, IB.

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.

Mr. Hayes filed his motion for independent testing contemporaneously with his motion for new trial. The trial court immediately denied his motion for new trial. Two months later, the trial court denied the motion for independent testing, but ordered the prosecution's expert, Howard Seiden, to test the hair. His results were inconclusive. Mr. Hayes then filed a renewed motion for independent testing. The trial court could have granted the original motion, held the motion for new trial in abeyance, and thus avoided the procedural bars argued by Appellee. This was error.

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. The trial court should have granted Mr. Hayes' motion for new trial.

POINT IV

THE TRIAL COURT ERRED IN ADMITTING COLLATERAL CRIME EVIDENCE.

Appellee's argument that this issue is not preserved is somewhat curious. Appellee ignores the fact that the trial court explicitly recognized that Mr. Hayes had a continuing objection to all of this material, the fact that Mr. Hayes' brought this issue to the trial court's attention on several occasions, and that Mr. Hayes' objected to the first mention of this evidence in opening statement. Indeed, Appellee's argument seems to be that Mr. Hayes' objected both too early and too late (and perhaps too often). This issue is preserved. To hold otherwise would turn the contemporaneous objection rule from a rule designed to bring matters to the trial court's attention into pure legal gamesmanship designed to thwart appellate review of substantive issues.

Mr. Hayes filed a pre-trial motion in limine to exclude the collateral offense evidence at issue here R2332-2336. An evidentiary hearing was held on this motion, during trial R78-337,565-583,889, 896,970-987,995-998. The trial court finally ruled, after extensive evidence and argument, immediately prior to opening statement R997-998. Defense counsel objected when this issue was mentioned in opening statement R1023. The objection was overruled. At the close of the collateral offense evidence the parties discussed the evidence. The following colloquy took place between defense counsel and the court:

> DEFENSE COUNSEL: I would just continue my objection, of course, to all of this.
>
> THE COURT: Yes.

R1603.

Mr. Hayes again raised this issue in his motion for new trial R2629-2630.

Mr. Hayes brought this issue to the trial court's attention on at least five different occasions: (1) Written Motion In Limine. (2) Lengthy evidentiary hearing which only concluded immediately before opening statement. (3) Objecting to the first reference to this evidence during opening statement. (4) Making a continuing objection to this evidence; which the trial court explicitly recognized. (5) Raising this issue on his motion for new trial. (Additionally, defense counsel specifically renewed all prior motions and objections prior to the jury retiring) R2092.

Appellee relies on Correll v. State, 523 So. 2d 562 (Fla. 1988); Lawrence v. State, 614 So. 2d 1092 (Fla. 1993); and Jackson v. State, 451 So. 2d 458 (Fla. 1989) for its argument that this issue is not preserved. Correll and Lawrence are distinguishable from this case and Jackson actually support the idea that this issue is preserved. In Correll and Lawrence there was only a motion in limine concerning the evidence. Here, there was a specific objection at the first mention of this evidence in opening statement and Appellant made a continuing objection which the judge specifically recognized.

Jackson actually supports the claim that this issue is preserved and explicitly rejects the argument advanced by Appellee. Appellee argues that the objection must be made at the beginning of the collateral offense evidence so that the court can "reconsider the issue and prevent its admission" AB20-21. Jackson specifically rejects this argument.

> An objection need not always be made at the moment an examination enters impermissible areas of inquiry. In *Roban v. State*, 384 So. 2d 683 (Fla. 4th DCA), review denied, 392 So. 2d 1378, 1379 (Fla. 1980), objection to an impermissible

> gratuitous comment by a witness was made several questions after the objectionable testimony. The district court found the objection timely because the question put to the witness was within the time frame for a contemporaneous objection. In the case now before us, objection was made during the impermissible line of questioning, which is sufficiently timely to have allowed the court, had it sustained the objection, to instruct the jury to disregard the testimony or to consider a motion for mistrial.
>
> 451 So. 2d at 461.

The purpose of the requirement of renewing matters raised in a motion in limine is to allow the judge to grant curative instruction or a mistrial not to exclude the evidence. Indeed, in Jackson, supra, the much of the objectionable testimony had already come out. Thus, it would have been too late for the judge to exclude the testimony. Objection after the objectionable material has come in is timely to allow the trial judge to grant a curative instruction or a motion for mistrial. Johnston v. State, 497 So. 2d 863, 868-869 (Fla. 1986); Barrett v. State, ___ So. 2d ___, 19 Fla. L. Weekly S627, 628 (Fla. November 23, 1994) (objection to discovery violation at the close of cross-examination, when violation revealed during direct examination); Sharp v. State, 605 So. 2d 146, 147 (Fla. 1st DCA 1992) (objection after all direct testimony had been completed on the impermissible topic); Roban v. State, 384 So. 2d 683, 685 (Fla. 4th DCA 1980) (objection three questions after comment on silence).

Mr. Hayes made a continuing objection which the trial court the trial court accepted. A continuing objection preserves an issue. Hopkins v. State, 632 So. 2d 1372, 1376 (Fla. 1994) (Recognizing attempt at continuing objection even though trial court had not accepted it); Spivey v. State, 529 So. 2d 1088, 1091 (Fla. 1988); Hardie v. State, 513 So. 2d 791, 792 (Fla. 4th DCA 1987).

It is important to consider the purpose of the contemporaneous objection rule. Castor v. State, 365 So. 2d 701, 703 (Fla. 1978), lays out the purpose of the rule.

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings.

(emphasis supplied).

The trial court was put on notice concerning this error on five different occasions. This is not a matter of "sandbagging" the trial judge and raising the issue for the first time on appeal.

It is clear that the trial judge (who this Court identified as the most important actor in Castor, supra) felt that the issue was preserved. The trial judge explicitly acknowledged this when he accepted defense counsel's request for a continuing objection to this evidence. If the trial court understood the issue to be preserved, the appellate court must treat it as preserved. Smith v. State, 562 So. 2d 787, 788-789 (Fla. 1st DCA 1990); Dinkins v. State, 566 So. 2d 859, 860 (Fla. 1st DCA 1990); Adams v. State, 559 So. 2d 1293, 1295-1296 (Fla. 3d DCA 1990); Langon v. State, 636 So. 2d 578 (Fla. 4th DCA 1994); United States v. Lefkowitz, 284 F.2d 310, 313 n.1 (2d Cir. 1960) (failure to object did not waive issue because co-defendant's objection brought issue to judge's attention); United States v. Hernandez, 921 F.2d 1569, 1581-1582 (11th Cir. 1991) (same holding). Further objection would have been futile, as the trial court had ruled and nothing had changed since the ruling. Simpson v. State, 418 So. 2d 984, 986 (Fla. 1982) ("We should seek to avoid, not foster, a hypertechnical application of the law"); Rodriguez v. State, 494 So.

2d 496, 498 (Fla. 4th DCA 1986); Cox v. State, 563 So. 2d 1116, 1117 (Fla. 4th DCA 1990). This issue is preserved.

This issue is meritorious. Appellee makes no attempt to distinguish the cases relied on by Mr. Hayes, all of which involved alleged similarities of prior sexual assaults. Drake v. State, 400 So. 2d 1217 (Fla. 1981); Peek v. State, 488 So. 2d 52 (Fla. 1986); Thompson v. State, 492 So. 2d 203 (Fla. 1986); Flowers v. State, 386 So. 2d 854 (Fla. 1st DCA 1980); Davis v. State, 376 So. 2d 1198 (Fla. 2d DCA 1979); AB21-23. These cases control this case.

All of the cases relied on by Appellee are clearly distinguishable. Lawrence v. State, 614 So. 2d 1092, 1095 (Fla. 1993) involved linking up a gun that was involved in the offense. Holsworth v. State, 522 So. 2d 348 (Fla. 1988) involved far greater similarities than the present case.

> Both the collateral crime and the instant offense were committed within two thousand feet of each other and within the same distance of Holsworth's residence at the time of each crime; both occurred in the early morning hours; both involved women asleep in house trailers and surreptitious entry; in both the assailant covered the mouths of the victims, battered and threatened them in response to their screams, and then quickly fled the same way he had entered.
>
> Id. at 353.

Holsworth involves many similarities that the present case does not have, including virtual identity of the offense and geographical area.

Rivera v. State, 561 So. 2d 536 (Fla. 1990) involves far greater similarities than the present case.

> Here, there were numerous similarities between the two crimes. Both victims were eleven years of age, caucasian, with blond hair. Both were similar in stature, small and petite. Both were alone and approached from behind. Both abductions occurred during daylight, and within four miles of Rivera's home. After each crime, individuals received phone calls from a man who identified himself as "Tony" and

> who stated that he was wearing pantyhose and leotards and had fantasized about raping young girls.
>
> Id. at 539.

The victims in Rivera were virtually identical in age, stature, hair color. The crimes involved virtually identical facts and extremely unusual phone calls after the crime. The current case involves none of these unique features.

Duckett v. State, 568 So. 2d 891 (Fla. 1990) also involves far greater similarity than the current case.

> The evidence in this record established Duckett's tendency to pick up young, petite women and make passes at them while he was in his patrol car at night, on duty, and in his uniform. All of these incidents occurred within six months of the victim's death.
>
> Id. at 895.

Duckett involves a unique modus operandi of a highway patrol officer using his official status.

Kight v. State, 512 So. 2d 922 (Fla. 1987) also involves far greater similarities than the current case. This Court stated:

> 1) the crimes occurred on the same day; 2) the victims were both black cab drivers; 3) on both occasions Hutto and Kight were picked up outside a Main Street bar; 4) both drivers were taken to the same general area of town; 5) a knife was used in both incidents; and 6) both victims were robbed.
>
> Id. at 928.

The offenses in Kight occurred on the same day in the same location. The facts were strikingly similar. In the present case, the alleged offenses were widely separated in time and geography.

Chandler v. State, 442 So. 2d 171 (Fla. 1983) also contains far more similarities than the present case. This Court stated:

> The significant common features of Chandler's previous crime and those charged here, as found by the trial court below, included:

> 1) In each, a victim's hands were bound behind him with an item belonging to the victim -- in one case, a necktie, in the other, the victim's dog leash;
>
> 2) In each, the victims were first forcibly abducted to a relatively remote location;
>
> 3) The victims of each crime were beaten repeatedly about the head with a blunt instrument;
>
> 4) The victims in both instances were robbed;
>
> 5) The defendant utilized, to some extent, both a knife and a blunt instrument.

Id. at 173, n.2.

The present case contains none of these unique similarities. Chandler, supra, is also significant in that it is virtually the only Florida case to allow introduction of collateral offenses separated by any significant period of time. This Court explained its reasoning.

> In so concluding, we recognize that the passage of several years between the collateral crime and the crime charged has often been reckoned to destroy the relevance of the previous crime to the issue of identity. Where, as in this case, however, the defendant spent almost the entire time between the two offenses incarcerated for the first crime, the relevance of that collateral crime to the proof of a common modus operandi is preserved, if not enhanced.

Id. at 173.

In the present case, there was an 18 month gap between the two incidents and Mr. Hayes had not been incarcerated during this time.

In attempting to establish similarities between the two offenses, Appellee makes a general summary of the two incidents, which includes substantial speculation AB21-22. However, Appellee overlooks the fact that in each case there was only one witness who provided direct evidence. A careful analysis of the testimony of these two witnesses reveals significant differences between the two offenses.

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.

R1590-1591.

This incident allegedly took place 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. Appellee's argument that the alleged attack was sexually motivated is purely speculative. (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. The alleged collateral incident involved a 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 a 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:

> 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.
>
> 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.
>
> 492 So. 2d at 204-205.

The present case involves fewer similarities and more dissimilarities than Drake, Peek and Thompson.

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).

A recent opinion of this Court in a sexual battery on a child also demonstrates the inadmissibility of this testimony. Feller v. State, 637 So. 2d 911, 916 (Fla. 1994):

> The charged and collateral offenses must "share some unique characteristic or combination of characteristics which sets them apart from other offenses." *Id.* at 124. In the instant case, the two offense have only two things in common: both are the same type of offense and both involved young girls. The charged offense involved allegations of several incidents of penial and digital penetration of the vagina while the child was unclothed inside the family dwelling; the collateral offense involved a single episode of touching on the outside of the child's clothing while she sat on the defendant's knee as they were fishing. As this Court explained in *Peek v. State*, 488 So. 2d 52, 55 (Fla. 1986), "[c]ollateral crimes evidence ... is not relevant and admissible merely because it involves the same type of offense."

The evidence in this case is harmful. 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).

See also Holland v. State, 636 So. 2d 1289, 1293 (Fla. 1994); Keen v. State, 504 So. 2d 396, 401-402 (Fla. 1987).

Appellee claims that the error here was harmless due to the strength of the prosecution's case. Appellee attempts to do this by discussing circumstantial evidence that is equally consistent with Mr. Hayes innocence AB24-25. There are only two pieces of direct evidence in this case. The alleged jailhouse statement to Ronald Morrison and the DNA evidence. 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. Thus, Morrison's credibility is severely suspect, both as a multiple convicted violent felon and as a person who was receiving great benefits for his testimony. The other piece of direct evidence is the DNA evidence. This evidence was in sharp dispute. See Point VI, supra, and Point VI, IB. There was expert testimony that the laboratory procedures in this case were unreliable. Indeed, one of the procedures has been condemned by a report of the National Academy of Sciences. Given the disputed nature of the evidence in the case and the highly inflammatory nature of the collateral offense, the prosecution has not met its burden, beyond a

reasonable doubt, to overcome the presumption that collateral offense evidence is harmful error.

Assuming arguendo, this Court feels the error is harmless in the guilt phase, it is clearly harmful in the penalty phase. Appellee has made no attempt to respond to this argument AB24-25. This Court has often found guilt phase errors, harmless as to guilt phase, but harmful in the penalty phase. Castro v. State, 547 So. 2d 111 (Fla. 1989); Lawrence v. State, 614 So. 2d 1092 (Fla. 1993). In Lawrence, this Court reversed for a new penalty phase due to the erroneous admission of collateral offense evidence despite finding the error harmless in the guilt phase. This Court stated:

> Any error regarding the introduction of that evidence was harmless as to Lawrence's conviction. We are not convinced, however, that any error would be equally harmless in regards to his death sentence. As we have stated before: "Substantially different issues arise during the penalty phase of a capital trial that require analysis qualitatively different than that applicable to the guilt phase. What is harmless as to one is not necessarily harmless as to the other." *Castro v. State*, 547 So. 2d 111, 115 (Fla. 1989).

614 So. 2d at 1096-1097.

This Court found the error harmful even though it had upheld three valid aggravators (under sentence of imprisonment, prior violent and underlying felony) and the trial judge found nothing in mitigation. 614 So. 2d at 1094, 1096-1097. In Castro, the Court also reversed for a new penalty phase based on the improper admission of collateral offense evidence in the guilt phase. This Court stated:

> What is harmless as to one is not necessarily harmless to the other, particularly in light of the fact that a *Williams* rule error is presumed to infect the entire proceeding with unfair prejudice.

547 So. 2d at 115.

In a well-reasoned concurring opinion by Justice Anstead, joined by a majority of this Court (thus being controlling authority), he

persuasively argued that the harmless error doctrine should be applied in the penalty phase far more sparingly than in the guilt phase. Wike v. State, ___ So. 2d ___, 19 Fla. L. Weekly S619 (Fla. Nov. 23, 1994) (concurring opinion by Anstead, J., joined by Overton, Shaw, Kogan and Harding, JJ. at S618-619). The issue in Wike involved the order of closing argument. However, the reasoning is equally applicable to any error potentially impacting on the jury's penalty phase vote.

> Indeed, since the defendant's life is literally on the line during the penalty phase, any arguable distinction would favor an even more stringent application of the rule in the penalty phase.
>
> 19 Fla. L. Weekly at S619.

It concludes:

> In a similar context involving a different sentencing error, Justice Sundberg succinctly made the point:
>
> > Would the result of the weighing process by both the jury and the judge have been different and had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial.... *Elledge v. State*, 346 So. 2d 998, 1003 (Fla. 1977).
>
> Id.

Applying these principles to the current case, the prosecution can not meet its burden, beyond a reasonable doubt, of overcoming the presumption of harmful error. 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. 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.

Appellee argues that Randolph v. State, 463 So. 2d 186 (Fla. 1984) resolves this issue and that Burr v. State, 576 So. 2d 278, 279 n.2 (Fla. 1991) does not leave this question open. Mr. Hayes disagrees with both these assertions. However, Appellee failed to respond to the merits of Mr. Hayes' argument.

Capital cases implicate a unique need for reliability pursuant to the Unites States and Florida Constitutions. 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). Both Burr and Randolph were prior to Tillman. Assuming arguendo, Appellee is correctly reading Burr and Randloph, Tillman is a substantial intervening case which gives reason to reconsider this doctrine. In Tillman, this Court saw the need for a higher standard of reliability in capital cases pursuant to Article I, Sections 9 and 17 of the Florida Constitution. 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 terminates the prosecution, this brings into question the reliability of the evidence. It also denies the accused an opportunity to answer the charges in a court of law. 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.

The present case shows the unreliable nature of such evidence and how it skews the process toward death. Mr. Hayes was charged with a misdemeanor, which was dismissed. Yet, the prosecution was allowed to parade in three witnesses and portray this as a serious violent felony. This renders his conviction and death sentence unreliable. Mr. Hayes' conviction must be reversed for a new trial. Assuming arguendo, this Court finds this evidence harmless in the guilt phase, it is clearly harmful in the penalty phase. See Point IV.

POINT VI

THE TRIAL COURT ERRED IN ADMITTING DNA TEST RESULTS.

Appellee's argument that this issue is unpreserved is contrary to numerous decisions. Mr. Hayes filed a motion in limine to exclude the DNA evidence in this case R2553-2580. An evidentiary hearing was held on this issue during trial R387-565. The trial court denied the motion during trial R565. Mr. Hayes renewed his prior objection immediately before any testimony was given concerning the DNA testing in this case R1080. It is absurd to say this issue is not preserved. See Jackson, supra, and discussion of preservation in Point III.

Appellee's reliance on Troedel v. State, 462 So. 2d 392 (Fla. 1984) is misplaced. This Court's actual holding in Troedel is that

the issue was unpreserved as Troedel had put on no evidence below as to reliability of the procedures. 462 So. 2d at 396. The entire discussion is dicta. This Court also stated that, on appeal, Troedel had not provided any reason why the evidence is unreliable. This is very different from the current case.

The issue in Troedel involved neutron activation tests. The challenge in Troedel was to the manner in which the detective swabbed the defendant's hands. Id. at 395-396. There was no challenge to the laboratory procedures of the chemist who analyzed the samples. Id. Here, the challenge was not to the way the crime scene detectives collected the sample, as in Troedel. It was to the way the laboratory tested and analyzed the evidence in this case. Thus, the Troedel dicta has no relevance much less controlling authority in this case. Perhaps, more importantly, Appellee has cited no case in the nation which states that DNA evidence can be admitted without a finding that the laboratory procedures are reliable (if they are properly challenged below). Mr. Hayes cited several cases in his Initial Brief to this effect. See Point VI, IB. Indeed, Appellee's brief includes the following quotation from this Court's opinion in Robinson v. State, 619 So. 2d 1288, 1291 (Fla. 1992):

> In admitting the results of scientific tests and experiments, the reliability of the testing methods is at issue, and the proper predicate to establish that reliability must be laid.

AB at 31.

Appellee makes two misrepresentations of Dr. Garner's testimony. Dr. Garner never stated that the "validity and reliability of the tests are widely accepted in the scientific community." IB at 30. He stated that if the DNA tests are "performed properly" then DNA evidence is reliable 3SR15-16. Secondly, although Dr. Garner initially

stated that his personal opinion is that the issue involves weight and credibility, he immediately clarified his response:

> If I can back up a second, the question asked prior to that concerning admissibility is actually a legal question so I need to back out of that just a touch because I know in some jurisdictions they actually are placing the third prong or the fourth prong into an admissibility issue and I don't what Florida is.

3SR27.

Obviously, a scientist can not determine legal questions. This Court has specifically stated that the reliability of the testing procedures is a proper issue for trial and appellate courts in deciding admissibility.

Appellee's recitation of the substantive testimony concerning this issue is also somewhat inaccurate. Appellee claims that the testimony of George Duncan, an employee of the Broward County Sheriff's Department, somehow constitutes independent scientific support for Lifecodes testing procedure. However, this argument is faulty in two respects. (1) George Duncan is an employee of the Sheriff's Department (hardly an independent expert). (2) His testimony actually supports exclusion of this evidence. He stated that in his lab, he has adopted the procedure of always having two serologists inspect a 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. No one, other than Lifecodes employees, testified that their testing procedures were reliable, or accepted, in the scientific community.

Appellee also asserts that Dr. Garner testified that contamination can only cause a false negative AB34. However, this is incorrect. Dr. Garner did testify that a false negative is the more common

error 3SR35-37. However, he testified that a false positive is also possible.

> Q (Prosecutor): If anything, you're talking about a false positive error, a possibility of a false positive error here.
>
> A (Dr. Garner): That's correct. The only way you can get contamination from another case, you'd have to have a double error, a double contamination problem and you'd have to be fairly sloppy to do that, but you'd have to contaminate basically two samples from a known blood sample on a second case because you're going to have to contaminate both a known and a question tube that you have labeled as such from a unknown blood sample from another case.

3SR37.

Appellee asserts that the issue of band shifting is not properly before this Court based on Dr. Garner's testimony. However, Appellee's characterization of Dr. Garner's testimony on this issue is incomplete.

> Q (Prosecutor): <u>But it's your opinion three bands are insufficient</u>?
>
> A (Dr. Garner): <u>Absolutely</u>. <u>Especially they've also got band shifting involved here that they've corrected for but</u>.
>
> Q That's the one that has the band slippage?
>
> A Correct....
>
> Q And you're satisfied with their procedures by a monomorphic probe to correct band slippage?
>
> A It seems to be adequate. I can't find fault with it.
>
> The monomorphic probe spans the areas that they're looking to correct. <u>There certainly isn't a whole lot of documentation in the literature about other people's experience in doing that and our experience and correcting with monomorphic probes is very limited</u>. <u>We don't do it in case work</u> but I can't find any fault with it.

(Emphasis supplied) 3SR31-32.

It is clear that Dr. Garner was specifically opposed to pronouncing a match concerning this evidence. He also stated that he knew of no documentation supporting band shifting and his lab did not do it.

Appellee is misplacing the burden here. Once the reliability of scientific evidence is questioned, the burden is on the proponent to establish a proper predicate for its admission. Ramirez v. State, 542 So. 2d 352, 355 (Fla. 1989); Flanagan v. State, 625 So. 2d 823, 828 (Fla. 1994). No one testified to the general acceptance of band shifting other than Lifecodes employees.

It must also be pointed out the report of the National Academy of Sciences condemning band shifting came out after the trial of this case, but prior to sentencing. Mr. Hayes brought this to the trial court's attention as soon as it came out R2766-2770.

Appellee's position that this Court can not consider this issue is directly contrary its direction quotation from Vargas v. State, 640 So. 2d 1139 (Fla. 4th DCA 1994) AB32:

> Our review of pertinent cases indicates that the correct manner of review is a *de novo* review of whether the evidence in question is generally accepted in the relevant scientific community, encompassing expert testimony, scientific and legal writings, and judicial opinions. *See Flanagan v. State*, 625 So. 2d 827 (Fla. 1993) (reviewing relevant academic literature and case law in analyzing whether sexual offender profile evidence is generally accepted in the scientific community.

Both Flanagan and Vargas hold there is de novo review on appeal, encompassing all relevant scientific research and literature once a proper challenge is made below.

Appellee relies on Robinson, supra; Vargas, supra; and State v. Andrews, 533 So. 2d 841 (Fla. 5th DCA 1988). None of these cases control this issue. In Robinson, supra, the defendant produced no testimony concerning the testing. 610 So. 2d at 1291. In this case, there was extensive testimony on this issue. Vargas, supra, involved a different laboratory. There was no attack on the scientific procedures at issue here. The Court in Vargas stated:

> The record and materials submitted for our review indicate that the heart of the controversy in this case is the effect of population subgroups on the calculation of statistical probabilities, the third step in the DNA profiling process.
>
> 640 So. 2d at 1144, n.7.

This is not the issue in this case.

Andrews, supra, does not control this issue for three reasons. (1) It employs the wrong legal standard. (2) It is impossible to tell from the opinion what, if any, defense evidence was introduced in the case. (3) It was decided in 1988 and there has been substantial scientific advance since that time. Andrews, supra, was decided before this Court's opinions in Ramirez, supra and Flanagan, supra. Both of these cases make clear that the test for admissibility is the test in Frye v. United States, 293 F. 1023 (D.C.Cir. 1923) involving general acceptance in the scientific community. Instead, Andrews employed the much less rigorous "relevancy" test. Andrews employed an abuse of discretion standard not the de novo review required by subsequent cases. Also, Andrews did not impose a requirement of testimony from neutral experts, which this Court required in Ramirez, supra.

It is impossible to tell from Andrews what defense evidence, if any, was presented. The Court in Andrews only recites the prosecution's evidence. Thus, it is impossible to tell if any of the issues involved in this case were involved in Andrews. It must be noted that Andrews was decided in 1988. There has been much caselaw and scientific research since then, including the report of the National Academy of Sciences which criticizes some of the procedures in this case. Indeed, Andrews has been widely criticized. See Hoeffel, The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant, 42 Stanford Law Review 465, 517-519 (1990).

Mr. Hayes presented testimony concerning the following defects in Lifecodes' procedures:

> (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.

There was no testimony about the testing procedures other than the self-serving testimony of Lifecodes' employees. This is insufficient to show general acceptance in the scientific community under Ramirez. This is especially true here where the Broward County Sheriff's Department chemist supported many of the attacks and the subsequent report of the National Academy of Sciences supports others. Mr. Hayes has cited many out of state cases in support of his position, which Appellee has ignored.

This error is harmful. The only other direct evidence in this case is from Ronald Morrison, who has been convicted of several violent felonies and received great benefits for his testimony. This evidence can not be considered harmless beyond a reasonable doubt.

POINT VII

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

Appellee's argument that this issue is unpreserved is misplaced AB36-37. There was extensive argument concerning this issue R1355-1363,1394-1400. Mr. Hayes specifically stated Tate's lying under oath to the Racing Commission "goes to his truth and veracity and his credibility." He also argued that this went to the "witness' bias, motive, or self interest" R1397. The argument advanced by Mr. Hayes on appeal is encompassed in these two objections.

Appellee asserts that the witness was not given an opportunity to deny or explain his prior inconsistent statement. The reason for this is that the Court prevented Mr. Hayes from doing this.

Farinas v. State, 569 So. 2d 425 (Fla. 1990); State v. Pettis, 520 So. 2d 250 (Fla. 1988); and Desantis v. Acevedo, 528 So. 2d 461 (Fla. 3d DCA 1988) are all distinguishable. None of those cases involve a prosecution witness previously lying under oath concerning his number of felony convictions. This Court has explicitly held this to be proper impeachment. Derrick v. State, 581 So. 2d 31, 34-35 (1991).

Appellee's reliance on Breedlove v. State, 580 So. 2d 605 (Fla. 1991) is erroneous. Breedlove involves a post-conviction proceeding in which it was revealed years after the offense that some of the police officers had been under federal investigation. This Court found that the trial prosecutor had no knowledge of the investigation. Id. at 607. Here, the trial prosecutor knew of the perjury and could charge Mr. Tate at any time. It is proper to impeach a state witness on a potential criminal charge. Livingston v. State, 565 So. 2d 1288, 1291 (Fla. 1988).

Appellant had a right to bring this evidence out as a prior inconsistent statement under Derrick to show bias under Livingston, and to impeach Tate's credibility. See Coxwell v. State, 361 So. 2d 148 (Fla. 1978) (broad scope of cross-examination in a capital case).

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. Appellee has made no attempt to respond to the argument that this error is separately prejudicial as to penalty. It clearly is. See argument as to penalty phase harm in Point IV, supra.

POINT XII

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

Appellee is incorrect that Mr. Hayes' argument that the prosecution's case was based solely on circumstantial evidence AB60-61. Appellant's argument is that the prosecution's own evidence is inconsistent with premeditation. 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. 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. This is not a premeditated murder, but an impulsive reaction to a scream to "shut her up"; not to kill the woman. A new trial is required as one or more of the jurors may have relied on the theory of premeditation.

POINT XIII

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

Appellee completely ignores the trial judge's comments. 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).

These comments are far stronger than those this Court held to require reversal in Ross v. State, 386 So. 2d 1191, 1197-1198 (Fla. 1980). See Henry v. State, 586 So. 2d 1033, 1037 (Fla. 1991) (judge is presumed to follow jury instructions even if different from order).

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.

Appellee claims that this argument involves residual doubt. That is not the issue here. 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 testimony of Ronald Morrison, the only direct evidence, clearly supports this non-statutory mitigator. This error is clearly harmful. The trial judge found only 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 error 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.

Appellant recognizes this Court's statement in Sochor v. State, 619 So. 2d 285 (Fla. 1993) concerning strangulation. However, this statement is inconsistent with numerous other cases requiring an intent to cause unnecessary and prolonged suffering. Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990) (hypothesis consistent with crime not "meant to be deliberately and extraordinarily painful" and thus not HAC); Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Mills v. State, 476 So. 2d 172, 178 (1985); Lloyd v. State, 524 So. 2d 396, 403 (Fla. 1988); Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989). Appellant urges this Court to reconsider its

statement concerning strangulation in Sochor and consistently apply the intent requirement.

Well reasoned cases from other states reject HAC on far worse facts. In State v. Hunt, 220 Neb. 707, 371 N.W.2d 708 (Neb. 1985), which deals with a far more aggravated case. In Hunt the defendant entered the victim's house and tied the victim's arms and legs. Items were stuffed down the victim's throat. The defendant then strangled the victim with a nylon stocking until she was unconscious. The Nebraska Supreme Court rejected HAC because there was "no evidence the acts were performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time":

> To be sure, forcing items into the victim's throat and the strangulation itself were cruel, but not "especially so," for any forcible killing entails some violence toward the victim. There is no evidence the acts were performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time.

Hunt, 371 N.W.2d at 721. Likewise, the similar facts in this case do not show that Appellant intended to inflict extreme or prolonged suffering to qualify this as especially HAC.

Also, in Perry v. New Jersey, 124 N.J. 128, 590 A.2d 624 (N.J. 1991), a similar aggravating circumstance, murder involving torture, was held to be improper in a strangulation case because the evidence did not indicate that the defendant intended to cause extreme physical or mental suffering. The court went on to state that the method of killing cannot constitutionally support such an aggravator by itself:

> Our concern is that if the c(4)(c) factor could be sustained on this evidence alone [method of killing] there would be no principled way to distinguish this case, in which the death penalty was imposed from many cases in which it was not.

> Because factor c(4)(c) focuses on the criminal's state of mind, it cannot be supported solely by reference to the means employed to commit the murder.

590 A.2d at 646. Almost all murders are brutal. It is the designed intent to inflict pain and suffering which causes this aggravator to truly narrow the list of death eligibles. This aggravator must be struck and this case reduced to life.

POINT XVII

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

Appellee only responds to Appellant's facial attack on this aggravator AB72. Mr. Hayes also has extremely strong facts for a challenge to the application of the aggravator to this case. There was virtually no evidence of premeditation in this case. 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 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. It is clear that some or all of the jurors relied on felony murder to reach a verdict of first degree murder.

This aggravating circumstance is essential to death eligibility in this case. The jury was only instructed on (and the judge only found) two aggravating circumstances R2259, 2777-2785. 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). 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. Regardless of the facial constitutionality of this aggravator, it is unconstitutionally applied to these facts. Thus, a life sentence must be imposed.

POINT XIX

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Appellee asserts that "some" of the issues in this point are unpreserved. However, Appellee makes no attempt to specify which issues are unpreserved. All of these issues are properly preserved as there were numerous pre-trial motions filed and special jury instructions requested concerning the death penalty.

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 SARA D. BAGGETT, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 3rd day of January, 1995.

Richard B. Greene

Of Counsel