IN THE SUPREME COURT OF FLORIDA

JAMES EARNEST HITCHCOCK,

Appellant,

v. CASE NO. 82,350

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This is an appeal from the death sentence imposed, following resentencing proceedings, on August 30, 1993. The procedural history of this case is lengthy, and, for that reason, it is set out in detail below.

In 1976, Hitchcock was convicted of first-degree murder for the strangulation murder of his brother's thirteen-year-old stepdaughter.[1] *Hitchcock v. State*, 413 So. 2d 741, 743 (Fla. 1982) (*Hitchcock I*). The advisory jury recommended a sentence of death, and, in January of 1977, the trial court sentenced Hitchcock in accordance with that recommendation. *Hitchcock I*, 413 So. 2d at 743. This court affirmed the conviction and sentence in 1982. *Id.*, at 741. Hitchcock then collaterally attacked his conviction and sentence in a Florida Rule of Criminal Procedure 3.850 motion, the denial of which was affirmed by this court in 1983. *Hitchcock v. State*, 432 So. 2d 42 (Fla. 1983). Hitchcock then filed a federal petition for habeas corpus relief, which was denied. *Hitchcock v. Wainwright*, 745 F.2d 1332 (11th Cir. 1984). The Eleventh Circuit Court of Appeals affirmed the denial of habeas relief. *Id.* Hitchcock successfully sought rehearing *en banc* and, in 1985, the *en banc* court affirmed the denial of the writ. *Hitchcock v. Wainwright*, 770 F.2d 1514 (11th Cir. 1985).[2] Hitchcock's petition for a writ of certiorari to the Eleventh Circuit Court of Appeals was granted and, in 1987, the United

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[1] Hitchcock was indicted for one count of premeditated murder. *Hitchcock I at 743.*

[2] By this point in time, the validity of the conviction itself was no longer an issue.

States Supreme Court reversed the sentence and ordered a new penalty phase proceeding. *Hitchcock v. Dugger,* 481 U.S. 393 107 S.Ct. 1821 95 L.Ed. 2d 347 (1987).

In accordance with the opinion of the United States Supreme Court, an advisory jury was impaneled and a new penalty phase was conducted. That jury also recommended a sentence of death, and the trial court again followed that recommendation. *Hitchcock v. State,* 578 So. 2d 685, 688 (Fla. 1990). *(Hitchcock II).* Hitchcock again sought certiorari review and, in 1992, the United Supreme Court remanded the case to the Florida Supreme Court for reconsideration in light of that court's decision in *Espinosa v. Florida*. *Hitchcock v. Florida,* 481, U.S. 393, 112 S.Ct. 3020, 120 L.Ed. 2d 892 (1992). This court vacated the death sentence based on an inadequate heinous, atrocious or cruel jury instruction and directed that a new penalty phase proceeding be conducted. *Hitchcock v. State,* 614 So. 2d 483 (Fla. 1993) *(Hitchcock III).* That penalty phase proceeding began on August 23, 1993, and concluded on August 27, 1993, with a unanimous recommendation of death. *(TR 857).* On August 30, 1993, the trial court followed that recommendation and sentenced Hitchcock to death. *(TR 876).*

Hitchcock gave notice of appeal on September 2, 1993. *(TR 436).* The record was supplemented repeatedly on Hitchcock's motion, and Hitchcock's initial brief was filed in this court on or about June 8, 1995.

STATEMENT OF THE FACTS

The appellee does not accept Hitchcock's argumentative and incomplete "Statement of the Case".

On direct appeal, this court summarized the facts of this murder in the following way:

> According to a statement Hitchcock made after his arrest, he returned around 2:30 a.m. and entered the house through a dining room window. He went into the victim's bedroom and had sexual intercourse with her. Afterwards, she said that she was hurt and was going to tell her mother. When she started to yell because he would not let her leave the bedroom, Hitchcock choked her and carried her outside. The girl still refused to be quiet so appellant choked and beat her until she was quiet and pushed her body into some bushes. He then returned to the house, showered, and went to bed. *Hitchcock I at 743*.[3]

The penalty phase evidence in the proceeding now before this court was the following:

Dr. Guillermo Ruiz, retired Deputy Chief Medical Examiner for Orange County, testified that he examined the victim, Cynthia Driggers, at the crime scene and subsequently during an autopsy. *(TR 327-8)*. The autopsy established that Cynthia had a laceration on her left side; that were there cuts (from blunt force trauma) around her eyes; that her eyes were severely swollen; and that there were multiple abrasions to her neck. *(TR 331-4)*. Cynthia had been struck in the face a number of times shortly prior to her death, but those blows were not of sufficient force to cause her to loose consciousness. *(TR 333-4)*. Dr. Ruiz was able to

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[3] Hitchcock's conviction of first degree murder has never been disturbed.

determine that Cynthia died of asphyxiation caused by manual strangulation. *(TR 338; 341)*. Further, the medical examiner was able to determine that Cynthia had struggled with her assailant (while she was being killed) based upon the patterns seen in the abrasions to her neck *(TR 335; 338)*, and that her assailant had strangled her using both hands *(TR 341)*. It took four to five minutes, or longer, for Cynthia to die by strangulation, and she was conscious and aware of what was happening to her during that time. *(TR 338-9)*. The medical evidence established that Cynthia had had sexual intercourse shortly before her death, and that she had been a virgin prior to that incident. *(TR 340-41)*. At the time of her death, Cynthia was thirteen years old; she was 62 inches tall and weighed 73 pounds. *(TR 342)*. The medical examiner observed that she was not especially physically mature for her age. *(TR 342)*.

Deputy Dan Nazarchuk, a homicide detective with the Orange County Sheriff's Office, testified to the circumstances surrounding the taking of Hitchcock's statement. *(TR 368-373)*. This statement is the one referred to at p. 4, above.[4] Detective Nazarchuk testified that when the victim was found, she was wearing only a white sweatshirt, and that her shorts were located in close proximity to her body. *(TR 375)*. Her underwear were found underneath her body. *(Id.)*.

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[4] Hitchcock raises no issue concerning the admission of this statement. That statement was admitted into evidence in the guilt phase of Hitchcock's first trial and has never been challenged.

The victim's sister, D L D , testified that Cynthia was afraid of Hitchcock, and that Hitchcock had been sexually abusing the victim on a regular basis. *(TR 387)*.[5] Cynthia was a quiet child who suffered from health problems. *(TR 384)*. Cynthia had few friends but was very close to D . *(TR 385)*. At the time of her death, Cynthia had never expressed any interest in "sex or boys" to her sister. *(Id.)*.

Cynthia was not a willing participant in the sexual activities Hitchcock forced her to participate in, and, shortly before she was murdered, Cynthia and her sister confronted Hitchcock and threatened to tell their mother unless the abuse ended. *(TR 387)*. Hitchcock replied that he would kill *both* girls if they told their mother what was happening. *(Id.)* That confrontation took place shortly before Cynthia was murdered. *(TR 388)*. On the evening before Cynthia was murdered, D tried to convince Cynthia to report the abuse to their mother, but Cynthia would not do so because she was afraid. *(TR 388)*. As of the night of her death, Hitchcock had not yet completed an act of intercourse with Cynthia. *(TR 389)*.

Hitchcock's cross-examination of D focused exclusively on why she had not previously told anyone what she knew about Hitchcock's sexual abuse of her sister. *(TR 390-2)*. Some examples of the questioning were: "When you got up in the morning and realized that your sister was missing, you immediately went to your mother and told her that Ernie had

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[5] Cynthia was one and one-half years older than D -- D was 12 when her sister was murdered.

threatened her life?" *(TR 390)*; "And so when the police came around that night after her body was discovered and Ernie had come back, you immediately told police or least told your mother to tell the police, listen, Ernie did it, because he said he was going to do it because he was messing with her sexually?" *(TR 391)*; "After Ernie was arrested and you knew he was going to be in jail in Arkansas, at least, and you knew he had been charged with Cynthia's murder at this point, you came forward and you told the State Attorney or your mother about what happened, certainly?" *(Id.)*.

On redirect, D testified that she did not disclose these matters earlier because she was afraid of Hitchcock because he also had sexually abused her. *(TR 394-5)*.[6] D was never asked if she had been sexually abused by Hitchcock until preparation for the resentencing proceeding was under way. *(TR 397-8)*.

Over defense objection, documentary evidence was introduced establishing that Hitchcock was on parole at the time of Cynthia's murder. *(TR 357-9)*.

Hitchcock presented a number of witnesses in his case-in-chief. Hitchcock's sister, Martha Galloway, testified about Hitchcock's (and her) early life in Arkansas *(TR 409-413)*, which essentially described the life of a poor farm family some thirty years ago. Ms. Galloway grew up in the same home that Hitchcock did, and allegedly received the same treatment that he received

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[6] D was eleven or twelve years old at that time. *(TR 395)*.

from their stepfather, yet Ms. Galloway has no criminal record. *(TR 417; 419)*.

Hitchcock's niece, Ruby Hitchcock, exchanges letters with the defendant, has received advice from him, and considers him to be her best friend. *(TR 454-60)*. She was five years old when Hitchcock murdered Cynthia, and had not seen him once during the thirteen years prior to this proceeding. *(TR 462)*.

James Hitchcock, the defendant's older brother, testified that the defendant worked for him at a gas station at age seven or eight, and also worked for him as a fruit picker at the age of thirteen. *(TR 465; 467)*. James helped the defendant find employment, and has never been convicted of a crime. *(TR 471)*.

The prior testimony of Wayne Hitchcock, the defendant's first cousin, was read to the jury.[7] *(TR 478)*. That testimony recounted how Hitchcock saved the life of Wayne's father by rescuing him from a drainage ditch into which he had fallen. *(TR 480)*.

Hitchcock's older sister, Betty Augustine, began working in the cotton fields at age nine. *(TR 570)*. When her husband was injured in a farming accident, Hitchcock helped her with her three children. *(TR 572)*. Many children in the area where Hitchcock grew up worked on farms *(TR 575)*, and farming was the principal occupation in that area *(TR 576)*.

Lisa McAbee, Hitchcock's niece, testified that she writes letters to Hitchcock, confides in him in those letters, and considers him to be a good friend. *(TR 580)*. She was seven years

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[7] Wayne Hitchcock is now deceased. *(TR 478)*.

old when Hitchcock was convicted in 1976 *(TR 579)*, and her contact with him is and has been limited to correspondence. *(TR 580)*.

James Morgan and Charles Foster, both of whom are under sentence of death, also testified. *(TR 584; 586)*. Morgan testified that Hitchcock taught him to read and write *(TR 585)*, and Foster testified that Hitchcock talked him out of assaulting a guard in 1976 or 1977 *(TR 589-90)*.

Lorine Galloway, Hitchcock's mother, testified that Hitchcock and his stepfather did not get along *(TR 627)*, and that Hitchcock went to live with first his sister and then his grandmother at twelve or thirteen years of age. *(TR 628-9)*. The death of Hitchcock's father was hard on the entire family *(TR 633)*, but at no time in Hitchcock's childhood was he abandoned or unloved. *(TR 634)*.

Hitchcock also presented the testimony of his first appellate attorney, Richard Greene. *(TR 428-9)*.[8] Greene represented Hitchcock in 1978 and has kept in contact with him since that time. *(TR 430)*. Hitchcock began an educational program in 1980 *(TR 431)*, and has earned his G.E.D. *(TR 433)*. Greene considers himself Hitchcock's friend (TR 442), and is of the opinion that Hitchcock is more empathetic now than he was in the past. *(TR 437)*.

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8 Greene is employed as an Assistant Public Defender in the 15th Judicial Circuit, as are Hitchcock's present counsel. Greene was counsel of record up until 1988. *(TR 437)*.

Dr. Elizabeth McMahon, a clinical psychologist, testified to her opinions about Hitchcock obtained from her 1983, 1988, and 1993 evaluations. *(TR 487; 497; 500)*.[9] In her opinion, Hitchcock has improved over the years *(TR 503)*, now has better "coping skills" *(TR 506)*, and has matured despite the lack of role models in his life *(TR 507)*. Dr. McMahon seems to have based her opinions on the premise that the victim was *not* raped, but rather engaged in consensual sex with Hitchcock. *(TR 522-3)*. Her opinions would not change even if she became convinced that Hitchcock raped the victim. *(TR 523)*. Dr. McMahon is of the opinion that Hitchcock is not a pedophile based on the facts of the crime. *(TR 524; 535)*. At the time of the murder, Hitchcock knew that rape and murder were wrong. *(TR 547)*. Despite the sexual component present in this case, Dr. McMahon did not inquire into Hitchcock's sexual history *(TR 516-17; 531; 550-52)*, and in fact used the statement of the facts from Hitchcock's initial brief on direct appeal as the factual basis for her opinions, even though she testified at one juncture that her facts came from a decision of this court. *(TR 556-59)*.

Michael Radelet, a sociologist, testified that Hitchcock is statistically unlikely to be a danger in the future. *(TR 592-3; 603-4)*. Radelet also testified that Hitchcock has a "high potential" to make a "satisfactory contribution to the community". *(TR 606)*. Radelet, who is opposed to the death penalty *(TR 616)*, would have opined, before this murder, that

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[9] Dr. McMahon works exclusively for the defense. *(TR 496)*.

there was a high probability that Hitchcock would never commit a violent crime. *(TR 619)*.

In rebuttal, Dr. Steven Jordan, a psychologist, testified about the opinions and conclusions he had reached based upon his review of documents, interviews with collateral source individuals, and his observations of the defense psychologist's testimony. *(TR 642-3; 648; 663; 676; 678; 679; 721)*. Dr. Jordan testified that an evaluation of a possible sex abuser cannot be based solely on self-report; cannot reliably be based on an MMPI profile; requires a thorough social and sexual history; and must be supported by information gathered from collateral sources. *(TR 661-2)*. Dr. Jordan summarized the information he relied upon, including the collateral source interviews, *(TR 668-77)*, and testified that, in his opinion, there is strong evidence suggesting that Hitchcock would probably be diagnosed as a pedophile under the presently accepted diagnostic criteria set out in the *Diagnostic and Statistical Manual, 3rd Edition-Revised*. *(TR 682)*. Dr. Jordan's diagnosis is not a definitive one because he was unable to conduct an in-person evaluation of Hitchcock. *(TR 682-3)*.

R M , D ' cousin, testified that he had related an incident of sex abuse perpetrated on him by Hitchcock to Dr. Jordan. *(TR 694-5)*.[10]

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10 R M ' testimon was taken out of order, but Hitchcock never complained abou that fact. *(TR 693-4)*. His cryptic comment in his brief whi implies some irregularity is spurious.

The foregoing discussion sets out the evidence presented at the penalty phase proceeding. When relevant to issues contained in Hitchcock's brief, further facts are set out in the argument section which addresses those issues or sub-issues.

SUMMARY OF THE ARGUMENT

Hitchcock's claim that the state presented improper mental state evidence is incorrect. Hitchcock opened the door to rebuttal testimony by the state's expert because, in the course of cross-examination of a state witness, he charged that the testimony of that witness was recently fabricated. The state was entitled, on redirect examination, to present testimony that explained the testimony given on cross-examination. Hitchcock's complaint about the state's cross-examination of the defense psychologist is not preserved for review by timely objection, and, even if this claim was preserved, none of the cross-examination of that witness was improper, anyway.

The state's mental state witness did not testify based upon a "pedophilia profile", but rather testified concerning the diagnostic criteria for a diagnosis of pedophilia under the *Diagnostic and Statistical Manual, Third Edition-Revised*. Those diagnostic criteria are accepted by the mental health community as the proper standards for reaching a diagnosis of pedophilia, and it makes no sense to suggest that those criteria may not be presented to the jury.

No improper hearsay was contained within the testimony of the state's expert witness. That testimony was proper in rebuttal of the defense expert's testimony, and because the

testimony was already before the jury, anyway. Hitchcock's claim that the state improperly bolstered the testimony of various witnesses is not preserved for review because Hitchcock did not raise a timely objection. Moreover, even if the claim had been preserved for review, the complained-of testimony was a proper subject for redirect examination because of Hitchcock's charge of recent fabrication of testimony.

Hitchcock's claim that the state's rebuttal evidence became a feature of the trial is without a factual basis. All of the evidence complained about by Hitchcock was proper rebuttal of the defendant's case-in-chief. Moreover, the nature of the defense theory opened the door to rebuttal of Hitchcock's claim of non-violence.

Hitchcock's claim that he is entitled to receive a life sentence because of a violation of his speedy trial rights has no legal or factual basis. It has long been the law that the speedy trial clause is inapplicable to appellate proceedings. There is no constitutional basis for this claim, and it is foreclosed by binding precedent.

Hitchcock's claim that he was prevented from presenting mitigation evidence is essentially the same claim that was raised on Hitchcock's last appeal and decided adversely to him. The trial court's ruling concerning the admissibility of the "mitigation" evidence was in accord with the prior decision of this court in this case, and the trial court should not be placed in error for relying on such precedent.

Hitchcock raises sixteen separately denominated claims of error in connection with the penalty phase jury instructions. Each claimed instance of error is foreclosed by the prior decisions of this court.

Hitchcock's claims of prosecutorial misconduct were not preserved for review by timely objection, and, even if they were preserved, the arguments were not improper.

To the extent that Hitchcock complains about the jury instruction concerning parole eligibility, which was given in response to a question from the jury, that claim is foreclosed by binding precedent and, even if it was not, it would not make sense to refuse to inform the jury of the full impact of their advisory recommendation. Hitchcock had argued that he would spend the rest of his life in prison and that he would not be a danger in the future. Hitchcock created this issue, and should not be heard to complain.

Hitchcock claims that the "murder during an enumerated felony" aggravating circumstance is unconstitutional on its face and as applied. That claim is not preserved for review by proper objection, and, even had it been preserved, Hitchcock would not be entitled to relief because that claim is foreclosed by binding precedent.

Hitchcock's argument concerning the "under sentence of imprisonment" aggravating circumstance is preserved for review only so far as the double jeopardy and due process components are concerned. This claim is foreclosed by binding precedent and, moreover, is indistinguishable from a claim decided adversely to

Hitchcock in his prior appeal. Likewise, Hitchcock's claim that the "consent component" of the sexual battery aggravating circumstance is not addressed by the sentencing order is rebutted by the facts. The related claim that the sex battery aggravating circumstance should not be applied retroactively is not preserved for review, and, even if not procedurally barred, the claim is foreclosed by binding precedent. To the extent that Hitchcock claims that "an actual, subjective awareness of an impending arrest" is required to establish the avoiding arrest aggravating circumstance, this claim was raised in Hitchcock's prior direct appeal, and was squarely rejected by this court. Likewise, Hitchcock's claim that the heinous, atrocious, or cruel aggravating circumstance should not apply to him because he did not "intend" to cause unnecessary pain is foreclosed by binding precedent.

Hitchcock's claim concerning the "reason for resentencing" jury instruction is not a basis for relief because the claim contained in Hitchcock's brief was not preserved by timely objection at trial, and because it is based upon a linguistic exercise that is not supported by the definition of the terms about which Hitchcock complains.

Hitchcock's claim that the lower court erred in denying his motion for a mistrial based upon the fact that the victim's sister wore a yellow lapel ribbon is meritless. The lower court did not abuse its discretion in denying Hitchcock's motion for a mistrial, and, in any event, there was no public pressure placed upon the jury by the wearing of a yellow ribbon, and Hitchcock is not entitled to relief on this claim.

Hitchcock's claim that death is disproportionate under the facts of this case is without merit. None of the aggravating circumstances found by the sentencing court should be stricken by this court because each aggravating circumstance is well supported by the record. The lower court's weighing of the aggravators and mitigators was proper, and the sentence of death should be affirmed. None of the cases relied upon by Hitchcock to support his claim of disproportionality is applicable to this case. Death is the appropriate sentence in this case.

ARGUMENT

I. THE STATE DID NOT PRESENT IMPROPER MENTAL STATE EVIDENCE

On pp. 16-44 of this brief, Hitchcock raises multiple complaints about the admission of various parts of the state's rebuttal case. None of Hitchcock's claims amount to error and, in fact, most of the claims contained in Hitchcock's brief are based upon either an inaccurate factual premise or upon an overreading of the testimony. The individual components of this claim are addressed below.

A. Hitchcock Opened The Door To Testimony About Other Acts Of Sexual Abuse

As Hitchcock points out in his brief, D L D testified that Cynthia (her sister) told her that Hitchcock had sexually abused her and that Cynthia did not want to tell their mother, nor did she want D I to tell their mother. *(TR 386-389).*[11] However, what Hitchcock refuses to recognize is that

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[11] If note 13 is an attempt to present an issue concerning the state's opening argument, it is insufficient for that purpose. In any event, Hitchcock's objection was sustained. *(TR 322).*

the cross-examination of D L D was a direct and unconcealed charge of recent fabrication of testimony that began with the first question and continued throughout cross-examination. *See, e.g., TR 390-92.*[12] Florida law is settled that redirect testimony is proper when that testimony "tends to qualify, explain, or limit cross-examination testimony". *See, e.g., Tompkins v. State,* 502 So. 2d 415, 419 (Fla. 1986); *See also, Johnston v. State,* 497 So. 2d 863, 869 (Fla. 1986); *Huff v. State,* 495 So. 2d 145 (Fla. 1983). It is disingenuous in the extreme to claim that the redirect testimony elicited from D L Driggers did not "qualify, explain, or limit" the testimony elicited during the defendant's cross-examination of her. The testimony on redirect was in direct response to and in explanation of the answers given on cross-examination. Rather than being a "state-concocted" theory to present that testimony, Hitchcock invited the redirect testimony, and should not now be heard to complain.[13] The state was entitled to explain the delay in D D ' reporting of abuse, and, regardless of Hitchcock's semantic exercise, the timeliness aspect was clearly addressed at length during cross-examination. The state was

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12 Even if Hitchcock's statement that "cross focused on the many years that passed..." before D L D reported the defendant's threats is taken as accurate, the result does not change. It is still a charge of recent fabrication.

13 To the extent that Hitchcock complains, in note 14, that he was "caught off guard" by this testimony because he did not invoke discovery, that complaint is spurious.

entitled to place the true explanation before the jury, and there was no error. Hitchcock's sentence should be affirmed.

The delay in disclosure of sexual abuse by the victim is referred to as the "child sexual abuse accommodation syndrome." *See, e.g., Jones v. State,* 690 So. 2d 1084, 1090 (Fla. 1994) (Kogan, J., concurring). As Justice Kogan stated, sexually abused children often do not disclose "their victimization for long periods of time" because they "are afraid, have been threatened, lack the vocabulary to even describe what has happened or are simply too ashamed to tell anyone." *Id.* These various behavioral correlates to sexual abuse are not disputed by Hitchcock. In changing recent fabrication by his victims, Hitchcock opened the door for the state to explain the delayed disclosure.

Insofar as Hitchcock's *male* victims are concerned, it has been established that male children often do not report sexual abuse because they often regard *themselves* as being guilty of what happened and "cannot concede that they were victims who had lost control of a disturbing situation...". *Id.* There was no error in allowing an explanation of the delayed disclosure to be presented to the jury.

B. The State's Cross-Examination Of The Defense Mental Expert Was Proper

On pp. 21-25 of his brief, Hitchcock argues that the state improperly cross-examined the defense psychologist concerning pedophilia and child sexual abuse. This argument does not establish grounds for reversal for two independently adequate reasons.

First, Hitchcock did not object at trial to any of the state's questions about pedophilia or sexual abuse. In fact, Hitchcock only objected five times during the state's cross-examination of his handpicked psychologist. Two of those objections were that the question had been asked and answered *(TR 521; 526)*; two were based upon relevance *(TR 528; 541)*; and one was a claim that the question posed by the Assistant State Attorney misstated the law *(TR 538)*. Only the two relevance objections warrant any discussion.

The first relevance objection was to the Assistant State Attorney's question as to why the defense expert did not discuss pornography with the defendant.[14] As the record demonstrates, the objection was only to the expert's explanation of his examination, not to the issue of whether or not she did in fact inquire into Hitchcock's experiences with pornography. The objection is wholly insufficient to preserve the issue contained in Hitchcock's brief. The second relevance objection came after the following question: "What training do you have specifically in treating sexual abusers?" *(TR 541)*. That objection is likewise wholly inadequate to preserve the issue contained in Hitchcock's brief. Any assertion to the contrary is disingenuous; neither

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[14] The pertinent questions and answers read as follows:

Q: Did you discuss with him the issue of pornography?

A: No.

Q: Why Not? [Defense Attorney]: Objection. Relevance. The court: overruled.

A. I didn't think it was relevant, again, to the assessment having to do with the issue of the homicide itself.

relevance objection, even if taken out of context, tangentially purports to object to cross-examination concerning pedophilia and child sexual abuse. Both questions by the Assistant State Attorney were entirely proper, and the defense relevance objections were properly overruled. Florida law is clear that a timely objection at trial is required to preserve an issue for appellate review. Hitchcock did not object to the testimony about which he now complains, and thereby failed to preserve the issues for review. *Steinhorst v. State,* 636 So. 2d 33 (Fla. 1994).

Although the foregoing procedural bars are adequate and independent grounds for disposition of this claim, and this issue should be decided on that basis, none of the cross-examination about which Hitchcock complains is improper, anyway. Florida law is settled that cross-examination into matters affecting the credibility of the witness is entirely proper. *See, e.g., Shere v. State,* 579 So. 2d 86, 90-91 (Fla. 1991); *see also, Coxwell v. State,* 361 So. 2d 148, 151 (Fla. 1978); *Fla. Stat.,* § 90.612 Second, all of the cross-examination about which Hitchcock now complains was proper because it inquired into the accuracy of the opinions and conclusions that were the subject of the defendant's mental state expert's direct testimony. Put another way, the state's cross-examination was proper impeachment. The propriety of the cross-examination is readily apparent when the record is fairly considered. Hitchcock's expert testified that there was (in her opinion) no evidence of pedophilia; described her evaluation of that aspect of Hitchcock's behavior in detail; and testified as

to the general "profile" of a pedophile. *(TR 524)*.[15] Moreover, Hitchcock's expert testified that he did not fit the "profile" of a pedophile. *(TR 524; 535)*.

Obviously, the state is entitled to inquire into the basis of the expert's opinions, and, just as obviously, the state is entitled to challenge the credibility of those opinions. The state's cross-examination was not improper, and, given the defense expert's absolute refusal to recognize the sexual overtones present in this crime, was legitimate impeachment of that witness. *(See, e.g., TR 527; 528; 523)*. Hitchcock should not be heard to complain, and the sentence should not be disturbed.

C. The claimed "Pedophilia Profile" Testimony

On pp. 25-33 of his brief, Hitchcock argues various claims concerning the testimony of the state's mental state expert. Each of those claims is predicated upon the premise that the state's witness testified based upon a "pedophilia profile". This claim collapses when its basis is examined.

The testimony that Hitchcock portrays as "profile" testimony is a far cry from that before the court in *Flannigan v. State*, 625 So. 2d 827 (Fla. 1993). In this case, rather than presenting testimony about characteristics of abusers, the state presented testimony detailing the *Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised* (hereinafter *DSM III-R*) diagnostic

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15 The "profile testimony" on cross-examination was non-responsive, but Hitchcock cannot complain about that volunteered answer.

criteria. The *DSM III-R* enumerates the following diagnostic criteria for pedophilia:

> 1. Over a period of at least six months, recurrent intense sexual urges and sexually arousing fantasies involving sexual activity with a prepubescent child or children (generally aged 13 or younger).
>
> 2. The person has acted on these urges, or is markedly distressed by them.
>
> 3. The person is at least 16 years old and at least 5 years older than the child or children in 1. *DMS III-R at 285*.

Those criteria, unlike the testimony at issue in *Flannigan* and *Turtle v. State*, 600 So. 2d 1214 (Fla. 1st DCA 1992), are accepted within the mental health community as the appropriate criteria for a diagnosis of pedophilia.[16] The state's expert testified that Hitchcock fit the diagnostic criteria with the exception of one of the criteria that he "could not comment on" *(TR 682)*.[17] Testimony that Hitchcock is properly diagnosed as a pedophile under the prevailing criteria established by (and accepted by) the mental health community is drastically different from the testimony disallowed in *Flannigan*. Moreover, unlike *Flannigan* and *Turtle*, the pedophilia testimony in this case came in rebuttal to Hitchcock's own expert testimony that he *is not* a pedophile. *(TR 523-4)*. Contrary to Hitchcock's claim, the rebuttal testimony was

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16 Hitchcock accepts the *DSM* criteria as proper on p. 31 of his brief. The acceptance of the diagnostic criteria set out in the *DSM III-R* is inconsistent with the rest of his position espoused in his brief.

17 That criteria is the one denominated "1". Obviously, because the state's expert did not have the opportunity to evaluate Hitchcock personally, that particular criteria could not be addressed.

proper impeachment of the testimony proffered by the defense. *Flannigan* and *Turtle* are distinguishable on even a cursory review, and do not control disposition of this issue.[18] No error of any sort occurred, and Hitchcock's sentence of death should be affirmed.

To the extent that Hitchcock argues that "mental illness" was improperly used in aggravation, that argument is of no help to him for two reasons. First, the pedophilia testimony elicited on rebuttal was a proper response to matters injected into the proceedings by the defendant. Hitchcock placed his mental state in issue, and he should not be heard to complain about the presentation of the true facts. Second, Hitchcock overreads *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), in his effort to create a constitutional claim. As used in *Stephens*, the term "mental illness" (which is mentioned only in passing) refers to mental conditions such as schizophrenia or delusional disorder which, under the proper facts, could be valid mitigation. However, not every diagnosis contained within the *DSM III-R* is mitigating in nature. For example, antisocial personality disorder is a mental condition that is hardly entitled to more than minimal weight as a mitigator, but yet is often presented by the state in rebuttal in capital sentencing proceedings. *See, e.g., Carter v. State,* 576 So. 2d 1219 (Fla. 1989).

Antisocial personality disorder hardly qualifies as a

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18 Unlike *Flannigan* and *Turtle*, no broad generalizations about the behavioral correlates of pedophilia were presented. The state's expert would not place Hitchcock in a sub-type of pedophilia (*TR 685 687*). Moreover, that witness testified that most pedophiles are non-violent. (*TR 685*).

mental illness, and pedophilia should not be treated any differently. Any other result would enable the defendant to present an erroneous picture of his true mental condition and leave the state with no opportunity to present the true facts about the defendant's mental state to the jury. That result is contrary to the truth-seeking function of the courts, and is antithetical to any rational system of justice. Hitchcock placed his mental state in issue in this proceeding, and the state was absolutely entitled to present evidence in rebuttal of that testimony. The death sentence should be affirmed in all respects.

On pp. 30-33 of his brief, Hitchcock argues that the state's expert falsely testified that Hitchcock might sexually prey on younger inmates if given the opportunity. Once again, Hitchcock has overread the testimony, which was in fact that the state expert testified that he *would be concerned* "if he has an opportunity to be alone with a youngish-looking person". *(TR 691).* That is opinion testimony which fell well within the realm of the witness's expertise. In addition to being proper testimony, it was clearly and precisely qualified, contrary to the assertion in Hitchcock's brief.

To the extent that Hitchcock claims that the state's expert erroneously reached a diagnosis of pedophilia, that argument is proper for cross-examination and, in fact, was addressed at that stage. *(TR 702-706).* In any event, the testimony of the state's rebuttal witness was not presented as a final, definitive diagnosis. *(TR 722).* To the extent that Hitchcock takes issue

with whether he meets the criteria for a diagnosis of pedophilia, those matters were developed at trial *(TR 682-3)* and do not implicate any knowing presentation of false testimony. To the extent that further development of this frivolous claim is necessary, the ages of the children involved are not the subject of dispute (i.e.: 12 to 14), nor is there any dispute as to Hitchcock's age of the time of the murder. *(R 431)*. The ages of the children involved fall well within the *DSM III-R* criteria, as does Hitchcock's age. *DSM III-R* at 284-5. Hitchcock does not fall "outside the accepted definition of pedophilia", and his charge of false testimony has utterly no basis in fact.[19]

Insofar as the component of this claim concerning Hitchcock's opportunity to be exposed to younger inmates is concerned, the authorities cited by Hitchcock in his brief establish that his argument has no basis in fact. Chapter 958 of the *Florida Statutes* does not guarantee that Hitchcock will never be near a young inmate. Instead, Chapter 958 only operates to insure that persons *sentenced* under the Youthful Offender Act will not be incarcerated with Hitchcock. *Florida Statutes 958.11(2)* and *(3)*. Moreover, the Department of Corrections regulations set out on pp. 32-33 of his brief do not ensure that Hitchcock will never be exposed to a young inmate. Hitchcock's argument is based upon a faulty premise, and there was no error.

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19 Hitchcock's claimed "immaturity" has nothing to do with anything because he is not mentally retarded. (*DSM III-R* at 285).

D. No Improper Hearsay Was Presented

On pp. 33-38 of his brief, Hitchcock complains that the state expert improperly testified concerning hearsay statements made to him by Hitchcock's other child victims. This argument is based on the incorrect premise that *Flannigan* bars the testimony of the state's rebuttal mental state witness. As set out above, *Flannigan* does not control this case. Because *Flannigan* is not controlling, there is no legal basis for Hitchcock's claim, and the argument collapses. Moreover, Hitchcock's claim is invalid for two additional independently adequate reasons.

First, under settled Florida law, it is proper to inquire into the medical history used by the defense expert in order to test the sufficiency of the basis for that expert's opinion. *Muehleman v. State,* 503 So. 2d 310 (Fla. 1987); *Parker v. State,* 476 So. 2d 134 (Fla. 1985); *Valle v. State,* 581 So. 2d 40 (Fla. 1991); *Jones v. State,* 612 So. 2d 1370 (Fla. 1992). *See also, TR 530-31.* The defense expert was cross-examined about the effect that information regarding other sexual molestation would have on her opinions and conclusions, and that expert stated that such information would have no impact whatsoever. *(TR 530-531).* The state was clearly entitled to rebut that testimony, and, if a defense expert can be cross-examined about un-charged violent acts, and the law is clear that that is proper, it would make no sense to preclude testimony by the state rebuttal expert on the same topic.

The second reason that Hitchcock's claim does not state grounds for reversal is because the complained of testimony was

already before the jury through the testimony of D L D . *(TR 394-398)*. To the extent that the rebuttal expert's testimony was any more detailed, that is of no consequence. Hitchcock put on evidence in an effort to demonstrate a lack of future dangerousness, and the testimony of the state witness was proper rebuttal. *See, e.g., Hildwin v. State,* 531 So. 2d 124 (Fla. 1988). Moreover, that testimony was properly admitted because it formed a part of the basis for the expert's opinion.[20]

Finally, Florida law is settled that hearsay evidence is admissible in the penalty phase. *See, 921.141, Florida Statutes; Spencer v. State,* 645 So. 2d 377, 383-4 (Fla. 1994); *Clark v. State,* 613 So. 2d 412, 415 (Fla. 1992); *See also, Breedlove v. Singletary,* 595 So. 2d 8, 10-11 (Fla. 1992). Hitchcock was afforded the opportunity to rebut any hearsay, and that is all that is constitutionally required. Moreover, the testimony was properly admitted under *Florida Statutes* 90.801(2)(b) to rebut Hitchcock's charge of recent fabrication on the part of D L D . *See, e.g., Anderson v. State,* 574 So. 2d 87, 92 (Fla. 1991). Hitchcock's death sentence should be affirmed.

E. There Was No Improper Bolstering Of Testimony

On pp. 39-40 of his brief, Hitchcock argues that the state improperly bolstered the testimony of the surviving sex abuse victims. This claim is not preserved for review because

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20 The trial court instructed the jury that the hearsay was only allowed in evidence as a part of the basis of the expert's opinion, not for the truth of the matters contained therein. *(TR 666-7).* Of course, juries are presumed to follow their instructions. *See, e.g., Sochor v. Florida,* 112 S.Ct. 2114, 2122 (1992); *Gorby v. State,* 630 So. 2d 544 (Fla. 1993).

Hitchcock did not object to four of the five complained-of instances, and has therefore preserved no claim for review by this court. *(TR 675; 678; 681; 685). See, 90.104(1)(a); see also, Steinhorst v. State, supra.* This component of Hitchcock's claim should be denied on procedural bar grounds. To the extent that Hitchcock claims that the state's expert was used to bolster the testimony of the witness [illegible]s after observing his testimony, it is true that Hitchcock interposed an objection in connection with that testimony. *(TR 701).* However, the testimony was hardly bolstering and was proper to rebut the charge of recent fabrication. *(TR 696).*[21] *See, e.g., Florida Statutes, 90.801(2)(b).* In any event, the question appearing at *TR 701*, to which an objection was made, was not the same question that was ultimately answered. The record reveals the following:

> Q. Did you observe his demeanor and testimony? [Defense Attorney]: Objection to bolstering the credibility of another witness and testifying about his demeanor. [Assistant State Attorney]: I didn't ask about the demeanor testifying [sic]. The court: I will overrule the objection.
>
> Q. Was your observation of him consistent with the way when you first spoke to him, that you told us about?
>
> A. He was kind of vague to me. I'm not quite--. *(TR 701).*

The answer set out above was not bolstering the prior witness because the answer indicated that there were differences between the observations at trial and the prior observations made

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[21] In his closing argument, Hitchcock expressly charged recent fabrication by the surviving witnesses. *(TR 825).*

by the state's expert. There was no error, and, even if there was, the issue is not preserved for review because Hitchcock did not object. [22]

Alternatively and secondarily, this claim would not be a basis for reversal even if a timely objection had been made. The critical distinction between the cases relied upon by Hitchcock and this case is that the testimony about which Hitchcock complains came in rebuttal at the penalty phase--none of this testimony came in in the state's case-in-chief. As to each abuse victim, Hitchcock cross-examined them alleging recent fabrication of their testimony. *(TR 391; 396; 696)*. The state was entitled to rebut the charge of recent fabrication, and Hitchcock should not be heard to complain because he did not like what was behind the door he opened.

F. The Rebuttal Evidence Did Not Become A Feature Of The Trial

On pp. 41-44 of his brief, Hitchcock argues that testimony concerning child sexual abuse and pedophilia became a "feature" of the penalty phase. A fair reading of the record does not support this claim.

First, as has been discussed above, all of the evidence about which Hitchcock complains came in rebuttal to the defendant's penalty phase case-in-chief. As has also been set out above, the defendant's penalty phase theory was that he would

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22 The absence of an objection by trial counsel who generally showed no reluctance whatsoever to object suggests that the testimony, as it played before the jury, was far more innocuous than Hitchcock now claims. *See, e.g., Sawyer v. Butler*, 881 F.2d 1273, 1287 (5th Cir. 1989)*(en banc)*.

not be a danger in the future if he received a life sentence. *See, TR 830-31; 833.* The factual scenario here is indistinguishable from that in *Hildwin,* where this court specifically held that evidence of prior violent acts is admissable in penalty phase proceedings to rebut evidence of future non-violence. *Hildwin v. State,* 531 So. 2d at 128.

Second, Hitchcock's claim that the jury was diverted from the proper focus of the penalty phase is spurious for two reasons. First, the nature of the defense theory (which the state was entitled to rebut) opened the door to rebuttal of Hitchcock's claim of non-violence. The rebuttal evidence was obviously relevant, and, just as obviously, highly probative of the issues before the jury. While any adverse evidence is "prejudicial" in a sense, the probative value of the evidence at issue clearly outweighs any prejudice. Without that evidence, the jury would have been called upon to return an advisory sentence based upon an incomplete and inaccurate picture of the defendant. That is not, and should never be, the purpose of a capital sentencing proceeding.

Moreover, the state placed minimal emphasis on the rebuttal evidence in its closing argument, and, given the strength of the case against Hitchcock, the total absence of any significant mitigation, and the extremely aggravated nature of the murder, it is clear beyond a reasonable doubt that any error in the admission of this evidence had no affect on the advisory sentence. While the state's position is that the rebuttal evidence was properly admitted, even if it was error, that error

was harmless beyond a reasonable doubt. *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986). To the extent that Hitchcock attempts to present an issue, of any sort, in n.43 at p. 41 of his brief, that footnote is misleading. The jury was clearly instructed that only statutory aggravators could be considered. *(TR 835-6)* ("The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence..."). Further, the defendant's requested jury instruction appearing at *R757* was an incorrect statement of the law which was properly refused.

Finally, the true claim contained in the first issue on appeal is found on the final paragraph on p. 43 of Hitchcock's brief, where he argues that "overbroad reading of the extent to which mitigation opens the door to harmful 'rebuttal' erases the guidance of the statutory factors and restricts presentation of mitigation." That claim is merely a variant of his prior claim, in a prior appeal, that he is not bound by the rules of evidence. His claim is no more persuasive now. *Hitchcock II,* at 690. Hitchcock opened the door to the rebuttal evidence about which he complains, and, contrary to his assertions, no "overbroad reading" of the "door-opening theory" is required to determine that the state's rebuttal case was wholly proper. There was no error, and the death sentence should be affirmed.

II. HITCHCOCK'S SPEEDY TRIAL CLAIM HAS NO LEGAL BASIS

On pp. 44-50 of his brief, Hitchcock argues that he is entitled to receive a life sentence because "the extra-ordinary delay in providing a penalty phase" has deprived him of his right

to a speedy trial. This claim has no legal or factual basis for at least two independently adequate reasons.

The proceeding now before this court is the appeal from Hitchcock's third sentencing proceeding. The first death sentence, which was imposed in 1977, remained in place for approximately 10 years before it was set aside by the United Sates Supreme Court in 1987.[23] Hitchcock was again sentenced to death in 1988, and that sentence was upheld by this court. *Hitchcock v. State,* 578 So. 2d 685 (Fla. 1990). Hitchcock again sought review by the United States Supreme Court, and that court remanded to this court for reconsideration in light of *Espinosa v. Florida*. *Hitchcock v. Florida,* 112 S.Ct. 3020 (1992). This court subsequently vacated the death sentence and ordered a new penalty phase proceeding. That penalty phase also resulted in an advisory verdict of death, which was the sentence imposed by the trial court.[24] Hitchcock attempts to pad the time span by arguing that the delay that this court must look at was the 17-year interval between his initial arrest and the most recent proceeding. This argument is remarkably disingenuous.

The fundamental defect in Hitchcock's argument is two-fold: first, it ignores the basic difference between trial and appellate proceedings, and, second, Hitchcock's view of the

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23 That case reached the United States Supreme Court on writ of certiorari to the Eleventh Circuit Court of Appeals following denial of federal habeas corpus relief.

24 The penalty phase proceedings at issue in this appeal took place on August 23-30, 1993. The record was supplemented several times by Hitchcock, with the result that his brief was not filed with this court until June 8, 1995.

speedy trial clause emphasizes collateral review as the main event in the review process. In resolving the precise issue presented in this case, the United States Supreme Court stated:

> It has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events [citations omitted]. The rule of these cases, which dealt with the double jeopardy clause, has been thought wise because it protects the societal interest in trying people accused of crime, rather than granting them immunization because of legal error at a previous trial, and because it enhances the probability that appellate courts will be vigilante to strike down prior convictions that are tainted with reversible errors. [citations omitted]. These policies comes as so carefully preserved in this court's interpretation of the double jeopardy clause, would be seriously undercut by the interpretation given the speedy trial clause by the court below. Indeed, such an interpretation would place a premium upon collateral rather than upon direct attack because of the greater possibility that immunization might attach.

United States v. Ewell, 383 U.S. 116, 121, 86 S.Ct. 773, L.Ed.2d (1966); *See also, United States v. Loud Hawk*, 474 U.S. 302, 311-12, 106 S.Ct. 648, 88 L.Ed. 2d 640 (1985) (Reaffirming *Ewell*).

Despite Hitchcock's protestations to the contrary, this case is controlled by *Ewell* and *Loud Hawk*. In fact, the United States Supreme Court's rationale in *Ewell* is particularly apropos in this case, given the result that Hitchcock desires. Hitchcock has no constitutional basis for his claim, and the sentence of death should be affirmed.

To the extent that further discussion of this claim is necessary, Hitchcock's claim that the state is to blame because the standard jury instructions later found to be inadequate were the cause of two sentence reversals is spurious. If a defense attorney is not deficient (for ineffectiveness of counsel purposes) for not objecting to the standard jury instructions, and that is the law, it makes no sense at all to suggest that blame attaches to the state when the standard jury instructions are given, but the case is later reversed on jury instruction error. *See, e.g., Harvey v. Dugger*, 20 Fla.L.Weekly S89, 90 (Fla. Feb. 23, 1995). It is blatantly ludicrous to suggest, as Hitchcock does, that the state has intentionally caused any error or delay in the prosecution of this case.

None of the cases relied upon by Hitchcock in his brief controls this issue, despite Hitchcock's efforts to insert a square peg in a round hole: no cited case dealt with the speedy trial doctrine in the context of resentencing after a reversal on appeal. *Harris v. Champion*, 15 F.3d 1540, 1560 (10th Cir. 1994), is the only case cited by Hitchcock which in any way addresses appellate delay, and that case is of no help to him because it deals with the narrow situation that confronted the appellate court when a multi-year backlog of appeals developed in the Oklahoma appellate courts. *Harris* does not deal with the situation presented in this case, which is purely whether the state can be barred from carrying out Hitchcock's death sentence due to the passage of time. *See, e.g., Lackey v. Texas*, 115 S.Ct. 1421 (1995); *Porter v. State*, 20 Fla.L.Weekly S152, 154 (1995);

Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), *reversed on other grounds*, 112 S.Ct. 3020 (1992). Hitchcock's claim has no constitutional basis, and, in fact, is foreclosed by binding precedent. There is no basis for reversal, and Hitchcock's death sentence should be affirmed in all respects.

III. HITCHCOCK WAS NOT PREVENTED FROM PRESENTING MITIGATION EVIDENCE

On pp. 51-58 of his brief, Hitchcock argues that he was improperly precluded from presenting mitigating evidence. Specifically, Hitchcock claims that the testimony of his former attorney was improperly restricted as to four particular areas of testimony; that parts of the testimony of his psychologist and sociologist were improperly restricted; and that evidence concerning the plea bargain once offered by the state was improperly excluded.[25] For the reasons set out below, there was no error and Hitchcock's death sentence should be affirmed.

A. The Testimony of His Former Attorney

Hitchcock claims that his former attorney, Richard Greene, should have been allowed to testify about:

> 1. The defendant's friendship with another inmate executed in 1984 and the effect of the execution on the defendant.
>
> 2. The comparisons of the changes in the defendant while on death row compared to other similar inmates.
>
> 3. The hearsay statements of three now-deceased persons who knew the defendant in Arkansas.

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[25] Each of these items of evidence was the subject of a motion *in limine* by the state.

> 4. The sentence received by the inmate with whom the defendant attempted to escape.

(Appellant's brief at 51.)[26] The law is settled that the capital sentencer may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the events that the defendant proffers as a basis for a sentence less than death". *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978). (Emphasis in original, footnote omitted). However, the omitted footnote states that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.*, at n.12. The relevancy requirement of *Lockett* was restated in *Saffle v. Parks*, when the court again emphasized that "the state cannot bar *relevant* mitigating evidence from being presented and considered during the penalty phase of a capital trial" *Saffle v. Parks,* 494 So. 2d 484, 110 S.Ct. 1257, 1261, 108 L.Ed. 2d 415 (1990) (emphasis added).

In his last appearance before this court, Hitchcock argued precisely this issue. As to items one and two, this court found them to be "clearly irrelevant to Hitchcock's character, prior record, or the circumstances of the crime at the time of this killing". *Hitchcock v. State,* 578 So. 2d at 689. That part of this court's opinion was unaffected by the *Espinosa* remand, and is the

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[26] Hitchcock does not press the fourth enumerated ground in this appeal.

law in this state. The state's motion *in limine* was squarely based upon this court's prior decision *(TR 85)*, and the trial court should not be placed in error for adhering to this court's prior ruling on the identical issue in the same case.[27] This court's prior decision is the law of the case, and there is no error.

In his brief, Hitchcock does not acknowledge the foregoing portion of this court's prior decision. This court found, in the alternative, that any error in excluding this testimony was harmless. *Hitchcock v. State,* 578 So. 2d at 690. While Hitchcock attempts to escape that holding by arguing (in a footnote) that that holding is no longer valid because only two, rather than eight, fellow inmates testified in this proceeding, that argument is invalid. In this proceeding, as in the previous one, Hitchcock presented a substantial amount of testimony about how he had "changed for the better" over the years. The testimony that Hitchcock claims was precluded was before the jury through other witnesses. Even if this testimony was admissible, and the state does not concede that it was, its exclusion was harmless error. *See, e.g., State v. DiGuilio, supra.*

Insofar as item 3 is concerned, that matter was also raised in Hitchcock's prior appeal and decided adversely to him. *Hitchcock v. State,* 578 So. 2d at 689, 690. Once again, Hitchcock merely repeats his previous argument, which this court categorically rejected in 1990. *Id.* This court's prior decision is the law in this state, and the lower court's decision to bar

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[27] The proffered testimony is the testimony that was before this court, by proffer, in the 1990 proceedings. (SR 11).

inadmissable hearsay was properly based upon that precedent. The trial court should not be placed in error for following the law announced by this court.[28] Moreover, as in 1990, the proffered testimony (even if admissible) was, at most, cumulative to the other testimony about Hitchcock's past. *Hitchcock v. State*, 578 So. 2d at 690. There was no error, and Hitchcock's death sentence should be affirmed.

B. Portions of the Defense Psychologist's Testimony Were Properly Excluded

On p. 56 of his brief, Hitchcock argues that his psychologist's testimony was improperly restricted to exclude:

> 1. The results or any reference to statistics comparing inmates on death row to inmates who received life sentences.
>
> 2. A recommendation to the clemency board as to this or any other inmate or her report to that body.

Hitchcock's argument in his brief is no more than a regurgitation of the argument made in his prior appeal. *See, e.g., Hitchcock v. State*, 578 So. 2d at 689, 690. The trial court properly followed the law as announced by this court, and the trial court should not be placed in error for following the directives of this court. This component of this court's prior decision was unaffected by the *Espinosa* proceedings, and, as set out above, remains the law in this state. The lower court should not be placed in error for following precedent. The matters that Hitchcock claims the psychologist should have been allowed to

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[28] The proffer of this testimony is also the one that was before this court in Hitchcock's last appearance.

present testimony about are irrelevant, and Hitchcock has done nothing to demonstrate that that testimony is any more relevant now than it was in 1990.

C. The Defense Sociologist was Properly Precluded From Testifying About Irrelevant Matters

On pp. 56-57 of his brief, Hitchcock argues that the state's motion *in limine* excluding the following matters was improperly granted:

> 1. That the defendant's execution would not deter others from committing murder.
>
> 2. The cost of execution compared to the cost of imprisonment for life.
>
> 3. The lingering data as to the confession period for the conditions the defendant would face if given a life sentence.
>
> 4. The level of premeditation in the killing in light of the defendant's educational level.

Appellant's Brief at 57. Those four matters were the subject of this court's 1990 decision in this case, wherein this court held them to be irrelevant. This court's prior decision is controlling. *See, e.g., Hitchcock v. State,* 578 So. 2d at 689. The sentence of death should be affirmed.

D. Evidence Concerning The Plea Bargain Offer Was Properly Excluded

On pp. 57-58 of his brief, Hitchcock argues that he should have been allowed to present, in the guise of mitigation, evidence that the state had, long ago, offered to recommend a life sentence in exchange for a plea of guilty. As is the case with the rest of this issue, Hitchcock's claim is no more than a

regurgitation of an issue that was decided adversely to him in 1990. This court's prior decision on this very issue also remains the law in this state, and the trial court should not be placed in error for following precedent. In any event, as this court noted when it addressed this issue before, merely because an offer was made does not make it relevant because that offer was rejected by Hitchcock. In the words of this court, that rendered the offer "a nullity". *Hitchcock v. State*, 578 So. 2d at 690. There is no error, and the sentence should be affirmed in all respects.

IV. THE JURY INSTRUCTION CLAIMS

On pp. 58-68 of his brief, Hitchcock raises sixteen separately denominated claims of error in connection with the penalty phase jury instructions. Each claim of error is either foreclosed by binding precedent or simply is not supported by the facts.

1. The Mitigation Instruction

Hitchcock argues that the standard mitigation jury instruction given in this case *(TR 838)* does not comport with *Lockett v. Ohio*. That claim has been resolved adversely to Hitchcock, and there is no reason to reconsider this claim in this case. *See, e.g., Dougan v. State*, 595 So. 2d 1 (Fla. 1992); *Carter v. State*, 576 So. 2d 1291 (Fla. 1989); *Jackson v. State*, 530 So. 2d 269 (Fla. 1988).

2. The Unanimity Instruction

Hitchcock also argues that the jury should have been instructed that a mitigator need not be unanimously found to

exist before it can be considered. This precise claim has previously been considered and rejected by this court, and there is no basis to revisit it at this point. *Waterhouse v. State*, 596 So. 2d 1008 (Fla. 1992).

3. Weighing of Aggravators and Mitigators

On pp. 60-61 of his brief, Hitchcock argues that his proposed jury instruction on the weighing of aggravation and mitigation was improperly recused. Despite Hitchcock's disingenuous argument to the contrary, this precise claim has been considered and rejected by this court. *Stewart v. State*, 549 So. 2d 171 (Fla. 1989). The jury was properly instructed in accord with settled Florida law *(TR 837-8)*, and there is no error.

4. The "Most Aggravated, Least Mitigated" Instruction

Hitchcock argues that his requested jury instruction to the effect that the death penalty is reserved for the most aggravated and least mitigated murders was improperly refused. This argument has been repeatedly rejected by this court. *See, e.g., Mendyk v. State*, 545 So. 2d 846 (Fla. 1989). There is no error and the sentence should be affirmed.

5. The Non-Existent Aggravating Circumstances Instruction

On pp. 61-62 of his brief, Hitchcock argues that the jury should have been instructed that there are eleven statutory aggravating circumstances, but that only four of those aggravators are potentially applicable to this case. This claim is a variant of the claim decided in *Stewart v. State*, 549 So. 2d 171 (Fla. 1989), where this court held that a defendant is not entitled to have the jury instructed on *all* of the aggravators so

that he may then argue that most of the statutory aggravators are not applicable. Hitchcock's claim is legally indistinguishable from the claim raised in *Stewart*, and is meritless for the same reasons. Moreover, Hitchcock's proposed jury instruction is even more misleading because it suggests that other murders would have many more aggravators present than are existent in this case. There was no error in refusing Hitchcock's proposed instruction, and the sentence should be affirmed.

6. The Anti-Doubling Instruction

In a two-sentence argument on p. 62 of his brief, Hitchcock argues that he is entitled to relief because the trial court refused his proposed jury instruction on the doubling of aggravating circumstances. This "issue" is not accompanied by any analysis to suggest its legal basis and is, consequently, not properly briefed. Moreover, even if this court does consider this claim, it is not a basis for relief because it has no legal support.

The jury was instructed on (and the trial judge found) four aggravating circumstances: (1.) Under sentence of imprisonment; (2.) avoiding arrest; (3.) during an enumerated felony; and (4.) heinous, atrocious, or cruel. None of those aggravators refer to overlapping aspects of the case, and, consequently, the anti-doubling instruction was properly refused. *See, e.g., Provence v. State*, 337 So. 2d 783 (Fla. 1976). Moreover, if the instruction had been given, it would have been confusing (as well as misleading) to the jury because they would have been instructed not to do something that, under these facts, could not be done.

The requested instruction was properly refused. *See, e.g., Bundy v. State,* 471 So. 2d 9 (Fla. 1985); *Brown v. State,* 473 So. 2d 1260 (Fla. 1985).[29]

7. The "Anti-Counting" Jury Instruction

On pp. 62-63 of his brief, Hitchcock argues that the trial court erroneously refused his requested jury instruction which stated "that the penalty verdict was not to be reached by merely counting sentencing circumstances." This court has repeatedly upheld the standard jury instruction (which was given in this case) as to the weighing of aggravators and mitigators, and there is no reason to revisit settled law. *See, e.g., Stewart, supra.* Moreover, the proposed jury instruction is misleading (and therefore incorrect) because it ignores the weighing process which is integral to Florida's capital sentencing process. The proposed instruction was properly refused because it was inaccurate, and because it was covered in the standard jury instructions, anyway. *Bertolotti v. State,* 476 So. 2d 130 (Fla. 1985).

8. The Post-Mortem Acts Instruction

On p. 63 of his brief, Hitchcock argues that his proposed jury instruction that acts committed after the victim's death are not relevant to the heinous, atrocious, or cruel aggravating circumstance was improperly refused. This claim is without merit for three independently adequate reasons. First, this proposed instruction was covered in the charge to the jury, which stated

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[29] At the charge conference, Hitchcock refused to specify how any of the aggravating circumstances would "double". *(TR 769).*

that "to be heinous, atrocious, or cruel, the victim must have consciously suffered a high degree of mental anguish or physical pain before death" *(TR 837)*. The law is settled that refusal of a proposed jury instruction is not error when the substance of the proposed instruction is covered by the change given to the jury. *Bertolotti, supra.* The standard heinous, atrocious, or cruel jury instruction is adequate, and there is no error. *Johnson v. State,* 20 Fla.L.Weekly S343, 346 (Fla., July 13, 1995); *Mendyk, supra.*

The second reason that the proposed instruction was properly refused is because it is not supported by the evidence. Nothing in the record even arguably suggests post-mortem mutilation of the victim, and, in the absence of such evidence, there can be no error.

The third reason that this claim is meritless is because the refusal of the proposed instruction did not allow the heinous, atrocious, or cruel aggravator to be found based upon an invalid theory (post-mortem mutilation). Because there is no factual support for the claimed "invalid theory" in the evidence, the jury cannot have relied upon such a theory. By definition, there can be no error. *See, e.g., Sochor v. State,* 112 S.Ct. 2114, (1992).

Finally, the jury instruction given in this case was upheld by this court in *Preston v. State,* 607 So. 2d 404 (Fla. 1992). In any event, Hitchcock's proposed instruction is no more than an instruction on an refinement in the law, on which a jury instruction is not required. *See, e.g., Vaught v. State,* 410 So. 2d 147 (Fla. 1982).

9. The Premeditation/Heinous, Atrocious, Or Cruel Instruction

On p. 63 of his brief, Hitchcock argues that the trial court erroneously refused to instruct the jury that "premeditation does not make a killing 'especially heinous, atrocious, or cruel'". While that statement may, in the abstract, be correct, it is also a mere refinement in the law, and consequently, no jury instruction to that effect is required. *Vaught, supra.* Moreover, the heinous, atrocious, or cruel jury instruction given in this case clearly defined that aggravating circumstance and is the instruction that has been repeatedly upheld.[30] *See, e.g., Power v. State,* 605 So. 2d 856, 864-5 and n.10 (Fla. 1992). Of course, juries are presumed to follow their instructions, and the jury instructions in this case were carefully limited and were not subject to the interpretation that Hitchcock applies to them. *See, e.g., Sochor v. Florida; supra, Gorby, supra.* Even if the proposed jury instruction should have been given, any error was harmless because this crime was heinous, atrocious, or cruel under any definition of that aggravator. *See, e.g., Henderson v. Singletary,* 617 So. 2d 313, 315 (Fla. 1993).

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30 The jury was instructed that: the crime for which James Earnest Hitchcock is to be sentenced was especially heinous, atrocious, or cruel. "Heinous" means extreme wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily tortuous to the victim. To be heinous, atrocious, or cruel, the victim must have consciously suffered a high degree of mental anguish or physical pain before death. *(TR 837).*

10. The Heinous, Atrocious, Or Cruel Jury Instruction

On p. 64 of his brief, Hitchcock argues that it was error to refuse his requested jury instruction on the heinous, atrocious, or cruel aggravating circumstance. That claim is spurious. First, the jury was instructed in accord with the post-*Espinosa* standard instructions which were upheld in *Preston v. State,* 607 So. 2d 404 (Fla. 1992). *See also, Power v. State,* 605 So. 2d 856 (Fla. 1992). Second, the standard instruction covered the principles of law contained within the defendant's proposed jury instruction. Consequently, there can be no error. *Bertolotti v. State,* 476 So. 2d 130 (Fla. 1985).[31]

11. The Mercy Option Instruction

On p. 64 of his brief, Hitchcock argues that the jury should have been instructed to consider mercy in returning its advisory sentence. This claim is without merit. The law is clear that it is not error to instruct the jury that it must avoid the influence of sympathy. *See, Saffle v. Parks,* 494 U.S. 484 (1990); *California v. Brown,* 479 U.S. 538 (1987). Moreover, Florida law is settled that refusal to instruct on mere mercy is proper. *See, e.g., Mendyk v. State,* 545 So. 2d 846 (Fla. 1989); *Dufour v. State,* 495 So. 2d 154 (Fla. 1986); *See also, Boyde v. California,* 494 U.S. 370 (1990).[32] Hitchcock's claim is foreclosed by binding precedent, and there is no basis for relief.

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[31] The final sentence of the heinous, atrocious, or cruel instruction appearing at *TR 830* was included at the defendant's request.

[32] Reliance upon *Presnell v. Zant,* 959 F.2d 1524 (11th Cir. 1992) is misplaced because Georgia's sentencing structure grants the jury an unbridled mercy option. Likewise, reliance upon *Morgan v.*

12. The Enumerated Non-Statutory Mitigation Instruction

On pp. 64-65 of his brief, Hitchcock argues that it was error to refuse his proposed jury instruction which specifically listed some of the non-statutory mitigation upon which he relied. Florida law is settled that the court is not required to list the non-statutory mitigators in the jury instructions. *Robinson v. State,* 574 So. 2d 108 (Fla. 1991); *Jackson v. State,* 530 So. 2d 269 (Fla. 1988). There is no error.

13. The Jury Pardon Power Instruction

On p. 65 of his brief, Hitchcock argues that the trial court erroneously refused three jury instructions, which, taken together, amount to an unbridled-mercy/pardon power instruction. Florida law is settled that the court is not required to give an instruction on the jury's "pardon power", nor is it proper to instruct the jury on mere mercy. *See, e.g., Foster v. State,* 18 Fla.L.Weekly S215 (Fla., April 1, 1993); *Boyde, supra; Mendyk, supra; Dufour, supra.* Further, it is proper to refuse to instruct the jury that it can return a life recommendation even if no mitigating circumstances whatsoever are found. *See, e.g., Boyde, supra; Mendyk, supra; Dufour, supra.* This claim is meritless.

14. The Definition of Mitigation

On p. 66 of his brief, Hitchcock argues that the trial court erroneously refused his requested jury instruction "defining" mitigation. However, the proposed instructions set out in footnote 65 at p. 66 of Hitchcock's brief are clearly

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Illinois, 112 S.Ct. 2222 (1992) is inappropriate because it is based upon a quotation taken out of context from a dissenting opinion.

proposed definitions of non-statutory mitigators.[33] Florida law is settled that the standard jury instruction correctly and adequately defines and gives effect to non-statutory mitigation. *Dougan v. State,* 595 So. 2d 1 (Fla. 1992); *Robinson v. State,* 574 So. 2d 108 (Fla. 1991); *Jackson v. State,* 530 So. 2d 269 (Fla. 1988).

D.1 The Heinous, Atrocious, or Cruel Jury Instruction

On pp. 66-7 of his brief, Hitchcock argues that the heinous, atrocious, or cruel jury instruction was incomplete because it did not instruct the jury on the "tortuous intent element" of that aggravator. Hitchcock's argument is based upon an out-of-context reading of the cases cited in his brief coupled with his steadfast refusal to recognize that strangulation murders, such as this one, are virtually *per se* heinous, atrocious, or cruel. *See, e.g., Sochor v. Florida,* 112 S.Ct. 2114 (1992); *see also, Hitchcock v. State,* 578 So. 2d at 693. While it is true that the heinous, atrocious, or cruel aggravator applies to murders that are "unnecessarily tortuous to the victim", that is the instruction that Hitchcock's jury received. *See, TR 837.* What is not correct is Hitchcock's claim that "tortuous *intent*" on the part of the defendant is an "element" of this aggravator. None of the cases relied upon by Hitchcock stand for a contrary result.

Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992), upon which Hitchcock relies, was decided based upon *Teffeteller v. State,* 439 So. 2d 840, 846 (Fla. 1983), and the heinous, atrocious, or

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[33] At trial, Hitchcock did not argue that the standard jury instructions do not contain a definition of mitigation. For that reason, this claim is not preserved for review. *Steinhorst, supra.*

cruel aggravator was stricken because "there was no pitiless or conscienceless infliction of torture." [34] In *Richardson,* this court cited *Sochor v. Florida,* which did no more than reiterate the *Proffit* heinous, atrocious, or cruel definition. That definition of the heinous, atrocious, or cruel aggravator is the one set out in the standard jury instruction. Florida law is, and consistently has been, that the heinous, atrocious, or cruel aggravator focuses on the perception of the victim rather than on that of the perpetrator *See, e.g., Stano v. State,* 460 So. 2d 890 (Fla. 1984). The claim contained in Hitchcock's brief has been expressly rejected by this court as meritless, and there is no need to revisit this issue. *Taylor v. State,* 638 So. 2d 30 (Fla. 1994).

To the extent that further discussion of this frivolous claim is necessary, some additional comments are in order. First, as this court noted in its last *Hitchcock* opinion, "[t]hat Hitchcock might not have meant the killing to be unnecessarily tortuous does not mean that it actually was not unnecessarily tortuous and, therefore, not heinous, atrocious, or cruel." *Hitchcock v. State,* 578 So. 2d at 692. Second, it is absurd to equate "intent to torture" to an intent to kill. That comparison is an attempt to compare apples and oranges that fails. As this court's decisions recognize, some cases (usually gun murders) are not unnecessarily tortuous to the victim. *See, e.g., Robertson, supra; Richardson, supra.* However, those cases focus on the perception of

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[34] Richardson's victim was killed by a single shotgun blast to the chest which struck the heart. *Richardson, supra,* at 1008.

the victim, as do the strangulation murder cases which are, according to this court, virtually heinous *per se*. *See, e.g., Sochor v. Florida,* 112 S.C. at 2121 (collecting cases). While some gun murders such as *Wuornos v. State,* 644 So. 2d 1000 (Fla. 1994) do demonstrate the desire to inflict great pain (or the indifference to or enjoyment of it) based upon the facts, strangulation murders such as this one likewise speak for themselves. To the extent that any tortuous intent element on the part of the defendant exists in connection with this aggravator, it is covered by the standard jury instruction, and exists in abundance in this case. There is simply no constitutional requirement that the jury be instructed in the manner advocated by Hitchcock, and the sentence of death should be affirmed.

Alternatively, and secondarily, if any so called "intent" requirement were to be grafted onto the heinous, atrocious, or cruel aggravator, that would be a mere refinement in the law upon which a jury instruction is not required. *See, Vaught, supra.* Even if the proposed jury instruction should have been given, any error is harmless because the murder at issue in this case was heinous, atrocious, or cruel under any definition. *See, e.g., Henderson v. Singletary,* 617 So. 2d 313, 315 (Fla. 1995).

D.2 Under Sentence of Imprisonment Jury Instruction

On p. 67 of his brief, Hitchcock argues that it was error to instruct the jury that a person who is on parole is under a sentence of imprisonment for purposes of the imprisonment aggravator. Hitchcock's argument fails to recognize that the jury was properly instructed because the effect given to parole

status in the context of an aggravating circumstance is a matter of law. The instruction given in this case was approved in *Carter v. State*, 576 So. 2d 1291 (Fla. 1989), and there is no basis for relief. *See also, Johnson (Terrell) v. State*, 442 So. 2d 193, 197 (Fla. 1983).

To the extent that any further discussion is necessary, the issue raised by Hitchcock is legally indistinguishable from the issue that can arise under the second aggravating circumstance (prior violent felony). There is no question but that it is proper (and indeed necessary) for the jury to be instructed as to the character (ie: a violent felony) of a defendant's prior convictions, because that is a matter of law. *See, e.g., Standard Jury Instructions (Criminal)* at p. 76. If there is no error in instructing the jury that a particular prior crime falls within the ambit of the second aggravating circumstance, there can be no error in instructing the jury that parole status falls within the reach of the first aggravator because that too is a matter of law. The proposed jury instruction was properly refused and Hitchcock's death sentence should be affirmed in all respects.

V. THE PROSECUTORIAL ARGUMENT CLAIM

On pp. 68-71 of his brief, Hitchcock points to three instances of what he terms improper argument by the prosecution. Each of those claimed instances of improper argument is based upon a slanted reading of the matter at issue. Moreover, none of Hitchcock's claimed instances of prosecutorial misconduct are preserved for review by timely objection accompanied by a motion for mistrial. *See, e.g., Spencer v. State*, 645 So. 2d 377, 383 (Fla.

1994). None of the complained-of arguments is improper, and there is no basis for reversal.

A. The "Parole Eligibility" Argument

Hitchcock's first instance of claimed error is predicated upon his assertion that the state argued that he would be paroled if he was not sentenced to death. Hitchcock bases this claim on three discrete lines of argument, each of which is set out below:

> ...But what you must ask yourselves is this: based on the weighing of aggravating and mitigating circumstances, if the defendant is given a sentence of life with a twenty-five-year minimum mandatory and at the expiration from that date that he began to serve that sentence or some point thereafter, the parole commission decides to parole him [objection]... based on the weight of these aggravating and mitigating circumstances can you say to yourself that's enough, he's paid his debt, the books are balanced? Based on the weighing of these aggravating and mitigating circumstances, can you say to yourself if Mr. Hitchcock is ever released on parole that will be justified based on the weighing of these circumstances?
>
> I will submit to you that it's not, that allowing Mr. Hitchcock even the possibility of ever walking the streets again, is not justice based on the weighing of these mitigating and aggravating circumstances, and that the only just decision in this case is death... *(TR 820-821)*.
>
> The real crux of mitigation that has been submitted to you, I believe, is this... is the issue of future dangerousness, hoping that you will be convinced that James Earnest Hitchcock, if he is released to general population or some day released on parole, that he will not be dangerous in the future. *(TR 816)*. Dr. Radelet testified, he

> testified that he's a sociologist, he does actuarial analysis just like an insurance company does. But there's two important differences between the actuaries that an insurance company does and the ones Dr. Radelet does.
>
> The insurance actuaries predict death, when someone will die, very few people die by their own decision. ...But what Dr. Radelet is trying to predict are events, he is trying to predict decisions Mr. Hitchcock will make in his future life. ...The other difference between Dr. Radelet's actuarial and an insurance actuarial, if an insurance actuary is wrong, the insurance company looses money. Dr. Radelet's actuary is wrong, somebody gets killed, and that's a very important difference. *(TR 814)*.

Hitchcock's claim of error is foreclosed by *Harvey v. State*, 529 So. 2d 1083, 1086 (Fla. 1988), where this court expressly held that it was a correct statement of the law to argue that the defendant would become parole-eligible after 25 years.[35] This court found no error, and Hitchcock's attempts to distinguish *Harvey* fail. While Hitchcock suggests that *Harvey* was decided as it was because the defense argued that Harvey would never be parole-eligible, and the state's argument was allowed only because it corrected the defendant's error, those facts are nowhere to be found in this court's opinion. In fact, defense counsel in *Harvey* filed a motion *in limine* to bar mention of parole eligibility. *Id.*, at 1086. This court went on to point out that "[a]ny suggestion that Harvey would never become eligible for parole if sentenced to life imprisonment would have been sheer

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[35] The penalty phase jury is instructed on the sentencing options anyway, and it is difficult to imagine a reversal predicated on an indisputably accurate statement of the law (that is found in the standard jury instructions).

speculation"...*Id.*, at 1087.[36] Even if *Harvey* made the argument Hitchcock claims that he did, that argument played no part in this court's decision by the plain language of the reported opinion.

Further, the closing argument in this case did not violate *Teffeteller*, either. Unlike that argument, the prosecutor's argument here was specifically directed to particular pieces of evidence and the permissible inferences therefrom. The argument at *TR 814-15* makes no mention whatsoever of parole, and is in response to the testimony of Dr. Radelet which included an "actuarial" prediction of Hitchcock's future dangerousness. The prosecutor's closing argument was proper argument which did nothing more than point out an obvious defect in the analogy used by Hitchcock's witness. There is no basis for reversal.

The argument at *TR 816-17* is likewise fair comment on the defendant's presentation of non-statutory mitigation in the form of testimony of future non-dangerousness. The prosecutor's argument was no more than a fair comment on the evidence, and the inferences flowing from that evidence. Hitchcock's claim that the state may not argue against evidence put on by the defense is absurd. The state's argument was not improper, and Hitchcock should not be heard to complain.

The portion of the state's closing argument set out on *TR 820-21* is likewise a fair argument concerning the weighing of the aggravation and mitigation. That argument emphasized the

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[36] The language of the sentence quoted from this court's opinion indicates that *Harvey* did not mention parole at all.

aggravated nature of this case and argued that the proper sentence was one of death. As this court noted in *Norton v. State*, 329 So. 2d 287 (Fla. 1976), shocking facts invite intense argument. Hitchcock can make no colorable claim that the facts of this murder are not shocking. However, the prosecutorial comments were not improper, and they certainly were not prejudicial. When the argument is considered in context, as it must be, there is no error.

B. The Weight Given to Aggravation Argument

On pp. 69-70 of his brief, Hitchcock argues that it was error for the trial court to overrule his objections to "argument about aggravation". The complained-of arguments are set out below:

> Now, remember, the defendant was released from incarceration and given the trust of the Arkansas Department of Corrections that he would follow the law. He didn't. I will submit that is a significant weight in this case. ...Whether someone shall commit a crime when they are a free man, under no obligation to the state, whether they commit a crime when serving a sentence in prison is great significance. But that ladies and gentlemen, is not the weightiest circumstance in this case. *(TR 795-6)*. ...The defendant's confession says very clearly she was going to tell Mama, and that's why I killed her. She was killed to shut her up, she was killed for the exact same reason James Earnest Hitchcock said he would kill her; Hitchcock said it in front of L D , her sister. He killed her because she was going to tell. *(TR 798)*.

Hitchcock's argument concerning the under sentence of imprisonment aggravator is based on an out-of-context reading of

the record. When the argument is read without slanting it to suit one's purpose, there is no doubt that what the prosecutor said was that the under sentence of imprisonment aggravator was a significant aggravator *in this case*. That is clearly proper argument, and Hitchcock would not be entitled to relief even if this claim was preserved for review.

Hitchcock's claim regarding the state's argument concerning the avoiding arrest aggravating circumstance is also not preserved for review by timely objection. *See, Spencer, supra.* To the extent that Hitchcock may claim that his trial counsel had been ordered not to object, thereby excusing application of the contemporaneous objection rule, that claim is spurious. The prosecutor is entitled (as is the defendant) to argue based upon the jury instructions, and that is exactly what the state did.[37] Moreover, if what transpired at *TR 796* was in fact an order not to interpose further objections, trial counsel certainly did not follow it, given that 16 more objections appear between the "order" on *TR 796* and the end of the state's closing argument on *TR 821*. Moreover, even if this claim were preserved for review, it would not entitle Hitchcock to relief. This claim, like all of the others, is predicated upon an out-of-context and incomplete excerpt from the record. When the record is fairly considered, the prosecutor's argument did not inaccurately state the law as it pertains to the avoiding arrest aggravator.[38]

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[37] Of course, control of closing argument is within the court's discretion. *See, e.g., Teffeteller, supra.*

[38] Even if the prosecutor mis-spoke, and the record is clear that he did not, there can be no error because the jury instruction was unquestionably correct. *TR 836-7.*

There is no error, and Hitchcock's death sentence should be affirmed.

C. The Mitigation Argument

On pp. 70-71 of his brief, Hitchcock argues that the state's argument regarding the effect the jury should give to some of Hitchcock's proffered mitigation is grounds for reversal. None of the arguments about which Hitchcock complains were preserved for review by timely objection and this issue should be resolved on procedural bar grounds.[39]

Alternatively and secondarily, this claim is not a basis for reversal because it is not supported by the facts. The arguments about which Hitchcock complains are set out below.

> ...You look at the facts presented by the defense. First of all, you ask yourselves, what do these facts proves; in other words what do I believe. But then you have to ask yourselves if I believe these facts, is this mitigating, is it something that should be considered in mitigation *(TR 794)*.
>
> ...For failing to do what those thousands of other people who grew up in the exact same environment did, such as his brother, law abiding citizens, just like the rest of us to Hitchcock's family. I submit to you, while its true that Mr. Hitchcock grew up in relative poverty, I say relative because compared to some areas of the world, Mr. Hitchcock was wealthy, but compared to the style of life and becoming accustomed to, he was poor; but so what? Does that belong on the scale, did that

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39 The matters at *TR 794, 804*, and *806-8* are not preserved by objection accompanied by a motion for mistrial. *See, Spencer, supra.* The matters appearing at *TR 809*, and *810-11* were not objected to at all. The objection at *TR 808* was on other grounds and preserved nothing.

> have anything to do with why he committed this crime? No it had nothing to do with it. *(TR 804)*.

When the foregoing arguments are considered in context, rather than in isolation, it is clear that the state's argument was in no way improper. Just as a defendant is entitled to argue against aggravators and in favor of mitigators, so too is the state entitled to argue the converse. The state's argument was not improper: it was a legitimate argument based upon the facts. That is not error. In any event, even if the prosecutor's argument was improper, that error was harmless because it was cured by the instructions to the jury. *See, Wuornos v. State,* 644 So. 2d 1000, 1010 (Fla. 1994).

The second reason that this claim is not grounds for reversal is because it has no legal basis. *Campbell v. State,* 571 So. 2d 415 (Fla. 1990), does not stand for the proposition that the jury must be instructed that, as a matter of law, certain matters are valid non-statutory mitigation. The state's arguments did not misstate the law, and the sentence of death should be affirmed. Hitchcock should not be heard to complain merely because the state was able to argue convincingly against the paltry mitigation that he presented. There was no error and Hitchcock's sentence of death should be affirmed in all respects.

VI. THE PAROLE ELIGIBILITY SUPPLEMENTAL JURY INSTRUCTIONS

On pp. 71-72 of his brief, Hitchcock argues that the trial court's answer to the jury's question regarding whether Hitchcock would receive credit for time served if given a life sentence "injected irrationality" into the penalty phase proceedings. This claim is without merit for two independently adequate reasons.

In response to the jury's question asking whether time served counted toward the 25 year minimum mandatory sentence, the court informed the jury that"...the jury should not speculate as to the date that the defendant may become eligible for parole or if he will be paroled at that time. However, all time served on this case would be credited towards the mandatory 25 year sentence if a life sentence were imposed". *TR 855-56)*. This issue is factually indistinguishable from the issue present in *Downs v. State,* 572 So. 2d 895, 900-901 (Fla. 1990), in which this court held that such an instruction was not error.

The second reason that this claim is not a basis for reversal is that it would be absurd not to inform the jury of the full impact their advisory recommendation. Hitchcock argued that he would spend the rest of his life in prison and *that he would not be a danger in the future.* While the jury was instructed (correctly) to disregard the "statement that the defendant will spend the rest of his life in prison" *(TR 833)*, the defendant continued to argue that he would not be a danger in the future and that a life sentence was appropriate *(TR 833-4)*. Under these facts, Hitchcock created the issue and should not be heard to complain.

To the extent that Hitchcock argues that the supplemental jury instruction "injected irrationality" into the penalty phase, that argument is not developed beyond a mechanistic citation to various constitutional provisions. However, if capital sentencing is to be an individualized process which considers all aspects of the defendant and his crime, and the law says that that must be so, then it makes no sense whatsoever to argue the position taken by Hitchcock. The instruction given by the court was undeniably correct in all respects, and there is no legally sufficient reason that the jury's question should not have been answered. Hitchcock should not be heard to complain because the jury was accurately instructed.

VII. THE AGGRAVATING CIRCUMSTANCE OVERLAP CLAIM

On pp. 72-74 of his brief, Hitchcock raises a constitutional challenge to the *Florida Statutes* 921.141(d) aggravating circumstance. Specifically, Hitchcock argues that the murder during an enumerated felony aggravator is unconstitutional on its face and as applied. Hitchcock challenged this aggravator through a pretrial motion based upon overbreadth and disproportionality grounds *(R 165-6)*, and the trial court denied that motion. *(Supplemental Record R39-40)*. On appeal, Hitchcock argues that this aggravator fulfills no narrowing function and is therefore improper. The grounds raised at trial appear to be different from those now advanced, and, therefore, this claim is not preserved for appellate review. *Steinhorst, supra.*

Alternatively and secondarily, assuming that this issue was properly preserved below, the claim has no merit because it is foreclosed by the prior decisions of this court. *See, e.g., Hunter v. State,* No. 82,312, ms.op. at 21 n.11 (Fla. June 1, 1995); *Parker v. Dugger,* 537 So. 2d 969, 973 (Fla. 1988); *see also, Lowenfeld v. Phelps,* 484 U.S. 231, 241-44, 108 S.Ct. 546, 553-54, 98 L.Ed. 2d 568, 579-81 (1988). To the extent that Hitchcock argues that this court should decline to follow settled precedent and should, instead, follow precedent from other jurisdictions, that claim is spurious. This issue was settled long ago in Florida, and this court should affirm Hitchcock's sentence on that basis in addition to the procedural bar grounds addressed above.

VIII. THE TRIAL COURT PROPERLY FOUND FOUR AGGRAVATING CIRCUMSTANCES

On pp. 75-85 of his brief, Hitchcock argues various perceived defects with each aggravating circumstance found by the trial court. The separate issues are individually addressed below.

A. The Under Sentence Of Imprisonment Aggravator

On pp. 75-79 of his brief, Hitchcock argues that it was a violation of due process, ex post facto, double jeopardy, and equal protection to apply the under sentence of imprisonment aggravator to his case. The only components of this claim preserved for review are the double jeopardy and due process components *(R127)*; none of the other grounds contained in Hitchcock's brief were raised below and are therefore waived. *Steinhorst, supra.*

Even if all components of this claim were preserved for review, Hitchcock would not be entitled to relief because this claim has already been decided adversely to him. Florida law is well-settled that a resentencing proceeding is a completely new proceeding. *See, e.g., Preston v. State,* 607 So. 2d 404 (Fla. 1992); *King v. Dugger,* 555 So. 2d 355 (Fla. 1990); *See also, Hitchcock v. State,* 578 So. 2d at 693. The issue contained in Hitchcock's most recent appeal is virtually identical to the issue that this court decided adversely to Hitchcock in *Zeigler v. State,* 580 So. 2d 127 (Fla. 1991), and likewise is indistinguishable from the issue decided by this court in Hitchcock's last appellate appearance. *Hitchcock, supra.* This claim is foreclosed by binding precedent, and the sentence should be affirmed in all respects.

B. The Sex Battery Aggravator

On pp. 79-83 of his brief, Hitchcock argues that the "during a sexual battery" aggravator was improperly found because (1) an element of that aggravator is not supported and (2) because the aggravator should not have been applied retroactively. Neither of those arguments is a basis for relief.

Hitchcock's claim that the consent component of the sexual battery aggravator is not addressed in the sentencing order (which appears to be the first sub-claim in connection with this issue) is not supported by the facts. In finding that the murder was committed during the commission of a sexual battery, the trial found:

> The defendant's contention that the victim consented to sexual intercourse is not supported by the record. D

> L D , the victim's sister, testified at the sentencing hearing. She was 12 years old at the time of her sister's murder and testified that both she and the victim were being sexually abused by the defendant. They had confronted the defendant, objecting to his abuse, the day before the murder and he had threatened to kill them if they reported his actions. The victim had pleaded with D D not to tell their mother of the abuse as she feared the defendant would harm them.
>
> The medical examiner testified the victim had a fresh hymenal tear indicating she was virginal prior to the sexual intercourse occurring just prior to her death.
>
> The defendant's statement discloses the victim had been hurt by him (this occurring prior to the time he began choking or hitting her). The conclusion is she was hurt by the act of intercourse. The defendant's violent action to prevent the victim from telling her mother of the sexual intercourse supports the state's claim of sexual battery.

(R 430).

The trial court found that there was no consent, as set out above. In this case, as in virtually any sex battery-murder, the proof of lack of consent was circumstantial. That fact does not diminish the strength of the sentencing court's findings that this aggravating circumstance was properly applied, and the sentence should be affirmed. *See, e.g., Dailey v. State,* 594 So. 2d 254 (Fla. 1991). Moreover, this court previously upheld the finding of this aggravator on essentially the same evidence. *Hitchcock v. State,* 578 So. 2d at 693. Hitchcock presented no new evidence to support his claim of consensual intercourse that was

not addressed and rejected in the previous two opinions of this court. *Hitchcock v. State,* 578 So. 2d at 693; *Hitchcock v. State,* 413 So. 2d at 746-7. The retroactivity component of this claim is not preserved for review by timely objection at trial. *(R 126-8).* Even if the procedural bar is overlooked, this claim has no merit. *See, e.g., Zeigler v. State, supra; Tompkins v. State,* 502 So. 2d 415 (Fla. 1986); *see also, Hitchcock I* and *Hitchcock II.*

C. The Avoiding Arrest Aggravating Circumstance

On pp. 83-84 of his brief, Hitchcock argues that the avoiding arrest aggravator is not properly found because "actual, subjective, awareness of an impending arrest must be proved beyond a reasonable doubt." (Appellant's brief at 84). This claim is wholly meritless.

In finding the avoiding arrest aggravating circumstance, the trial court stated:

> The victim knew her sexual attacker and the defendant in his statement of August 4, 1976, said he choked and beat Cynthia to make her be quiet and to keep her from telling her mother. The testimony of D D described the defendant's prior threats of death. It is clear the victim was murdered to eliminate a witness. *(R 430).*

The linchpin of Hitchcock's argument is that an "actual, subjective awareness of an impending arrest" is required before this aggravating circumstance is established. The precise claim was raised in Hitchcock's prior direct appeal and was squarely rejected by this court. *See, Hitchcock v. State,* 578 So. 2d at 693. ("Contrary to his current contention, we have never held that '[a]ctual, subjective awareness by accused of an impending arrest

must be proven beyond a reasonable doubt' before this aggravator can be found"). This issue was meritless in 1990 and is equally meritless now. The presentation of this issue once again, after it was squarely rejected by this court, strains credulity. There is no error, and the death sentence should be affirmed.

D. The Heinous, Atrocious, or Cruel Aggravator

On pp. 84-85 of his brief, Hitchcock argues that the heinous, atrocious, or cruel aggravating circumstance was improperly found because there is "no direct evidence" of an intent to cause unnecessary pain. This claim is foreclosed by binding precedent.

In finding that the murder of Cynthia Driggers was especially heinous, atrocious, or cruel, the trial court stated:

> The defendant's statement of August 4, 1976, establishes that he first choked the victim in the house to keep her quiet. She was conscious when he carried her outside with his hand over her mouth. When she began screaming outside he choked her again. When he let up she screamed again and he hit her in the face more than one time and then choked her until dead. The medical examiner testified she died within a minute or two of the last choking, but there was no evidence she was rendered unconscious by the beating. Defendant's statement shows she was awake and aware for several minutes during which she was chocked three separate times and beaten in the face. *(R 430).*

This issue, like the previous one, is a rehash of an issue that was decided adversely to Hitchcock in 1990. In ruling against Hitchcock before, this court stated:

> That Hitchcock might not have meant the killing to be unnecessarily tortuous

> does not mean that it actually was not unnecessarily tortuous and, therefore, not heinous, atrocious, or cruel.
>
> This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's. [citation omitted] Hitchcock stated that he kept "choking'" and "choking'," the victim and hitting her both inside and outside the house, until she finally lost consciousness. Fear and emotional strain can contribute to the heinousness of a killing. [citation omitted]. As Hitchcock concedes in his brief, "[s]trangulations are merely per se heinous." [citations omitted]. The court did not err in finding this murder to have been heinous, atrocious, or cruel.

Hitchcock v. State, 578 So. 2d at 692-693. This court's prior resolution of this issue is a correct ruling under Florida law, and there is no basis for changing long standing-precedent. Strangulation murders have routinely been found heinous, atrocious, or cruel, *Sochor, supra,* and, under the evidence in this case, there is no doubt that this murder was far more than unnecessarily tortuous. This aggravating circumstance was properly found, and the death sentence should not be disturbed.

IX. THE "REASON FOR RESENTENCING" JURY INSTRUCTION

On pp. 85-91 of his brief, Hitchcock argues that his sentence must be vacated because the trial court did not give *his* proposed jury instruction informing the jury "about the prior death sentence". This was error, according to Hitchcock, because the trial court (on the state's objection) replaced the word "improper" with the word "incomplete".[40] Hitchcock's sentence of death should not be disturbed for the following reasons.

The first reason that this issue is not a basis for relief is because the issue contained in Hitchcock's brief was not preserved at trial. While Hitchcock did object to the giving of the instruction proposed by the state, that objection was on different grounds than those advanced in Hitchcock's brief. The relevant portion of the record is set out below:

> ...It was last time regarding whether it should be jury instruction or jury *instructions*. That is the preliminary jury instruction number one, entitled Amended Preliminary Jury Instruction.
>
> Ms. CASHMAN: Yes, Sir
>
> THE COURT: Let's deal with that first, because that is going to be necessary for voir dire.
>
> State?
>
> MR. ASHSTON: Your Honor, according to the opinions of both the United States and the Florida Supreme Court, that was sent back because of "heinous, atrocious and cruel", and if the jury is to be instructed on the reason it's to be sent back, it should be instructed accurately. And there was only one instruction that was found to have been inadequate, so I ask them to be instructed in that way.
>
> MS. CASHMAN: Judge, the standard jury instruction defining heinous, atrocious and cruel was found to be inadequate.

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40 The defense instruction read: "a jury previously recommended that James Earnest Hitchcock be sentenced to death for this crime. However, the death sentence was overturned because of *improper* jury instructions rendered to the previous jury". *(R 295)*. The instruction ultimately given to the jury was that "this case is back before you for consideration because a jury previously recommended that James Earnest Hitchcock be sentenced to death for this crime. However, the death sentence was overturned because of an *incomplete* jury instruction rendered to the previous jury". *(TR 23)*.

> We had asked for a number of special instructions, none of which were given to help define heinous, atrocious and cruel for the jury. I believe it's proper as we have submitted it.
>
> THE COURT: I tend to agree with the state. The death sentence was overturned because of an incomplete jury instruction, I will give it as amended, as read to the previous jury...

As a fair reading of the record demonstrates, the "improper"/"incomplete" issue never came up. Instead, the argument at trial focused on whether or not the word "instruction" should be plural or singular. *See, e.g., (TR 7).* The argument advanced on appeal was never presented to the trial court, and that court should not be put in error based upon an argument that court never had the opportunity to address. Hitchcock's argument, which is raised for the first time on appeal, is not preserved for review. *See, e.g., Steinhorst v. State, supra.*

Second, even if this claim had been preserved for review, it would not provide a basis for setting aside Hitchcock's sentence.[41] The fundamental premise of Hitchcock's argument is that because the court used the word "incomplete" as opposed to "improper" in explaining the need (at Hitchcock's request) for the resentencing proceeding, the jury was left with the

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[41] A large part of Hitchcock's brief on this point is extraneous. The issue as framed by Hitchcock is the improper/incomplete issue, only. In his motion asking that this instruction be given, Hitchcock *requested* that the court "read a cautionary instruction substantially" like the one set out in Footnote 40 above. *(R 293).*

impression that the case was reversed on a technicality. This argument is spurious for two independently adequate reasons.

First, while Hitchcock's argument includes multiple citations to various decisions, none of those decisions bear more than tangential relevance to the issue contained in his brief. The only citation provided in support of Hitchcock's claim that (in this context) "incomplete" carries the connotation of a "legal technicality" is his own pleading filed in the trial court. That is simply not sufficient. Nothing in the definition of "incomplete" set out on p. 90 of Hitchcock's brief carries the perjorative meaning he attempts to attach to it. This claim is specious.

To the extent that Hitchcock's dissertation into the niceties of semantics deserves any further response, Hitchcock has reached the wrong conclusion with his linguistic exercise. Accepting Hitchcock's definition of "improper" *(Appellant's Brief at 90)* for purposes of argument, a close consideration of that definition establishes that the jury introduction on heinous, atrocious, or cruel set aside in *Espinosa* was not, *strictly speaking*, an "improper" instruction. Under the facts of this case (which are the only facts relevant to this issue), the sentence was not vacated because the heinous, atrocious, or cruel charge was "not suitable or consistent with the circumstances..." (Hitchcock's definition of "improper"). Instead, the reversal came because the heinous, atrocious, or cruel charge was "vague",[42] because it was "lacking a part or parts" (Hitchcock's definition of

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42 I.e; "not clearly expressed." *See, Espinosa*, supra.

"incomplete"). In summary, the use of "improper" in Hitchcock's proposed instruction was improper because it is not consistent with the circumstances. The jury instruction given in this case was legally correct, technically accurate, and linguistically proper. There was no error, and the death sentence should be affirmed in all respects.

To the extent that Hitchcock may argue that no instruction should have been given at all if it was not the one he proposed, that claim is not preserved for review. The only issue before this court is the grammatical exercise set out above. There was no attempt by Hitchcock to withdraw the proposed instruction altogether, and it would be absurd to grant relief because Hitchcock's jury was given a corrected instruction that Hitchcock had proposed.[43] As Hitchcock recognized when he asked that this instruction be given, it would be virtually impossible to prevent the jury from learning that Hitchcock had previously been sentenced to death. Hitchcock made the tactical decision "to ameliorate or diminish the obvious and fatal damage by defusing the situation through a jury instruction given by the court." *(R 293)*. The instruction as given was correct, and there is no error. Hitchcock's sentence of death should be affirmed in all respects.

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43 The first sentence of the instruction, which informed the jury that Hitchcock had previously received the death sentence, was never an issue.

X. THE MOTION FOR MISTRIAL BASED ON THE YELLOW RIBBON WAS PROPERLY DENIED

On pp. 91-92 of his brief, Hitchcock argues that the lower court erred in denying his motion for mistrial based upon the wearing of a yellow lapel ribbon by the victim's sister. While the record is slightly confused, it appears that that witness was wearing the ribbon when she took the stand, but removed it before her testimony. (*See, e.g., TR 400*). The trial court's denial of a mistrial was not an abuse of discretion for the reasons set out below.

While Hitchcock's brief ignores the governing standard of review, Florida law is settled that the ruling on a motion for mistrial is within the discretion of the trial court, and will not be reversed on appeal except for an abuse of discretion. *See, e.g., Power v. State,* 605 So. 2d 856 (Fla. 1992). Under the facts of this case, there was no reason to resort to the drastic step of a mistrial because Hitchcock was not deprived of a fair trial.

The offending adornment in this case is a ribbon which is one and one half inches wide and, and as reproduced in the record, some three inches in length as folded. (*See, Court Exhibit No. 1*). No writing appears on that ribbon. *Id.* However, the record does indicate that some other ribbons bore the legend "Crime Doesn't Pay, Victims Do" *(TR 310)*. A total of seven persons were wearing yellow ribbons of one form or another. *(TR 404)*. There is nothing in the record to suggest that any member of the jury ever read (or was able to read) the printing on the ribbons, and, in fact, the record indicates that the printing was

quite small and difficult to read. *(PR 310)*. The record does not indicate how many people were in the courtroom because Hitchcock never put that information on the record. Apparently, each individual wearing a ribbon was a member of the victim's family.[44] Nothing in the record even remotely suggests that any ribbon-wearer conducted himself (or herself) in any manner which would tend to suggest that they carried any *official authority.* Likewise, there is nothing in the record which even remotely suggests that any emotional outbursts occurred at any point in the proceedings.[45]

This case is in a different legal posture from the two cases Hitchcock cites as authority for reversal because, in those cases, the "public pressure" came at the guilt/innocence stage. While the state does not concede that the attire at issue here was such pressure, the fact is, at this stage of the case, Hitchcock can hardly be considered to be free from guilt. To state the obvious in another way, there was no possibility that the presence of the victim's family lead to Hitchcock's conviction, because that occurred long ago. Moreover, the pretrial publicity component of *Woods v. Dugger,* 923 F.2d 1454 (11th Cir. 1991) (which was part and parcel of the decision in

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[44] While not discernible from the record, some wearers could have been members of Hitchcock's family, too.

[45] There is no assertion that the ribbons in some way suggested what sentence Hitchcock should receive.

that case) is wholly absent from this case, as are the two components of *Hall v. State,* 579 So. 2d 329 (Fla. 1st DCA 1991).[46]

In addition, Hitchcock's trial occurred in Orlando, while the trial in *Woods* took place in Union County (which is small and rural). *Woods, supra.* Wood's trial was attended (apparently daily) by up to forty uniformed correctional officers, while Hitchcock's trial was attended by seven members of the victim's family wearing small yellow ribbons.[47] The difference in effect is obvious, but bears repetition: in *Woods,* many jurors were connected with the Department of Corrections, while there is no indication that any juror in this case was in any way familiar with the victim or her family. Moreover, nothing in this case even approached the impact of uniformed spectators that was present in *Woods*.[48] It is inaccurate (and inappropriate) to compare the public pressure in *Woods* to the discrete display of a lapel ribbon.

Further, there is no suggestion that the family members in this case in some manner exhibited the same air of official interest that was present in *Woods*. The attire at issue here is simply in no way comparable to the presence of a large number of

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46 *Hall* bares no factual resemblance to this case.

47 The ribbons apparently were not worn throughout the trial. *(TR 410)*

48 The victim's family in this case is also on a different footing under Article I, Section 16 of the Florida Constitution than were the Department of Corrections employees in *Woods*.

uniformed officers. Reliance upon *Woods* is an attempt to compare apples and oranges; Hitchcock's analogy fails.

Likewise, Hitchcock's claim that the family exhibited a "united front" in favor of a death sentence cannot be rationally compared to *Woods*. The presence of the victim's surviving family, whether or not identifiable to the jury, is immaterial. Under the Florida Constitution, those family members were not excludable from the trial. The undersigned is unaware of any symbolism which equates the color yellow with the desire for a death sentence, and it is spurious to attach any such meaning. There was no abuse of discretion in denying the motion for mistrial because Hitchcock suffered no prejudice. The testimony of the victim's sister was prejudicial only in the sense that adverse testimony is always prejudicial. Whether or not the victim's family had even attended the trial, the result would be the same--a death recommendation based upon the facts. The bits of cloth about which Hitchcock complains sent no message to that affected the jury's recommendation--Hitchcock sent that message himself on July 4, 1976, when he brutally raped and murdered Cynthia Driggers. There is no error and the death sentence should be affirmed.

XI. DEATH IS THE PROPER PENALTY

On pp. 92-99 of his brief, Hitchcock argues that if any aggravator is stricken, his sentence should be reduced to life. *(Appellant's Brief at 95)*. Hitchcock further attempts to portray this murder as one that resulted from a family dispute for which death is disproportionate. *(Appellant's Brief at 93.)* Neither of those

arguments is accurate, and Hitchcock's claim of disproportionality collapses.

Hitchcock's argument that all four aggravators should be stricken is erroneous for the reasons set out on pp. 60-65, above. Each of the four aggravating circumstances found in this case has previously been held properly applied by this court, and, while the state recognizes that a resentencing proceeding is a wholly new proceeding, the facts underlying this crime (and establishing the aggravators) have not changed. Each aggravating circumstance is fully supported by the record and the lower court's findings as to each of the aggravators should not be disturbed.[49] The lower court properly weighed the aggravators and mitigators and the sentence should not be disturbed.

Invoking *Dixon v. State,* Hitchcock argues that this is not one of "the most aggravated, most indefensible of crimes." *Dixon v. State,* 283 So. 2d 1, 8 (Fla. 1973). With all due respect, that claim is incredible. The strangulation murder of a thirteen-year-old child during the course of a sexual battery is, in fact, well within the scope of murders that are accurately described as the "most indefensible." Further, the four aggravating circumstances in this case demonstrate that this murder is indeed one of the "most aggravated" of murders. Death would be the only

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[49] Hitchcock did not raise a consent "defense" to the sexual battery aggravator at trial or in his brief. Hitchcock has raised a consent "defense" in prior proceedings. *See, e.g., Hitchcock v. State,* 578 So. 2d at 693. On p. 93 of his brief, Hitchcock obliquely suggests that consent is an issue--there is no evidentiary support for that claim. Of course, "consent" is not an issue in light of the victim's age. Whether or not the victim "consented" to sexual intercourse, she certainly did not "consent" to being beaten and strangled to death.

proper punishment in this case even if Hitchcock had presented substantial statutory mitigation. He did not, and has never, come forward with any mitigation that is deserving of more than slight weight. The fact, that in three attempts, Hitchcock has *never* presented *any* substantial mitigation means that no such evidence exists and, even if it did, it would not mitigate against death as the proper sentence for this crime. *See, e.g., Tafero v. State,* 403 So. 2d 355 (Fla. 1981); *Johnson v. State,* 20 Fla.L.Weekly S343 (July 13, 1995); *Gamble v. State,* Fla.L.Weekly S242 (Fla. May 25, 1995).

To the extent that Hitchcock argues that the death penalty is inappropriate because this murder took place during a "heated domestic confrontation", that argument wholly ignores the facts. There simply was no family dispute, unless the complaints of a child rape victim qualify. Any claim by Hitchcock that this was a domestic murder is specious because it is not supported by the facts.

Finally, none of the cases cited by Hitchcock in support of his argument that death is disproportionate are of any help to him. The cases relied upon by Hitchcock are distinguishable because they are primarily jury overrides, true domestic killings, and cases with few aggravators and strong mitigation. *See, e.g., Garron v. State,* 528 So. 2d 353 (Fla. 1988) (Domestic); *Farinas v. State,* 569 So. 2d 425 (Fla. 1990) (Domestic); *Bedford v. State,* 589 So. 2d 254 (Fla. 1991) (Jury override); *Buckrem v. State,* 355 So. 2d 111 (Fla. 1978) (Jury override); *Banda v. State,* 536 So. 2d 221 (Fla. 1988) (No aggravators); *D'Angelo v. State,* 616 So. 2d 440 (Fla. 1993) (One aggravator and substantial mitigation).

In its sentencing order, the trial court found four aggravating circumstances: (1). Under sentence of imprisonment; (2.) Murder committed during the course of a sexual battery; (3.) Murder for the purpose of avoiding lawful arrest; and (4.) That the murder was especially heinous, atrocious or cruel. In mitigation, the trial court found the defendant's age (at the time of the murder) to be a "significant mitigating factor." As non-statutory mitigation, the defense offered four areas of "deprivation." *(R 431)*. The trial court in its sentencing order stated that "individually they create sympathy but they do not weigh heavily against the aggravating circumstances of this crime." *Id.* Likewise, the evidence that Hitchcock is a "hard worker" and that he is a "good family person" are not significant mitigating circumstances, as the trial court found. Likewise, Hitchcock's claims that he is "a generous person, a teacher, a helpful person, and has acted as a mediator/peacemaker" are not traits that were established by the evidence. As the trial court found, while specific limited incidents which demonstrate these facts were established, the traits themselves were not. *(R 432)*. Hitchcock's actions as a mediator/peacemaker were weighed by the trial court as being heavier than the specific good acts performed by the defendant, but of less significance than the statutory mitigating circumstance of age. Finally, the trial court gave Hitchcock the benefit of the doubt and considered Hitchcock's "use of alcohol, lack of a history of violence, difficulty in controlling emotions, lack of statements regarding intent, lack of a weapon, and the defendant's voluntary surrender

and the defendant's voluntary surrender as potential mitigation," even though Hitchcock did not present evidence of these matters nor did he argue them before the jury or at sentencing. *(R 432)*. The trial court gave "added weight" to Hitchcock's use of alcohol, but gave little weight to the other factors. In weighing the aggravation and mitigation, the trial court found that "the totality of the mitigating circumstances presented, both statutory and non-statutory, are insufficient to outweigh the aggravating circumstances." *(R 433)*. Under the facts of this case, the death sentence is clearly proportionate. *See, e.g., Tompkins v. State*, 502 So. 2d 415 (Fla. 1986); *Adams v. State*, 412 So. 2d 850 (Fla. 1982). The four aggravating circumstances found by the trial court are substantial ones, and the mitigators are incredibly weak. The trial court properly weighed the sentencing evidence, and there is no error. The death sentence should be affirmed in all respects.

CONCLUSION

Based on the arguments and authorities presented herein, appellee requests this court to affirm Hitchcock's sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by U.S. Mail to Steven H. Malone, and Gary Caldwell, Office of the Public Defender, 15th Judicial Circuit of Florida, Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401, this 11th day of September, 1995.

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