IN THE SUPREME COURT OF FLORIDA

JAMES HITCHCOCK, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 82,350

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

James Ernest Hitchcock appeals his death sentence for his conviction for first degree murder in the death of Cynthia Driggers.

1. Mr. Hitchcock was convicted of the murder in 1976, and sentenced to death in January 1977. This Court affirmed in Hitchcock v. State, 413 So. 2d 741 (Fla. 1982). He promptly pursued his challenges in unbroken litigation in the state and federal courts until the Supreme Court found "it could not be clearer" that the penalty phase violated the eighth amendment. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 262 (1987). He was retried, but that penalty phase too was constitutionally deficient. Hitchcock v. State, 614 So. 2d 483 (1993). This case arises from a death sentence imposed after the 1993 reversal.

2. The state's case below was that Mr. Hitchcock committed a sexual battery on his 13-year-old cousin Cynthia Driggers and then strangled her when she threatened to tell her mother. The state called three witnesses in its case in chief.

The medical examiner testified that Ms. Driggers died of asphyxiation caused by strangulation. T 341. She had suffered blows to the face shortly before her death, T 333, and the irregularity of neck abrasions showed that there had been a struggle. T 335. Death by asphyxiation would take 4-5 minutes, or longer in the event of a struggle. T 337-38. She had had sexual intercourse within minutes or hours before her death; before that she had been a virgin. T 340-41.

The main evidence linking Mr. Hitchcock to the crime was a taped statement to Detective Dan Nazarchuk. T 373. According to the statement, he came home about 2:30 a.m. on July 4, 1976, went to Cynthia's room and had sex with her. She said she was hurt, and would

tell her mama, and he told her she couldn't. When she began hollering, he grabbed her neck and took her outside with his hand over her mouth. They lay on the grass, and he told her she couldn't tell her mother, but she said he had hurt her and had just hurt her again. When she began to scream, he grabbed her throat and choked her and hit her twice in the face. When she kept hollering, he kept choking her. When there were no signs of life he pushed her into the bushes. He then went inside, took a shower, washed his shirt and lay down. Supp. R. 2-7.

The third witness was D L D , the younger sister of the deceased. Her testimony on direct was that her sister told her that she and Mr. Hitchcock were doing sexual things against her will, but had not had intercourse, and that she was afraid of him. T 386-87. D told Mr. Hitchcock that if he did not stop, she would tell her mother, and he replied that he would kill both girls. T 387. D wanted to tell their mother, but Cynthia begged her not to. T 388. The night before Cindy's death, L begged her to tell the mother because "it was too much, it was too long". T 388. Cynthia wouldn't let her tell. T 388-89.

The defense crossed Ms. D about her not having told anyone about these conversations until 17 years after her sister's death. T 390-92.[1] On redirect, she testified that she had told no one as she feared Mr. Hitchcock because he had also sexually assaulted her. T 393-95. The court overruled defense objection that the evidence was irrelevant. T 393. Redirect included charges that Mr. Hitchcock had committed specific acts of sexual abuse on her and her sister Cynthia:

[1] D did not testify to these conversations at the original trial or at the 1988 resentencing.

BY MR. ASHTON:

Q. Tell us what Ernie did to you.

A. Well, my sister Cindy went into the hospital to have her eye fixed because it was crossed. When we were at home, my two brothers and me were at home and we were cleaning the house getting ready for her to come home with my parents. And R and B. were there in their bedroom cleaning up their room, and they had a door that led outside.

Ernie locked the front door and locked them in there [sic] bedroom because it could lock from the outside, and I didn't know that he was in there. And I was cleaning up my mom's room, and he came in there and threw me on the bed and just said, come on, I ., let me touch you, and I kept telling him no. And so he got his hands in my pants, and I kept pushing him away.

So R and B. were already outside, and they couldn't get in because the front door was locked. So I got away from him and went outside, and we had this pole that was outside, and I climbed up there and stayed there until mama came home.

Q. Did that also frighten you?

A. Yes.

Q. How old were you then?

A. I guess 11 or 12.

Q. Had the stories that Cindy told you about what Ernie did to her been similar kinds of things?

A. Yes.

Q. Did those make you afraid of Ernie as a 12-year-old?

A. Yes.

Q. When Ernie told you that he would kill you and kill Cindy if you told your mom, did that scare you?

A. Yes.

Q. And when you saw your sister dead in the bushes, did that scare you?

A. Yes.

Q. Is that why you didn't tell the police?

A. That's why.

Q. When is the first time that you told anyone outside your family about this?

A. When I told you.

MR. ASHTON: Nothing further.

T 394-95.

The parties agreed that at the time of the murder appellant was on parole for Arkansas burglary and larceny convictions. T 358-59.

3. The defense presented unrebutted evidence about Mr. Hitchcock's background and his life on death row, as well as expert evidence pertaining to his ability to conform to prison life.

Martha Galloway, his sister, testified that he and his six brothers and sisters were raised in a three room house without indoor plumbing. T 411. Their father died of skin cancer when Ernie was six. T 410. They cut wood for heat and used cardboard for insulation. T 412. The children chopped and picked cotton. T 413. Their mother was epileptic and Ernie was terribly afraid of her seizures. T 413. He left the home around age 10 when his mother married a very abusive drunkard who did not want children around; he grew up moving from relative to relative with no real home. T 414-15.

His older brother, James Harold ("Sonny"), gave similar testimony and testified that at age 7 Ernie worked at James' gas station from 7 a.m. until 9 p.m., pumping gas. T 465-66. At age 13, Ernie picked fruit for James in Winter Garden. T 457. Ernie's cousin, Wayne, who was raised with him, testified that when he was 17 or 18, Ernie saved Wayne's father from drowning. T 480, 484-85. Ernie took care of Sonny's wife, Fay, and children when Fay was sick in Florida. T 481-83. Ernie worked hard as a fruit picker. T 486.

Another sister, Betty Augustine, testified that Ernie began picking and chopping cotton at age 9. T 570. They earned $3 for a day's work of 10-12. T 571. After her husband suffered brain damage

as a result of a tractor turning over on him, Ernie came and helped her with her children. T 572. At that time he was only old enough to pick pecans or chop a little cotton. T 573.

Lorine Galloway, Mr. Hitchcock's mother, testified that Ernie's father died when Ernie was 7. T 427. She then married Ed Galloway, an abusive drinker, and Ernie left home, hitchhiking 100 miles away to his grandmother's home in Mississippi. T 628-29.

Ruby Hitchcock (Sonny's daughter and Ernie's niece) testified that she corresponds regularly with her uncle and he has helped her with family problems. T 455-59. Lisa McAbee, another niece and the daughter of Betty Augustine, gave similar testimony. T 578-80.

Richard Greene, an attorney who represented Mr. Hitchcock from 1978 to 1988, testified that when he first met him 1978 his verbal skills were extremely limited. T 431. In 1980, Mr. Hitchcock began an educational program and tremendously improved his verbal abilities and understanding of the world. Id. Since condemned inmates lack access to classrooms, they obtain education only by writing to the educational supervisor, getting books, and studying on their own: "It's completely self-initiated, self-driven." T 434. After obtaining his GED, he took college courses. T 435. "His verbal abilities improved, his interests widened tremendously, he became more interested in things around him, people around him; he developed more empathy and compassion for other people, his interests in the world became greater." T 435-36. Over time, he has shown "more maturity, more self-understanding, and self-awareness. I would say he's a calmer, more patient person; he's more concerned and tolerant of others, and has more of an understanding of their needs and the importance of their needs ...". T 436-37. Death row inmates James Morgan and Charles

Foster testified to Mr. Hitchcock's creditable behavior on death row: he helped Mr. Morgan to learn to read and write, T 584-85, and persuaded Mr. Foster not to kill a man and not to attack the man who delivered mail to inmates. T 588-89, 590-91.

Dr. Elizabeth McMahon, a psychologist, examined Mr. Hitchcock in 1983 (for six hours), 1988 (for two hours), and 1993 (for three hours). T 497-8, 500. The 1983 examination revealed a man of average intelligence, highly anxious and full of inner turmoil, which he dealt with by avoidance. His emotional tone was dampened and very distant; he had a lot of unmet needs for affection. He would try to get close to people, but did not know how, which raised his anxiety. T 501. If he could not distance himself, he became more disorganized. He was becoming more mature, less reactive. He was learning to speak better and handle things by communicating. T 502. In 1988, his responses were more solid: he dealt with problems better. T 503. By 1993, he was much more able to confront emotional issues. Id. Over the years he has developed more mature coping mechanisms by reading, looking at educational television, and writing to people. T 506-507. He has an observable degree of empathy, concern and compassion, especially for those in discomfort. T 511. His emotional responses are better modulated; his responses are very well thought out. T 512.

Much of the state cross of Dr. McMahon concerned Mr. Hitchcock's sexual history, a matter not raised on direct. The court overruled relevancy objections to questioning about pornography, T 528 (Dr. McMahon did not ask Mr. Hitchcock about pornography because she did not think it relevant), and to questioning as to whether Dr. McMahon had specific training in treating sexual abusers. T 541-42 (she did not).

The state crossed her about pedophilia, suggesting she should have evaluated or diagnosed Mr. Hitchcock as a sexual abuser.[2] The pedophile questioning saturated the rest of the trial. From the beginning of cross the state asked if she had "take[n] a sexual history from Mr. Hitchcock?" T 515. The subject on cross did not deviate from child sexual abuse: she was asked Mr. Hitchcock's age at his first sexual experience, whether he had been sexually abused, "what type of women he found appealing, physical attributes;" and whether she had "ever question[ed] him as far as his sexual fantasies?" T 516.

The state asked: "Could pedophilia be one of [Mr. Hitchcock's] dynamics?" T 523. Though she said no, the state continued pressed on. T 523-527[3]. Among the continued pedophilia and sex offender profile questions asked of Dr. McMahon: "Did you discuss with him the issue of pornography"?[4] "So the fact that this was the -- at the very least, a sexual act with a 13-year-old girl, you didn't think it was helpful to delve into his preferences in pornography?" "Isn't that one factor that you look to in determining pedophilia?" T 529.

The state posed questions whether Mr. Hitchcock had been sexually abused, T 529-30, about the expert's experience treating and writing

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[2] Early in her cross testimony she said she did *not* find Mr. Hitchcock's sexual history to be particularly important to her evaluation, T 517, and that even if it were true that he had first raped the decedent, that fact was not relevant to her opinion. T 523. But questioning continued as the she explained a pedophilia evaluation was not relevant to her inquiry because her evaluation had nothing to do with his behavior at the time of the crime. T 530-31.

[3] Here's a sampling: "How much time did you spend talking about his sexual behavior and fantasies?" T 526; "Can you tell the jury how much time you spent with these sexual issues?" T 526 (objection overruled); "Now, there are sexual inventories that are accepted to give to people similar to the MMPI to determine sexual attitudes; isn't that correct? ... "And you could have given Mr. Hitchcock one of those sexual inventories and chose not to?" T 527.

[4] Relevance objection was overruled. T 528.

about "sexual abusers" T 530, and seeking to show Mr. Hitchcock was a child molester. T 530-31.

In Dr. McMahon's cross, the state implied Mr. Hitchcock could never be cured of his "pedophilia" in prison, and debated with her whether he was a "power-prone pedophile" or "cruelty pedophile," and whether such a condition could ever change. T 531-35. The state suggested to her (she did not agree) that because of the facts of the case the "power-prone pedophile" label fit Mr. Hitchcock. T 535.

The state turned the issue to Mr. Hitchcock's future behavior in prison. T 538[5]. Cross continued with numerous questions about the experience of the doctor in "treating sexual abusers", T 544, that she did not cover the sexual part of Mr. Hitchcock's dynamics sufficiently, T 544-547, and to finish, whether he had violence in his sexual history, and whether he had engaged in homosexual behavior as an adult or child. T 552-553[6].

On redirect, Dr. McMahon testified that Mr. Hitchcock would get along quite well in a general prison population, T 553, and she did not see evidence that he was a pedophile. T 553-54.

Dr. Michael Radelet, a sociology professor, testified that, if spared the death penalty, Mr. Hitchcock had an extremely high potential of making a satisfactory contribution to the community in prison. T 605-606. He based his conclusion on the basis of these criteria: the degree of premeditation; prior history, if any, of violent crimes;

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[5] When the state turned the cross back to her training in "treating sexual abusers", objection was overruled with the judge's comment that the prosecutor had "belabored the point". T 542.

[6] The state argued in closing that Dr. McMahon's responses to his cross meant "it didn't matter to [Dr. McMahon] whether this child was raped or not", T 812, and that "she didn't do a complete sex abuser analysis because it wouldn't have helped". T 812-813.

relationship between defendant and victim; the defendant's family or community ties; history of mental hospitalization, if any; age at time of crime; the defendant's education and efforts to improve himself; and history of violence, if any, including while in incarceration. T 604-605.

The state's rebuttal case[7] consisted largely of the testimony of Steven Jordan, a psychologist, who testified over objection that Mr. Hitchcock is a pedophile, with the caveat that "my diagnosis has to be suggestive and not necessarily definitive, but the evidence very strongly points in the direction of pedophilia." T 682-83. Also over relevance objection, he testified that there are two main types of pedophiles (fixated, and regressive) and that Mr. Hitchcock has characteristics of both. T 683-84.

Over objection that such testimony was speculative he said Mr. Hitchcock fit into what is "according to research" a small minority (15%) of pedophiles who are violent, T 685-6, and do it either for sexual sadism or domination and control; he could not say "which of those two categories" fit Mr. Hitchcock, T 687, but did testify that the sexual sadism category is "associated with anti-personality disorders and is frequently associated with assault or even murderous behavior". T 686-87.

He testified over objection that, as a pedophile, Mr. Hitchcock would be dangerous in the future, T 687, since, in his view, pedophiles generally could not be "spontaneously" cured. He reasoned over objection, T 692, that, as a pedophile, Mr. Hitchcock would sexually

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[7] The state's case in chief, including opening statement, took less than three hours. R 450. Its rebuttal case was nearly as long, consuming two and a half hours. R 453. The testimony rebutted at most two minutes of defense testimony.

prey on younger inmates, T 689-91, and that there was a "correlation between rape and pedophilia.": "The analysis of four hundred rapists indicated that 50.7 percent were pedophiles". T 692.[8]

Over defense objection that the testimony was nonstatutory aggravation and hearsay, T 663-66[9], he related details of L D ' report to him that Mr. Hitchcock had sexually abused her and Cynthia. He interviewed Ms. D in five one-hour sessions. T 666. His recitation of what L told him went far beyond her testimony to the jury. He said L told him Mr. Hitchcock "always tried to put his hands in my pants, at least every other day, sometimes more than once a day," that "He was mean and rough, he didn't just lay on me --," "He was just so mean. He would slap me across the face. It happened to Cindy. It would be a ritual." L told him Cindy told her that "He never raped Cindy before; he would put his fingers in her, and on her butt. She was so scared of him." L told him: "That night I said we got to tell. After, Cindy was crying and begging me not to tell. She said please don't tell. Ernie ever --" Id.

He related a story about Mr. Hitchcock locking her brothers out of the house and putting his hands in her pants, trying "to put his

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[8] In closing argument the state expanded this theme, arguing over repeated objection that Mr. Hitchcock is a "violent pedophile" with "a small likelihood of being cured," and that the jury "could not possibly be reasonably convinced" "that if this man is released into the general population" or "that if this man is paroled, sometime after twenty-five years, he will not be dangerous in the future." T 816-817.

[9] At the start of his testimony about L D , the defense objected that such testimony was irrelevant, was non-statutory aggravation, and that "if he's going to start testifying about whether or not she was a victim of child abuse", Mr. Hitchcock had not been convicted of such a crime. T 663-664. The state argued the defense had implied recent fabrication by Ms. D , and the court overruled the objection on that basis. T 664-665. The defense also objected to testimony that Mr. Hitchcock was a sexual abuser, which was also overruled. T 665-666.

thing in my butt", putting his fingers in her, and her going up a pole outside where he could not reach her. She related to him how when she told Mr. Hitchcock she was going to tell her mama, he said he would kill both her and Cindy. T 668-674.

He interviewed R D , L and Cindy's brother, in two one-hour sessions. T 676. Over relevancy objection, he said it was hard for R to talk -- he was very reluctant, and going through emotional difficulty. However, "he got to the point where he was able to say that Ernie had sexually abused him, but nothing more than that" and "he was not able to give me details of what happened". T 676-677.

Details of alleged sexual abuse of R M first came out during the doctor's testimony about what L D told him. He there testified over objection that he spoke with L D about her cousin (Mr. M), and later with the cousin, and "His cousin told me that Ernie made him go down on him, and said if he told he would break his neck". T 673-74.

The expert said he interviewed Mr. M personally the day before "in the corridors of the courtroom" and that M told him he was "fourteen of fifteen when [he] first met Ernie", that he "didn't like him" and "was scared of him". He related that Mr. M said that Mr. Hitchcock was "mean to R and R . He was slapping them on the head, calling them stupid." He told a hearsay story about a 4th of July picnic when Mr. Hitchcock "smashed the ball on R who was lying down. It hurt him."

Dr. Jordan testified about an explicit story from Mr. M that on the night of the 4th of July picnic Mr. Hitchcock forced him to begin to perform oral sex, and threatened to anally rape him (though the doctor also testified M was "a little unclear" whether the

anal rape had been stated). The doctor related M told him "I know more happened with R and B ." T 680-81.

When Mr. M testified (in the midst of Dr. Jordan's testimony), the state asked him only ""Did you relate some incident that occurred in 1976 involving yourself and Ernie Hitchcock?' 'Yes, I did.', and 'Were those incidents true?' 'Yes, sir.'" T 695. Mr. M is a deputy sheriff and a corrections officer now. T 694.

Dr. Jordan testified that the stepbrother Richard Hitchcock told him that when he and appellant lived together in Mississippi, appellant said he had a girlfriend and was having trouble controlling his sexual impulses. T 679.

After relating hearsay allegations of those who said Mr. Hitchcock sexually abused them as children, Dr. Jordan expressed his opinion that their behavior was consistent with being a victim of child abuse. As to L D he testified at T 675:[10]

> Q. Did you find I 's demeanor and presentation to you to be consistent with an adult who had been a victim of sexual abuse or sexual trauma as a child?
>
> A. Yes.

After relating R D ' allegations, the doctor said it was "hard to say" from his demeanor whether he was telling the truth, because he gave no details. T 678. But with R M , whom he had interviewed in the courthouse hallway, the doctor concluded from his demeanor that he was telling the truth:

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[10] While there was no objection immediately after the question, defense counsel had objected to this entire line of testimony at the start of the doctor's testimony, and had objected (to preliminary testimony just before this that he carefully interviewed Ms. D) that he was "bolstering his own testimony", T 674, and it was "advice he gave a witness". T 675.

Q. Would you describe his demeanor in presentation while he was telling you those things yesterday?

A. He was profoundly shaken; he was very upset. Quite disturbed.

Q. Did you find his presentation and demeanor consistent with someone who was a victim of the act he described as a teenager?

A. Yes.

T 681. Later, he again expressed his opinion about R M claims. Referring to Mr. Hitchcock's "subgroup" of pedophilia, he said "he did abuse C " (Mr. M). T 685. Shortly after, having watched Mr. M testify in court that he had told the doctor about Mr. Hitchcock's sexual abuse of him, the doctor over objection opined about the witness's demeanor T 701.[11]

While deliberating, the jury sent a question ("Does time served count towards 25 years minimum?") about parole eligibility. T 847-56, T 417. When the court accepted defense argument that it should tell the jury that it was an improper consideration under Norris v. State, 429 So. 2d 688 (Fla. 1983), T 847-52, the prosecutor objected saying that such an instruction "is going against whatever argument I made. I made an argument about whether or not they should consider nonviolence [sic], and you're telling them they can't consider my argument." T 852. The court then said it would instruct the jury "that they should not speculate as to when the defendant make [sic] become eligible for parole or if he will be paroled. However, whatever time served on this case would be credited toward the 25 years mandatory sentence if the life sentence is imposed." T 854.

[11] Asked if he would be surprised that appellant did not commit a violent felony while under strict confinement on death row, he replied: "I don't believe I'm qualified to answer that question." T 702.

Overruling defense objection to the jury's consideration of time served, it instructed the jury at T 855-56:

> Ladies and gentlemen, I have received a copy of a question from the jury, and the question states does time served count towards 25 years minimum.
>
> Ladies and gentlemen, 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.

The jury then returned a unanimous recommendation for a death sentence. Finding four aggravating circumstances,[12] and substantial mitigation, as set forth in the proportionality discussion below, the trial court imposed a death sentence.

SUMMARY OF THE ARGUMENT

1. Illegal evidence of child sexual abuse and inadmissible expert opinion based on a "pedophilia profile" and witness bolstering infected the trial.

2. In the long span (caused by the state) since the 1976 trial, the state has developed substantial new and prejudicial evidence, and a new sentencing factor to apply against Mr. Hitchcock, he has lost important mitigation, the state has turned his good behavior leading to the possibility of parole into evidence and argument against him, and he has been otherwise so prejudiced that the sentencing proceeding was unfair and unconstitutional.

3. The court erred in suppressing mitigating evidence.

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[12] That the murder was committed by one under sentence of imprisonment, was committed to avoid arrest, was committed during the felony of sexual battery, and was especially heinous, atrocious, or cruel.

4. The refusal to instruct the jury properly rendered arbitrary and unconstitutional the penalty verdict procedure, and authorized the state's unconstitutional argument regarding sentencing circumstances.

5. The state threatened the jurors that, unless appellant was put to death, the state would free him in a few years to prey on Florida's children. In advancing this argument, it turned mitigation into reasons for execution, misleading the jury as to the nature of the aggravating circumstances and its duty to consider mitigation. In overruling defense objections to the state argument, the trial court signalled to the jury that the state's argument was correct. The state's improper argument injected irrationality into sentencing in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and Article 1, Sections 2, 9, 15, 16, 17, 21, and 22 of the state Constitution.

6. When the jury asked about Mr. Hitchcock's parole eligibility, the court erred in not forbidding the jury to consider it.

7. The felony murder aggravating circumstance is unconstitutional in that it doubles an element of the offense.

8. Use of the imprisonment aggravator on a parolee who committed murder in 1976 violates due process and ex post facto principles, constitutes double jeopardy, violates the equal protection of the laws, and creates an unconstitutionally irrational aggravator. The findings do not exclude a reasonable hypothesis of innocence to an element of the sexual battery aggravator and indeed make no finding supporting that element and the court retroactively applied the sexual battery aggravator to an offense occurred when the statute made rape, not sexual battery, an aggravator. The evidence does not support the avoid arrest and heinous aggravators.

9. The instruction to the jury about the case's prior history unlawfully minimized the reason the prior death sentence was vacated, and led jurors to think this penalty proceeding was a formality.

10. The show of solidarity between witnesses and members of the courtroom audience unconstitutionally and unlawfully invited the jury to base its decision on improper grounds.

11. The death penalty is disproportionate.

ARGUMENT

POINT I

THE STATE UNLAWFULLY AND UNCONSTITUTIONALLY FEATURED UNCHARGED ALLEGATIONS THAT MR. HITCHCOCK HAD SEXUALLY ABUSED ADOLESCENTS, INADMISSIBLE EXPERT OPINION TESTIMONY THAT HE WAS AN INCURABLE PEDOPHILE, AND IMPROPER WITNESS BOLSTERING.

A. Introduction

From opening on, the state made Mr. Hitchcock's purported sexual abuse of adolescents, and its expert's opinion that he was a pedophile, the feature of this case. The judge let the evidence in on a door-opening theory, although it was the state that opened the door. This evidence of "pedophilia" permeated the trial, inflaming the jury and diverting its attention from the lawful sentencing considerations. The sentence of death thus violates Florida law as set forth below and the rights to the effective assistance of counsel, to present a defense, to compulsory process, to confront the evidence against him, to cross examine witnesses, to due process, a fair trial, equal protection of the laws, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution, and Florida law.

The state's theme was that appellant is an incurable pedophile who would be a menace to young people if sentenced to life. It put on

evidence in its case in chief that he had sexually abused male and female teenagers. It extensively crossed Dr. McMahon on her "failure" to diagnose pedophilia. Its rebuttal case presented an "adult sexual abuser" expert who deemed Mr. Hitchcock a pedophile who would prey on teenage inmates if given life. This expert based his opinion on interviews with people who said appellant had sexually abused them as teenagers. The expert detailed the interviews to the jury, and said the claims were true.

B. Unlawful testimony alleging uncharged child sex crimes in the state's case in chief.

L D testified on direct that Cynthia said Mr. Hitchcock sexually abused her, and that Cindy begged her not to tell her mother T 386-89[13]. The state saved the most damaging information for her redirect[14], leading the jury away from statutory aggravators to irrelevant claims of child sexual abuse. Cross did not open the door to this "redirect,"[15] as over objection[16] the witness testified that Mr. Hitchcock sexually abused her and her sister. T 394-95[17].

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[13] The state first raised these matters in opening statement. T 321-22. Defense nonstatutory aggravation and hearsay objections were overruled, as was further objection at the bench. T 322; 323-4.

[14] The defense did not invoke discovery in this case, and was caught completely offguard by this entire line of testimony.

[15] Cross focused on the many years that passed before she told anyone of the alleged threats, only six months before this penalty trial. T 390-92.

[16] The court overruled relevance and nonstatutory aggravation objections, saying that "given the cross-examination this is a proper line of inquiry". T 39.

[17] The state emphasized the testimony in closing. T 797 ("You heard evidence from L D , who told you that Ernie Hitchcock on a number of occasions molested her sister Cindy"); T 799-800 ("Now, ask yourselves at this point, Cindy Driggers was so frightened of Ernie Hitchcock that she was willing to let him molest her and not tell her mom; she was willing to look at her sister *who was always being molested by Ernie* and said please, I beg you don't tell, within eight

The court erred in ruling that cross opened the door. "While the rules of evidence have been relaxed somewhat for penalty proceedings, they have not been rescinded." Hitchcock v. State, 578 So. 2d 685, 690 (Fla. 1990), *vacated on other grounds*, Hitchcock v. Florida, __ U.S. ____, 112 S.Ct. 3020, 120 L.Ed.2d 854 (1992). "Generally, testimony is admissible on redirect which tends to qualify, explain, or limit cross-examination testimony." Tompkins v. State, 502 So. 2d 415, 419 (Fla. 1986). In Tompkins, the door-opening occurred when the defense crossed the victim's friend on whether the victim had complained to her mother that the defendant had made sexual advances. The friend testified she had not complained. The trial court then let the friend testify on redirect that the victim had "begged" *her* not to go back with the defendant. This court held the testimony admissible under a door-opening theory lest the jury be left with misleading testimony that had been advanced on cross:

> Moreover, defense counsel's question on cross examination could have led the jury to infer that [the victim] had never complained to her mother about Tompkins. We find that the state was properly allowed to pursue this line of questioning to rebut such an inference. *Cf. McCrae v. State*, 395 So. 2d 1145, 1151-52 (state properly entitled to transcend normal bounds of cross-examination in order to negate delusive innuendos of defense counsel).

At bar, cross left no similar misleading "innuendo" to correct on redirect; in fact, it made no mention at all of the witness's relation to appellant. L D ' redirect testimony that she did not come forward due to fear of appellant did not "qualify, explain or limit" testimony in the three-page cross, which went solely to the fact she did not report the matter for seventeen years T 390-92. Her redirect about fear of Mr. Hitchcock does not even respond to the timeliness

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hours of her death she was begging her sister, please don't tell" (objection overruled)).

question, since from early on there was nothing to fear since appellant was in custody. The state just concocted this door-opening theory to admit extensive and detailed testimony about specific unlawful sexual acts[18].

Rebuttal may go no further than necessary to respond to testimony to which it is addressed[19]. As the Court wrote in the context of "invited error" in a prosecutor's closing argument:

> In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's comments were 'invited,' *and did no more than respond substantially in order to 'right the scale,'* such comments would not warrant reversing a conviction.

United States v. Young, 470 U.S. 14, 12-13, 105 S.Ct. 1038, 1045 (1985) (italics supplied, footnotes omitted). The child sexual abuse evidence here was far out of proportion to that necessary to respond to the defense and instead of righting, it tipped the scales.

The explicit, extensive redirect testimony (later elaborated and vouched for by the state's expert) was irrelevant. The "door" was not

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[18] The state successfully prevented defense testimony that L had an opportunity to come forward at clemency and at resentencing years earlier with this allegation, but did not do so. T 451-453.

[19] Judge Kozinski has criticized the "door opening" doctrine:

> This 'opening the door' doctrine has a certain common-sense appeal, but where is it to be found in the Rules of Evidence? I'm aware of no authority for admitting inadmissible evidence just because we think turnabout is fair play. Perhaps it would be sensible to let the [evidence] in, but lots of violations of the rules seem equally sensible.... But rules are rules. The basic judgments were made by the drafters; when we rely on common sense in admitting evidence contrary to the Rules, we're simply substituting our own judgments for theirs.

United States v. Wales, 977 F.2d 1323, 1328-29 (9th Cir. 1992) (Kozinski, J., concurring).

opened to *why* the witness was afraid of Mr. Hitchcock, which was the purported relevance of the otherwise inadmissible details of child sexual abuse. See Tindall v. State, 645 So. 2d 129 (Fla. 4th DCA 1994) (asking officer if witnesses had made statements did not open door to what they said: "Appellant's counsel does not make inquiry into the content of the anonymous witness' statements. Rather, the questions were designed to impeach the officer's testimony that they told him anything at all"); Thompson v. State, 615 So. 2d 737, 743 (Fla. 1st DCA 1993) (asking officer *from whom* he got information for warrant did not open door to testimony *what* the information was); Kyle v. State, 20 Fla. L. Weekly D298 (Fla. 4th DCA Feb. 1, 1995) ("While appellant's statement that he had been 'jumped on by the police before' may have opened the door slightly, it could not possibly have opened it wide enough to allow in the state's naming the crime and pointing out that appellant had been incarcerated for it[.]").

In any event, the court overruled the defense objection when the state raised the matter in opening statement. Hence, the defense cross as to the timing of the disclosure did not "open the door" to yet more objectionable redirect testimony: "'It is a general rule that a party does not waive his previous objection to the admission of improper, illegal or incompetent evidence merely by cross-examining the witness with relation to the objectionable matter.' *Louette v. State*, 12 So. 2d 168, 174 (Fla. 1973); *Stripling v. State*, 349 So. 2d

187, 193 (Fla. 3rd DCA 1978)."[20] Dupree v. State, 639 So. 2d 125, 127 n. 3 (Fla. 1st DCA 1994).

The crimes recounted by Ms. D are not aggravating factors. Using such evidence on redirect "improperly lets the state do by one method something which it cannot do by another." Robinson v. State, 487 So. 2d 1040, 1042 (Fla. 1986). Accord, Geralds v. State, 601 So. 2d 1157, 1162-1163 (Fla. 1992) ("The State is not permitted to present otherwise inadmissible information regarding a defendant's criminal history under the guise of witness impeachment")[21].

C. The State's unlawful interjection of pedophilia and child sex crimes into the cross of the defense mental health expert.

Dr. McMahon, the defense mental health expert, testified on direct to her interview of Mr. Hitchcock for his clemency application years before, and his maturation since. T487-514. The basis of her opinion was observations of his death row behavior. From that base, the state launched extensive sexual abuser/pedophilia allegations.[22]

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[20] In *Stripling*, the trial court suppressed three illegally seized notes. When at trial, the police officer's testimony on direct tracked the language of the suppressed notes, defense counsel crossed the officer on how he had obtained them, his discussion of them with a state attorney investigator, and what he had done with the notes after seizing them. The trial court then let the state introduce the notes themselves on redirect, concluding the cross had "opened the door." The Third District reversed, writing: "defense counsel was within the proper bounds of cross-examination" by seeking "to minimize the harmful effect of [the officer's] testimony and did not expound on the subject matter any further than necessary." Id. 193.

[21] The refusal of the proposed defense instruction not to consider nonstatutory aggravation heightened the error. T 760-61.

[22] The court had overruled prior relevancy defense objections to evidence of child sexual abuse T 322-24;393. During McMahon's cross, the defense unsuccessfully objected to questions about Mr. Hitchcock's preferences in pornography as irrelevant, T 528, and to questions whether the witness had treated child sexual abusers. T 542.

The state quizzed Dr. McMahon *ad nauseum* about pedophilia, suggesting failure in not evaluating or diagnosing appellant as a sexual abuser. But her direct testimony had not mentioned sexual abuse; nor did it address, explain, or otherwise mitigate behavior at the time of the killing. In fact, she testified repeatedly on cross that unlawful sex acts committed by Mr. Hitchcock would not alter her opinion, which was limited to his progress in prison[23]. But the state was intent on opening its own door to its expert's diagnosis of pedophilia.

Sexual abuse and pedophile claims drenched the trial. The state used the word "sexual" 53 times in Dr. McMahon's 39 page cross T 514-553. It used "pedophilia" 14 times in the cross. Neither word had been uttered by defense counsel or the witness on direct.

The state asked if she had taken a sexual history from appellant, T 515, his age at his first sexual experience, if he had been sexually abused, "what type of women he found appealing, physical attributes;" and "his sexual fantasies?" T 516. Sex was the sole subject of cross.

The state could not mention "pedophilia" more often. Although the witness denied that pedophilia could be one of his dynamics, T 523, it would not drop the topic. T 523-525. Though the witness had not sought to determine if Mr. Hitchcock was a sexual abuser, and

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[23] Early in cross she said that she did not find his sexual history important to her evaluation, T 517, and that even if he had first raped the decedent, that fact was irrelevant to her opinion. T523. Later answers show cross had nothing to do with her direct testimony. T 530-31 (even if she knew he had "forcibly molested" other children, it would have no bearing on her opinion).

offered no such testimony on direct, the state made it the issue on cross with repeated irrelevant questions[24].

The state suggested Mr. Hitchcock could never rid himself of "pedophilia" in prison, and would never be cured. It debated whether he was a "power-prone pedophile" or "cruelty pedophile", and the immutability of that label. T 531-35.

The state turned the issue to future behavior in prison T 538[25]. Cross continued with many questions about the witness's experience "treating sexual abusers", T 544, that she didn't cover the sexual part of appellant's dynamics sufficiently, T 544-547, and to finish, whether his sexual history contained violence, and if he engaged in homosexual behavior as an adult or as a child. T 552-553[26].

"*Coxwell*[27] does not indicate that irrelevant, prejudicial material may be elicited on cross examination. Rather, that case applies its

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[24] Here's a sampling: "How much time did you spend talking about his sexual behavior and fantasies?" T 526; "Can you tell the jury how much time you spent with these sexual issues?" T 526 (objection overruled); "Now, there are sexual inventories that are accepted to give to people similar to the MMPI to determine sexual attitudes; isn't that correct? ... "And you could have given Mr. Hitchcock one of those sexual inventories and chose not to?" T 527; "Did you discuss with him the issue of pornography"? Objection based on relevance was overruled T 528. "So the fact that this was the -- at the very least, a sexual act with a 13-year-old girl, you didn't think it was helpful to delve into his preferences in pornography?" "Isn't that one factor that you look to in determining pedophilia?" T 529. More questions continued into whether Mr. Hitchcock had himself been sexually abused T 529-30, the expert's experiences in treating and writing about "sexual abusers" T 530, and to otherwise show Mr. Hitchcock was a child molester T 530-31.

[25] When the state turned the cross back to Dr. McMahon's training in "treating sexual abusers", objection was overruled, though the judge did comment that the prosecutor had "belabored the point" T 542.

[26] The state argued in closing that her responses to cross meant "it didn't matter to [Dr. McMahon] whether this child was raped or not" T 812, and "she didn't do a complete sex abuser analysis because it wouldn't have helped" T 812-813.

[27] Coxwell v. State, 361 So. 2d 148 (Fla. 1978).

principles only to germane and plausibly relevant testimony." Sneed v. State, 397 So. 2d 931, 933 (Fla. 5th DCA 1981) (error to let state cross defendant on nature of prior charge; rejecting state claim that "door opened" on direct). Accord, Nowitzke v. State, 572 So. 2d 1346, 1350-54 (Fla. 1990) (condemning cross on defense mental health expert's reputation and on consequences of insanity verdict). Since direct was not directed to appellant's behavior at the time of the offense, questions whether the witness evaluated him for pedophilia were irrelevant. State v. Michaels, 454 So. 2d 560 (Fla. 1984) (testimony of defendant's peacefulness at time of offense did not open door to testimony that he beat his wife at a later time).

The pedophilia/pornography/child sex abuse questions were reversible error, because, as shown below, profile evidence of pedophilia is unreliable and inadmissible, Flanagan v. State, 625 So. 2d 827 (Fla. 1993), so harping on the issue on cross of the defense expert was error. Turtle v. State, 600 So. 2d 1214, 1221 (Fla. 1st DCA 1992) (pedophile profile testimony not admissible under rebuttal theory since "[w]hether Turtle was a pedophile simply had no probative value regarding any material fact or issue in dispute").

Being irrelevant to aggravating factors, the testimony would not have been admissible in the state's case. The featuring of the inflammatory nonstatutory aggravation in cross of the defense expert under the guise of impeachment is no more proper. "The State is not permitted to present otherwise inadmissible information regarding a defendant's criminal history under the guise of witness impeachment."

> This rule is of particular force and effect during the penalty phase of a capital murder trial where the jury is determining whether to recommend the death penalty for the criminal accused. Improperly receiving vague and unverified information regarding a defendant's prior felonies clearly has the effect of unfairly prejudicing the defendant in the

> eyes of the jury and creates the risk that the jury will give undue weight to such information in recommending the penalty of death.

Geralds v. State, 601 So. 2d 1157, 1162-63 (Fla. 1992).

Robinson v. State, 487 So. 2d 1040, 1042 (Fla. 1986), reversed where the state crossed defense witnesses about violent acts the defendant "had not even been charged with, let alone convicted of." Id. The state "gave lip service to its inability to rely on these other crimes to prove the aggravating factor of previous conviction of violent felony," but this Court found the distinction "meaningless" as "it improperly lets the state do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial." Id.

D. The State's "rebuttal" case inflamed the jury with inadmissible, unreliable evidence that appellant is an incurable pedophile.

(1) The state expert's pedophilia diagnosis.

The expert "rebuttal" witness, Dr. Steven Jordan, served solely to portray Mr. Hitchcock as a pedophile[28]. His role was "to investigate the defendant as a possible sex abuser." T 646. The defense objected to his qualifications and argued that even if he was qualified, the entire line of testimony was irrelevant. T 659; 665-666[29].

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[28] The state sought to qualify him as an "expert psychologist, particularly in the area of psychologists specializing in sex abuse and sex abusers". T 649. In the jury's presence, the court found him to be an "expert in the area of psychology, specializing in the area of treatment and evaluation of abused children and child abusers" which the prosecutor modified to be "adult sexual abusers". T 660.

[29] After voir dire on qualifications on adult child sexual abusers, the defense unsuccessfully objected to his qualifications and that his testimony about adult child sexual abusers was irrelevant, constituted nonstatutory aggravation, and did not rebut mitigation. T 659. As his testimony moved to the specifics of this case, the state told the court: "He's going to give an evaluation of Mr. Hitchcock as a sexual abuser and what it means in terms of his future and as an aggravator, and he will testify as for future dangerousness, which is rebuttal to

His testimony went to his opinion that Mr. Hitchcock was and is a pedophile, including extensive reference to hearsay statements of others that Mr. Hitchcock had sexually abused them. Dr. Jordan said: "I believe that he fits into the category of a pedophile", T 682, and over relevancy objection opined in detail that he had characteristics of both a fixated and regressed pedophile. T 683-85.

He said Mr. Hitchcock fit what is "according to research" a small minority (15%) of violent pedophiles acting from sexual sadism or domination and control. T 685-687. Unable to say which of those two categories he fit, T 687, he said the sexual sadism category is "associated with anti-personality disorders and is frequently associated with assault or even murderous behavior", T 686-87, implying that Mr. Hitchcock gained sexual pleasure from this killing. The state and its witness used the word "pedophile" 21 times, and "sexual abuser" 49 times during the 51 page direct. T 644-694, 701.

At closing the state elaborated the theme, arguing to the jury over repeated objection that appellant is a "violent pedophile" unlikely to be cured, and that jurors "could not possibly be reasonably convinced" "that if this man is released into the general population" or "that if this man is paroled, sometime after twenty-five years, he will not be dangerous in the future." T 816-817[30].

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defense experts". T 665. The defense unsuccessfully objected based on nonstatutory aggravation, collateral crime evidence, and relevance. T 665-66. Later, during the expert's testimony on subcategories of pedophiles the defense relevance objection was overruled T 683.

[30] The court denied a requested defense instruction that future dangerousness was not a statutory aggravator. T 757.

(2) Admission of testimony that Mr. Hitchcock is a pedophile.

Dr. Jordan's school of testimony is inadmissible and unreliable. Flanagan v. State, 625 So. 2d 827 (Fla. 1993). In Flanagan, a child sexual battery case, the state presented testimony of a psychologist describing characteristics of the home environments where child sexual abuse occurs and about the characteristics of abusers. Id. at 828. The First District sitting en banc certified two questions:

> (1) IS EXPERT SCIENTIFIC TESTIMONY WHICH DOES NOT MEET THE TEST OF *FRYE V. UNITED STATES*, 293 F. 1013 (D.C. CIR. 1923) FOR ADMISSIBILITY OF NOVEL SCIENTIFIC EVIDENCE OTHERWISE ADMISSIBLE AS BACKGROUND INFORMATION IN A CRIMINAL TRIAL?
>
> (2) IS PEDOPHILE/CHILD SEX OFFENDER PROFILE EVIDENCE ADMISSIBLE IN A CRIMINAL TRIAL?

Flanagan, 625 So. 2d at 828 (*quoting Flanagan v. State*, 586 So. 2d 1085, 1124-25 (Fla. 1st DCA 1991) (en banc).

Answering both questions no, this Court found that sex offender profile testimony must meet the Frye standard since "[p]rofile testimony ... necessarily relies on some scientific principle or test, which implies an infallibility not found in pure opinion testimony." 625 So.2d at 828. The Frye test is "designed to ensure that the jury will not be misled by experimental scientific evidence which may ultimately prove to be unsound." Id. The testimony did not meet the Frye standard as "sexual offender profile evidence is not generally accepted in the scientific community". Id.

> [A] courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments. If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use.

Id. (quoting Stokes v. State, 548 So. 2d 188, 193-94 (Fla. 1989)).

Judge Ervin discussed the literature on the matter in the First District's Flanagan decision[31], noting "a lack of general consensus in the relevant community that ... profile testimony is reliable for the purpose of establishing that a particular person was responsible for committing a crime."

> For example, one group of commentators has stated: 'Nothing in the professional literature suggests that experts on child sexual abuse possess special knowledge or expertise that allows them to identify the *perpetrator* of sexual abuse.' Myers, Bays, Becker, Berliner, Corwin & Seywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb.L.Rev. 1, 127 (1989)[hereafter Myers]. (Emphasis added.) Myers also points out
>
> > that sex offenders are a heterogeneous group with few shared characteristics apart from a predilection for deviant sexual behavior. Furthermore, there is no psychological test or device that reliably detects persons who have or will sexually abuse children. Thus, it is appropriate to conclude that under the current state of scientific knowledge, there is no profile of a 'typical' child molester.
>
> *Id.* at 142.

586 So. 2d 1085, 1114-15 (Ervin, J., concurring and dissenting). Here the state and its expert gave the jury a false belief that the pedophile diagnosis was reliable. The "rebuttal" testimony was improper under Flanagan.[32]

Since such unreliable evidence cannot be used in a noncapital prosecution, its use requires reversal here since "[t]he fundamental

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[31] This Court referred to Judge Ervin 's opinion as "an excellent and thorough discussion of this issue." 625 So. 2d at 828.

[32] Prior decisions barred such testimony as evidence of bad character and credibility vouching. Erickson v. State, 565 So. 2d 328 (Fla. 4th DCA 1990). A "personality characteristic of being attracted to children" cannot be offered to prove a defendant acted in conformance with that character or trait. Francis v. State, 512 So. 2d 280, 282 (Fla. 2d DCA 1987). Exclusion of defense testimony that a defendant did not meet a pedophile profile has been upheld on the theory that opinion testimony cannot prove character. Wyatt v. State, 578 So. 2d 811 (Fla. 3d DCA 1991).

respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment in any capital case.' See *Gardner v. Florida*, 430 U.S. 349, 363-364, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (WHITE, J., concurring in judgment) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976))." Johnson v. Mississippi, 486 U.S. 578, 584, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988).

Even if such evidence were true or admissible, or in the least bit reliable, state law and the Eighth and Fourteenth Amendments bar consideration of mental illness in aggravation. Miller v. State, 373 So. 2d 882, 885 (Fla. 1979); Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). In Zant, the Court equated the use of mental illness in aggravation with the improper use "race, religion or political affiliation[33] of the defendant." The Court wrote:

> ... Nor has Georgia attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion or political affiliation of the defendant, cf. *Herndon v. Lowry*, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066 (1937), *or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness, Cf. Miller v. Florida*, 373 So. 2d 882, 995-886 (Fla. 1979). If the aggravating circumstances at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside.

Id. 885 (italics supplied).

The defense testimony from Dr. McMahon that Mr. Hitchcock had matured while on death row, and from Radelet that he would make a

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[33] Dawson v. Delaware, 503 U.S. ___, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) invoked this First Amendment reference of Zant to strike a death sentence based on evidence that the defendant was a member of the Aryan Brotherhood, a white racist prison group.

contribution to the community cannot "open the door" to unreliable sex offender profile testimony. As the court wrote in Turtle:

> We reject the state's argument that the pedophile testimony was admissible to 'rehabilitate' M.J.F.'s credibility, and to rebut the defense's attempt to show that it was another individual who sexually assaulted M.J.F. The state cites no provision of any statute or rule, or any case decision that directly supports the admissibility of this testimony on these grounds. This evidence did not tend to rehabilitate M.J.F.'s credibility, and did not prove that Turtle rather than Bruner sexually assaulted M.J.F. ***Whether Turtle was a pedophile simply had no probative value regarding any material fact or issue in dispute.*** Although expert testimony may, under certain circumstances, be admissible to aid in assessing the verity of a child abuse victim's injury, it should not be admitted to vouch for the credibility of the victim's testimony. *See Tingle v. State*, 536 So. 2d 205 (Fla. 1988); *Erickson v. State*, 565 So. 2d 328 (Fla. 4th DCA 1990).

600 So. 2d at 1221-1222 (emphasis supplied). *Accord*, Nowitzke.[34]

(3) The state expert's testimony that as a pedophile Mr. Hitchcock would sexually prey on younger inmates.

Stretching the inadmissible pedophile testimony, Dr. Jordan reached further insupportable and false opinions. In supposed "rebuttal" of future nondangerousness[35] he testified over objection, T 687, that since Mr. Hitchcock was a pedophile, and since he thought

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[34] Dawson v. Delaware, rejected a similar door-opening argument advanced for use of evidence of membership in the Aryan Brotherhood:

> Delaware argues that because Dawson's evidence consisted of 'good' character evidence, it was entitled to introduce any 'bad' character evidence in rebuttal, including that concerning the Aryan Brotherhood. The principle of broad rebuttal asserted by Delaware is correct, but the argument misses the mark because, as stated above, the Aryan Brotherhood evidence presented in this case cannot be viewed as relevant 'bad' character evidence in its own right.

112 S.Ct. at 1099.

[35] Such testimony rebutted nothing since no defense witness attested to future nondangerousness. The state succeeded in preventing Radelet from qualifying to render an opinion as to Mr. Hitchcock's future nondangerousness, T 600-601, and his testimony was only that Mr. Hitchcock would make a contribution to the community. T 606. Dr. McMahon did not testify to future nondangerousness.

pedophiles generally cannot be "spontaneously" cured, appellant was incurable since there were no programs for him in prison. He reasoned over objection, T 692, that Mr. Hitchcock would sexually prey on younger inmates, T 689-691 (and others when released from prison), because of his pedophilia, and because there was a "correlation between rape and pedophilia." "The analysis of four hundred rapists indicated that 50.7 percent were pedophiles". T 692.[36]

The testimony that Mr. Hitchcock is a pedophile who would prey on younger inmates is false, as the state knew. Accepting as true the worst allegations, such conduct at best only borderline meets the definition of pedophilia of the DSM IIIR (or the DSM IV), and most of the hearsay recited by the doctor does not support such a diagnosis:

> The essential feature of this disorder is recurrent, intense, sexual urges and sexually arousing fantasies, or at least six months' duration, involving sexual activity with a prepubescent child. The person has acted on these urges, or is markedly distressed by them. The age of the child is generally 13 or younger. The age of the person is arbitrarily set at age 16 years or older and at least five years older than the child.

DSM IIIR 302.20 **Pedophilia** at 284. The Manual warns: "Do not include a late adolescent involved in an ongoing sexual relationship with a 12- or 13-year-old." Id. 285. At bar the sex abuse charge of M occurring when he was "14 or 15", T 680-681, 694-695, is contrary to a pedophilia finding. The alleged events occurred when L was 12 or 13, Cynthia was 13, and Mr. Hitchcock was 20 or younger.[37] There was no proof, as required for pedophilia, that L or Cynthia were "pre-pubescent." These ages, and Mr. Hitchcock's, place this conduct outside the accepted definition of pedophilia.

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[36] As already noted, the state hammered these matters in closing.

[37] His immaturity at that time is undisputed.

The state misled the jury into believing Mr. Hitchcock would sexually prey on young inmates if given a life sentence. If sentenced to life, he would not be placed with youthful inmates, and would not be near inmates 16 or under, as the state knew. Law governing classification and housing of inmates guarantees segregation of young inmates. Section 958.11(1) & (2), Florida Statutes, governing youthful offenders, requires the Department of Corrections to designate youthful offender institutions to house "*only* those youthful offenders sentenced as such by a court or classified as such by the department." (emphasis supplied)[38]. DOC strictly segregates youthful offenders.[39] Inmates under 20, whether designated youthful offenders

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[38] "The youthful offender program office shall continuously screen all institutions, facilities, and programs for any inmate who meets the eligibility requirements for youthful offender designation specified in s. 958.04(1)(a) and (c), whose age does not exceed 24 years and whose total length of sentence does not exceed 10 years, and the department may classify and assign as a youthful offender any inmate who meets the criteria of this subsection." § 958.11(4), Fla. Stat. (1993).

[39] Rule 33-6.003, F.A.C. **Transfer of Inmates.**

* * *

(1) The following institutions are designated as youthful offender institutions, and only youthful offenders shall be assigned to these facilities.

(a) Brevard Correctional Institution - age 24 and below;
(b) Indian River Correctional Institution - age 19 and below;
(c) Lancaster Correctional Institution - age 24 and below; and
(d) Basic Training Program located at Sumter Correctional Institution.

* * *

(3) Inmates 20 years of age or younger shall not routinely be assigned to non-youthful offender institutions. However, in selected cases, when the facts justify such action, youthful offenders not sentenced under the Youthful Offender Act may be considered for placement at non-youthful offender institutions....

(4) Once youthful offenders are received at non-youthful offender institutions, it is incumbent upon the staff to continuously review those cases for consideration for recommending transfer to a

or no, go to a non-youthful offender facility. They would be in no institution where appellant would serve a life term. The state's false hypothetical requires reversal. Nowitzke; Garcia v. State, 622 So. 2d 1325, 1331 (Fla. 1993) ("the state ... may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts").

E. Unlawful hearsay allegations of alleged child sex abuse victims was presented to the jury through the state's expert to support his inadmissible sex offender profile.

Flanagan's bar of profile evidence makes incompetent the detailed narrative of out of court allegations to support the diagnosis. An expert cannot relate hearsay that a defendant committed a crime. The use of second and third hand hearsay about sexual abuse violates the Confrontation and Due Process Clauses and requires reversal.

(1) Detailed allegations of L D that Mr. Hitchcock sexually abused her and Cynthia.

Over objection of nonstatutory aggravation, relevance and hearsay T 663-666, Dr. Jordan detailed L D ' report of sexual abuse of her and her sister. The state offered this hearsay to support the pedophilia diagnosis. T 666. The recital of L 's account far surpassed what she herself had told the jury. Dr. Jordan said she said appellant "always tried to put his hands in my pants, at least every other day, sometimes more than once a day," that "He was mean and rough, he didn't just lay on me --," "He was just so mean. He would slap me across the face. It happened to Cindy. It would be a ritual." Dr. Jordan gave a thirdhand account that L had told him that Cindy told her that "He never raped Cindy before; he would put his fingers in her, and on her butt. She was so scared of him."

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youthful offender institution....

He elaborated L 's account of appellant locking the brothers out and putting his hands in her pants; he had I saying appellant tried "to put his thing in my butt" and put his fingers in her. He repeated that the two wanted to tell the mother, appellant threatened to kill them, and Cynthia begged L not to tell. T 668-674.

The court admitted this evidence to rebut a claim of recent fabrication raised on cross of L D , and as the basis of the pedophilia diagnosis. Neither theory holds up. Repetition of hearsay is error in any event as the pedophilia diagnosis is incompetent evidence under Flanagan.

"Although an expert witness is entitled to render an opinion premised on inadmissible evidence when the facts and data are the type reasonably relied upon by experts on the subject, the witness may not serve merely as a conduit for the presentation of inadmissible evidence." Malakiewicz v. Berton, 20 Fla. L. Weekly D759 (Fla. 3d DCA March 29, 1995). Accord Forester v. Norman Roger Jewell & Brooks, 610 So. 2d 1369, 1373 n.2 (Fla. 1st DCA 1992). Here the witness was but a conduit of what each complainant told him, purportedly in support of the pedophilia diagnosis contrary to section 90.803(4).

State v. Jones, 625 So. 2d 821 (Fla. 1993) found inadmissible a doctor's repeating a child's statement that the defendant had "messed with her". The hearsay exception for medical diagnosis or treatment does not let the expert repeat statements identifying a perpetrator:

> In addition to statements about symptoms, statements describing the inception or cause of an illness or injury are admissible under the exception if they are reasonably pertinent to diagnosis or treatment. *Torres-Arboledo v. State*, 524 So. 2d 403, 407 (Fla.) *cert. denied*, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988). However, statements of fault are *not* admissible. *Id.*

Id. 823-24 (emphasis in original). Accord, Hitchcock v. State, 636 So. 2d 572 (Fla. 4th DCA 1994) (barring similar hearsay testimony related by forensic psychologist and child sexual abuse expert). The very purpose of Dr. Jordan's testimony detailing the sex abuse allegations was to fault Mr. Hitchcock. It was error to admit it.

While section 921.141 sometimes permits some hearsay, the state and federal Confrontation, Due Process and Jury Trial Clauses apply to the penalty phase of a capital trial. Rhodes v. State, 547 So. 2d 1201, 1204-05 (Fla. 1989); Engle v. State, 438 So. 2d 803, 813-14 (Fla. 1983); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). The hearsay admitted here violates these Clauses. Mr. Hitchcock had no "fair opportunity to rebut" the hearsay, section 921.141(1), since the hearsay allegations were remote in time, there was no discovery, and Dr. Jordan testified to matters and details of sexual abuse far beyond L . D jury testimony.

Even if the hearsay were admissible under section 921.141, its use was error because Dr. Jordan repeated specific hearsay allegations to the jury, and thus bolstered the witness's testimony. Hitchcock, 636 So.2d 572, disapproved the expert's detailing the child's claims of abuse, terming it "inadmissible hearsay that improperly bolstered the victim's credibility." Id. 573. The court wrote at page 574:

> [The expert's] testimony was hearsay that the trial court should have ruled inadmissible. In the present case, Appellant contended that the victim fabricated the allegations against him so that Appellant would not continue to punish him for his rebellious behavior. Determining the victim's credibility was one of the jury's crucial functions. Because [the expert] may have bolstered the victim's testimony, we cannot say beyond a reasonable doubt that the erroneous admission of [the expert's] testimony did not contribute to the verdict.

The other basis was to rebut a charge that L D had recently fabricated her testimony[40]. Florida law permits such rebuttal only if the rebutting statement occurred "'*prior* to the existence of a fact said to indicate bias, interest, corruption, or other motive to falsify.'" Jackson v. State, 498 So. 2d 906, 910 (Fla. 1986) (italics in original; quoting *McElveen v. State*, 415 So. 2d 746, 748 (Fla. 1st DCA 1982)). The "consistent" statements to Dr. Jordan were made but a few months before this penalty phase. There **was** no *prior* consistent statement made in the many years before she spoke to the state's expert, which is the sole time period inquired into by the defense.

In Parker v. State, 476 So. 2d 134, 137 (Fla. 1985), co-defendant Bush's girlfriend testified that Parker told her he had shot the victim. This Court found consistent statements to her family members inadmissible because the witness all along had the "same motive to testify falsely, namely, to keep Bush out of the electric chair," Id. Here, L D had a consistent motive all along too, only it was to put Mr. Hitchcock in it. Nothing about that motive changed *after* she spoke with Dr. Jordan. The defense cross questioned nothing occurring after her meetings with Dr. Jordan that can be said to be an event triggering a recent fabrication. Courts must "guard against allowing the jury to hear prior consistent statements which are not properly admissible." Rodriguez v. State, 609 So. 2d 493, 500 (Fla. 1992). The hearsay here was inadmissible since not made "prior to" anything the defense alleged was a reason for recent fabrication.

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[40] See Jones (hearsay to expert admissible to rebut charge on cross that state coached the testimony).

(2) Allegations of sexual abuse of R D .

Over relevancy objection, Dr. Jordan said it was hard for R D to talk, and he was very reluctant, and having emotional difficulty. However, "he got to the point where he was able to say that Ernie had sexually abused him, but nothing more than that" and "he was not able to give me details of what happened" T 676-677). Thus the state left to the jury's imagination what appellant may have done to him. Since Mr. D did not testify, it had only the expert's word "Ernie sexually abused him."

This hearsay violated the Confrontation Clause. Jones; Rhodes. There was no "fair opportunity to rebut", under section 921.141 since R D did not testify. It was improper bolstering, and its use violated Flanagan, since the opinion the hearsay testimony was offered to support is incompetent evidence. The vague allegations of sexual abuse is nonstatutory aggravation. Compounding the error was the testimony about R D ' emotional difficulties supposedly resulting from the incident. Walton v. State, 547 So. 2d 622, 625 (Fla. 1989) disapproved such testimony where a psychologist testified about the emotional condition of the victim's eight year old son to show why he could not testify at trial.

(3) Details of allegations of R M that Mr. Hitchcock had sexually abused him and others.

Dr. Jordan testified over objection that he spoke with L D about R M , that he later spoke with M himself who "told me that Ernie made him go down on him, and said if he told he would break his neck". T 673-74. The day before, "in the corridors of the courtroom", R M told him he was fourteen of fifteen when he first met Ernie, that he didn't like him and was scared of him, and appellant was "mean to R and R . He was

slapping them on the head, calling them stupid." He related hearsay about a 4th of July picnic incident when appellant "smashed the ball on R who was lying down. It hurt him."

He repeated a story that on the night of a July 4th picnic Mr. Hitchcock forced him to begin oral sex, and threatened to anally rape him, though the doctor said M was "a little unclear" about the anal rape. M told him "I know more happened with R and Brian." T. 680-81[41].

The sex abuse allegations mouthed by Dr. Jordan violate the hearsay rule and Confrontation Clause. Rhodes. They violate Flanagan since the opinion they were to support is inadmissible, and are nonstatutory aggravation, as shown above.

The state and witness presented the testimony to support the pedophilia diagnosis when they knew it could not, since the DSM IIIR bars from the definition of pedophilia the alleged sexual relationship by the 19 or 20 year old appellant with 14 or 15 year old R M . DSMIIIR, 302.20 Pedophilia, pp. 284-85. Use of an expert to mislead the jury is error. Nowitzke; Garcia.

(4) Statement of Richard Hitchcock.

The stepbrother Richard Hitchcock was said to have told Dr. Jordan that appellant once said he had a girlfriend and had trouble controlling sexual impulses. T 679. This is inadmissible hearsay which Mr. Hitchcock could not rebut. It is nonstatutory aggravation, and is reversible error for the reasons set forth above.

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[41] When Mr. M testified, the state asked only if he had related a 1976 incident and if "those incidents" were true. Mr. M answered yes to both questions. T 694-5.

(F) The state expert was improperly allowed to bolster the testimony of the alleged victims by commenting on the truthfulness of their reports.

After relating the allegations of those who said Mr. Hitchcock sexually abused them, Dr. Jordan expressed his opinion that each was truthful. T 675 (L D); 678 (R D); 681 (R M). He affirmatively concluded that appellant raped M . T 685. After watching him testify in court, he again (over objection) bolstered the veracity of M ' complaints. T 701.

"It is well established ... that an expert is prohibited from commenting to the fact-finder as to the truthfulness or credibility of a witness's statements in general." State v. Townsend, 635 So. 2d 949, 958 (Fla. 1994) (citing *Tingle v. State*, 536 So. 2d 202 (Fla. 1988), *Weatherford v. State*, 561 So. 2d 629 (Fla. 1st DCA 1990), and others). Although courts have upheld expert testimony diagnosing a child's condition as consistent with that of sexually abused children, Townsend, id. 958; Glendening v. State, 536 So. 2d 212 (Fla. 1988),[42] such testimony has never been held admissible when the person alleged to be the victim is an adult when he or she actually testifies.

Audano v. State, 641 So. 2d 1356, 1360 (Fla. 2d DCA 1994) disapproved testimony that a set of facts was "more consistent with a true allegation of sexual abuse." The court wrote:

> The cases which support the trial court's ruling here generally involve very young victims who do not testify. *Townsend* (two year-old victim did not testify); *Glendening* (three-and-a-half year old victim did not testify); *North v. State*, 65 So. 2d 77 (Fla. 1952), *affirmed*, 346 U.S. 932, 74 S.Ct. 376, 98 L.Ed.2d 423 (victim deceased). In *Glendening*, the court noted that the expert's opinion testimony would be helpful to the jury in view of the age of the

[42] Compare, J.H.C. v. State, 642 So. 2d 601, 602 (Fla. 2d DCA 1994) ("This record does not suggest that psychology, as a science, has determined that this battery of common psychological exams can validly and reliably identify persons who have been subject to sexual abuse").

> victim and the child's likely inexperience and inability to describe what happened.
>
> Here, because the victim testified, that consideration is not present. This type of testimony is inherently prejudicial to the defendant, especially in a case where the credibility of the perpetrator and the victim is the sole issue. We accordingly hold that in this limited context the trial court abused its discretion in allowing the expert's opinion into evidence.

Id. Accord, J.H.C., 642 So. 2d at 603 (opinion about sexual abuse profile of older victim impermissibly intrudes into jury's function to determine credibility).

In Ball v. State, 20 Fla. L. Weekly D 572, 573 (Fla. 2d DCA March 3, 1995), the state's expert said "it was common for sexual abuse victims to delay disclosure and that children are particularly apt to convey confusing and inconsistent information." The complainants were 11 or 12 when the expert spoke with them, and were 14 at time of trial. The expert testimony that their conduct was consistent with being victims of child sexual abuse was found to be harmful error even though the expert had "carefully qualified " his bolstering testimony:

> As is noted in *Audano* (which was not issued until after the trial), that type of expert medical testimony is helpful when the case involves a young victim who is unable to testify at trial. When the victim is older, however, and there exists no corroborating medical or physical evidence, these cases will often involve a credibility contest between the alleged abuser and the abused. As long as the child is capable of accurately relating events to the jury, the expert's opinion will invariably constitute a seal of approval for the alleged victim and a highly prejudicial stamp of condemnation for the alleged perpetrator.

Those testifying here were adults by the time of trial, and all but R D testified. Testimony that their "demeanor" was "consistent" with child sex abuse victims was improper bolstering. This "seal of approval for the alleged victim" was a "highly prejudicial stamp of condemnation" requiring reversal.

G. Allegations of chid sexual abuse and pedophilia became a feature of this trial.

The alleged "child sexual abuse" and the designation of Mr. Hitchcock as a pedophile diverted the jury from the guided decision-making required by the constitution and Florida law.

"This Court has long held that aggravating circumstances must be limited to those provided for by statute." Geralds v. State, 601 So. 2d 1157, 1162 (Fla. 1992). There were no convictions for the alleged abuse here, so it did not involve a prior violent felony aggravator and it was not alleged to have occurred during this killing. Irrelevant testimony about the collateral child sex crimes became the trial's focus, going far beyond rebuttal of mitigation[43].

Even if evidence is admissible at penalty phase, "the line must be drawn when that testimony is not relevant, gives rise to a violation of defendant's confrontation rights, or the prejudicial value outweighs the probative value." Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989) (disapproving excessive description of prior violent felony). Duncan v. State, 619 So. 2d 279, 282 (Fla. 1993) (error to use at penalty phase photo of injuries to victim in prior violent felony case, even though it was offered to rebut mental mitigation: "We agree with Duncan that the prejudicial effect of this gruesome photograph clearly outweighed its probative value. Section 90.403, Fla. Stat. (1991)"); Dragovich v. State, 492 So. 2d 350, 354 (Fla. 1986) (testimony the defendant was known as "the Torch" and that he was a suspect in other arsons required reversal of death sentence).

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[43] The court even refused to instruct the jury not to consider nonstatutory aggravation, T 760-61, and that future dangerousness was not an aggravating factor. T 757.

Admission of relevant "Williams Rule" evidence causes reversal if it is "so disproportionate to the issues ... that it may well have influenced the jury to find a verdict resulting in the death penalty ..." Williams v. State, 117 So. 2d 473, 476 (Fla. 1960). Testimony of sexual abuse of a child is highly prejudicial regardless of the issue being tried. See Coler v. State, 418 So. 2d 238, 239 (Fla. 1982) (testimony of "deviant sexual behavior" with children "obviously prejudicial"). The testimony here was irrelevant to any aggravating factor, and was offered supposedly as rebuttal. The probative value is thus low, and could not outweigh the prejudicial effect. See Turtle (reversal where evidence of uncharged sexual assault against another child "became such a feature of the trial that Turtle was unduly prejudiced and deprived of his right to a fair trial").

The state's reservation of collateral crime evidence for rebuttal heightens its prejudice. In Donaldson v. State, 369 So. 2d 691, 695 (Fla. 1st DCA 1979), the defendant's wife testified on rebuttal that he had once beat her, supposedly to rebut a self defense claim. The Court reversed, finding it "important to note ... that the state did not elect to use the wife as a witness on direct but withheld her testimony until the final stage of the trial", adding:

> It is our view that the purpose and effect of this testimony by way of rebuttal was to poison the minds of the jury against the appellant, as a 'last shot', so to speak. This court has held in *Reyes v. State*, 253 So. 2d 907 (Fla. 1st DCA 1971), that this sort of tactic on the part of the state serves to spotlight unrelated past activities on the part of the appellant as a last impression, making it difficult to envision how the jury could possibly not have been influenced by such inadmissible evidence.

Use of the testimony violates the Eighth and Fourteenth Amendments. The decision to impose death must be based on "reason rather than caprice or emotion." Gardner, 430 U.S. at 358. The Eighth

Amendment bars consideration of an aggravating circumstance invalid under state law, unless the state court finds its use harmless:

> We require close appellate scrutiny of the import and effect of invalid aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases.... In order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor. Otherwise, the defendant is deprived of the precision that individualized consideration demands under the *Godfrey* and *Maynard* line of cases.

Stringer v. Black, 112 S.Ct. 1130, 1136-37 (1992) (citations omitted). Accord, Romano v. Oklahoma, 114 S.Ct. 2004, 2011 (1994) (discussing Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988)). See also Steven Paul Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 Colum.L.Rev. 1249 (1993).

Where "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Payne v. Tennessee, 111 S.Ct. 2597, 2608 (1991); Romano, 114 S.Ct. at 2012 ("The relevant question in this case, therefore, is whether the admission of evidence regarding petitioner's prior death sentence so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process").

The Eighth Amendment protects the right to present mitigation and to a sentencing decision based on lawfully guided discretion. Overbroad reading of the extent to which mitigation opens the door to harmful "rebuttal" erases the guidance of the statutory aggravating factors and restricts presentation of mitigation. A death sentence under such circumstances violates the constitutional mandate that the sentencer be suitably guided and directed. Citing Proffitt v.

Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 859 (1976) and Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Court wrote in McCleskey v. Kemp, 481 U.S. 279, 303-304, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) that the state must "narrow the class of murderers subject to capital punishment" by providing "specific and detailed guidance" to the sentencer. Broad use of the door-opening rule below erased the guided discretion of section 921.141.[44]

POINT II

THE EXTRAORDINARY DELAY IN PROVIDING A PENALTY PHASE RESULTED IN THE INABILITY TO PRESENT A DEFENSE, AND IN OTHER PREJUDICE, REQUIRING REDUCTION TO LIFE.

The long delay in affording a constitutional penalty phase violates the Speedy Trial and Due Process Clauses, and constitutes cruel and unusual punishment.[45] Appellant has always sought a fair penalty trial since his arrest in 1976, but Florida has continuously failed to provide one. As a result he was rendered helpless to meet the state's extensive case that he was a child sexual abuser, he lost significant mitigation through the death of favorable witnesses, he has been confronted with an aggravating circumstance not present at his initial sentencing, the state threatened the jury that the state would soon release him, and he has suffered other substantial preju-

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[44] Use of the door-opening rule at bar violates due process. Bouie v. City of Columbia, 378 U.S. 347 (1964). "As Justice Holmes wrote [over] 60 years ago: 'Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'" James v. Kentucky, 466 U.S. 341, 349 (1984) (quoting Davis v. Wechsler, 263 U.S. 22, 24 (1923)). Since the door-opening rule is ambiguous and uneven in application, it cannot authorize the unlawful testimony here. Ford v. Georgia, 111 S.Ct. 850 (1991); Reece v. Georgia, 350 U.S. 85 (1955).

[45] These rights are guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, 16, 17 and 21 of the Florida Constitution.

dice. The prejudice from this extraordinary delay requires reduction of his sentence to life.

1. Violation of the right to a speedy trial.

The right to speedy trial applies to capital sentencing. Pollard v. United States, 352 U.S. 354 (1957), assumed the speedy trial right encompasses even noncapital sentencing, and "[o]f note, 'no federal court has held that sentencing is *not* within the protective ambit of the Sixth Amendment right to a speedy trial.'" Burkett v. Fulcomer, 951 F.2d 1431, 1438 n. 7 (3d Cir. 1991) (quoting Perez v. Sullivan, 793 F.2d 249, 253 (10th Cir. 1986). In Moore v. Zant, 972 F.2d 318, 320 (11th Cir. 1992), the Eleventh Circuit held the right applied to capital sentencing proceedings, warning:

> In this case, if Georgia waits too long, the state could lose the right to sentence Moore to death. Moore has speedy trial rights under the sixth amendment that would cover a death penalty proceeding. *United States v. Howard*, 577 F.2d 269, 270 (5th Cir. 1978) ("constitutionally guaranteed right to speedy trial applies to sentencing").

Moore, 972 F.2d at 320. But see Lee v. State, 487 So. 2d 1202 (Fla. 1st DCA 1986) (due process, not speedy trial, governs non-capital sentencing).

In Doggett v. United States, ___ U.S. ___, 112 S.Ct. 2686, 2696 (1992), even though the petitioner "did indeed come up short" in showing prejudice, delay required outright dismissal of charges. The Court restated the four relevant inquiries to determine a violation of the right to a speedy trial:

> whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result.

Doggett, 112 S.Ct. at 2690 (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972))[46]. Mr. Hitchcock raised the speedy trial and related issues pretrial, but the trial court denied the motion to impose a life sentence. R 122-125. Applying the relevant factors, it is plain that relief is required.

(a) The delay before trial was uncommonly long.

The penalty phase here occurred August 23-30, 1993, over 17 years after the July 1976 arrest. In Doggett, the "extraordinary 8½ year time lag between Doggett's indictment and arrest clearly suffice[d] to trigger the speedy trial enquiry." Id. 2691. The Court noted that "the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." Id. at n.1. See Madonia v. State, 648 So. 2d 260 (Fla. 5th DCA 1994) (delay of more than three years between charge and arrest "is sufficient time to make the delay 'presumptively prejudicial' and require a *Doggett* inquiry"). Compare Harris v. Champion, 15 F.3d 1540, 1560 (10th Cir. 1994)("a two-year delay in finally adjudicating a direct criminal appeal ordinarily will give rise to a presumption of inordinate delay that will satisfy this first factor in the balancing test").

The delay between the arrest here and the penalty phase is staggering. In Burkett v. Cunningham, 826 F.2d 1208, 1223-24 (3d Cir. 1987), the court found "egregious" delays in sentencing a fraction of the seventeen years in this case. The seventeen year delay here is presumptively prejudicial.

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[46] In assessing the related issue of appellate delay, "[t]he factors of *Barker* are preferred . . . since the reasons for constraining appellate delay are analogous to the motives underpinning the Sixth Amendment right to a speedy trial." Harris v. Champion, 15 F.3d 1538, 1559 (10th Cir. 1994) (*quoting Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980).

(b) The government is more to blame for the delay.

Had Florida obeyed the law, a lawful penalty phase would not have been so delayed. Mr. Hitchcock continuously raised his right to a constitutionally adequate penalty phase throughout the years, but this effort was continuously thwarted by the state. His claims were pending for nearly five years on direct appeal of the conviction and sentence, in Hitchcock v. State, 413 So. 2d 741 (Fla.), *cert. denied*, 459 U.S. 960, 103 S.Ct. ___, 74 L.Ed.2d 213 (1982). He promptly pursued his challenges in unbroken litigation in the state and federal courts. Hitchcock v. State, 432 So. 2d 42 (Fla. 1983) (3.850 appeal), Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984), *vacated for reh'g en banc*, 745 F.2d 1348 (11th Cir. 1985), *reinstated in part*, Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) (en banc), until 1987 when the Court agreed "it could not be clearer" that the penalty phase violated the eighth amendment. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 262 (1987). He was retried, but that penalty phase too was found constitutionally deficient. Hitchcock v. State, 614 So. 2d 483 (1993). His speedy trial claim is not invalid because he exercised his right to appeal. See United States v. Loud Hawk, 474 U.S. 302 (1986) (applying Barker to delay due to interlocutory appeals). The state cannot visit blame on him for the delay when he has been proven correct in asserting that his prior penalty phases were conducted unlawfully

(c) The speedy trial right has been asserted in due course.

Mr. Hitchcock has always sought a constitutional trial, and first asserted this claim as early as 1988, prior to his second penalty phase trial. See Hitchcock v. State, 578 So. 2d 685 at 693. He has been continuously in state custody, available for trial.

(d) The delay has prejudiced Mr. Hitchcock.

Extraordinary delay "threatens to produce more than one sort of harm, including 'oppressive pretrial incarceration,' 'anxiety and concern of the accused,' and 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." Doggett, 112 S.Ct. at 2692 (citing cases). "Of these forms of prejudice, 'the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Doggett, 112 S.Ct. at 2692 (quoting Barker, 407 U.S. at 532, 92 S.Ct. at 2193)[47].

The delay has produced the last, "most serious" form of prejudice. The delay fatally impaired the defense. For the first time after seventeen years, the state produced extensive and extremely damaging evidence that Mr. Hitchcock had sexually abused several children. The passage of time prevented rebuttal of these charges[48].

The delay also led directly to the state's threat to the jury that it, the state, would soon release Mr. Hitchcock because he had served 17 years of the 25-year terms before parole eligibility.[49]

Three important witnesses died during the delay, silencing their humane insights. The court barred Richard Greene from telling jurors

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[47] These factors are modified by courts considering the related issue of appellate delay. There the interests in avoiding delay are described similarly as: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." Harris, 15 F.3d at 1559 (*quoting Rheuark*, 628 F.2d at 303).

[48] This substantial prejudice was not present in the last appeal where this court concluded there was "no undue prejudice caused by the delay." Hitchcock, 578 So. 2d at 693.

[49] This prejudice was also not present at the last appeal.

what the three dead witnesses would have said had Mr. Hitchcock been tried before their deaths.[50] They would have related his early life and work habits, and the time he risked his life to save his drowning uncle. One witness was a former police officer and another a non-family member. In this case who the witnesses were would have been as persuasive to the jury as what they had to say. Their testimony would have been especially valuable to add credibility to the evidence presented, most of which came from the defendant's family.

He was prejudiced because by the time of this sentencing, those who knew him best were death row blockmates. The state underscored the menace of these men in cross examination and in closing argument. He was prejudiced because jurors knew he had been sentenced to death before and the state stressed the delay throughout the trial. They heard the resentencing occurred because of a legal technicality. He no longer looked twenty years old, but instead a veteran of death row. These problems materially and severely hampered his case for life.

Mr. Hitchcock was subjected to "oppressive incarceration" and the "anxiety" which the Court has recognized: "when a prisoner is sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." In re Medley, 134 U.S. 160, 172, 10 S.Ct. 384, 33 L.Ed.2d 835 (1890). See Lackey v. Texas, 115 S.Ct. 1421 (1995) (STEVENS, J., respecting denial of certiorari; collecting cases).

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[50] A full version of this testimony is covered elsewhere in the brief. Even if this Court decides the proffer should be admitted, it cannot cure the prejudice to Mr. Hitchcock's speedy trial right. The credibility of the witnesses would be diminished by the presentation of their statements through his former lawyer.

2. Other constitutional violations.

Due process forbids delay prejudicing the ability to present a case. See United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497 (1982); Scott v. State, 581 So. 2d 887 (Fla. 1991) (due process violated by seven year, seven month delay where defense witnesses had died, exculpatory evidence was lost, and basis of scientific evidence was compromised). See Harris v. Champion, 15 F.3d 1538 (3d Cir. 1994) (due process, equal protection, right to effective assistance may be violated by appeal delays). In this death penalty case, delay violated the cruel and unusual punishment requirement of heightened reliability. See California v. Brown, 479 U.S. 538, 107 S.Ct. 837 (1987); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976). Fundamental fairness and the Eighth Amendment demand that a defendant not suffer the added punishment of death when through no fault of his own, delay prejudiced his case for life. Exclusion of mitigation violates the Eighth Amendment. See Hitchcock, 107 S.Ct. at 1824; Skipper v. South Carolina, 476 U.S. 1 (1986); Mills v. Maryland, 108 S.Ct. 1860 (1988). Excluding evidence by delay violates this rule.

The delay led to the instruction to the jury (discussed below) on the case's history which made the resentencing seem a mere formality.

The delay led to the state's after-the-fact applying the imprisonment circumstance to him: he has lost his complete defense to that circumstance -- that it did not apply to parolees.

The extent of the harm here requires a life sentence be imposed.

POINT III

MR. HITCHCOCK WAS PREVENTED FROM PRESENTING MITIGATING EVIDENCE, AND HIS SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS 9, 16, 17, 21 AND 22 OF THE FLORIDA CONSTITUTION, THE MANDATE OF THE UNITED STATES SUPREME COURT, AND SECTION 921.141, FLORIDA STATUTES.

The Eighth Amendment forbids exclusion of mitigation at capital sentencing. Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982), Skipper. In this very case, the Court condemned bars to mitigation. Hitchcock, 107 S.Ct. at 1824. It allowed resentencing, "'provided that [the State] does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available.'" Hitchcock, 107 S.Ct. at 1824 (e.s.). Exclusion of mitigation violates not only the Eighth Amendment, but also the explicit mandate of the Supreme Court.[51]

(a) Restriction on testimony proffered from Richard Greene

The state sought to prevent Richard Greene's testimony about:

"1. the Defendants [sic] friendship with an 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.

4. the sentence received by the inmate with whom the Defendant attempted to escape."

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[51] Such exclusion also violates Section 921.141(1), Florida Statutes, providing for the admissibility of "Any ... evidence which the court deems to have probative value." These are the plain words of the governing statute. Where the words of a statute are plain and unambiguous, that meaning will be given effect. See Graham v. State, 472 So. 2d 464 (Fla. 1985).

R 85. The Court granted the state's motion as to each ground, T 27, 29, and at trial the defense proffered the testimony of Richard Greene on the first three of these subjects. T. 427; S 11-40[52].

1. Mr. Greene would have testified to Mr. Hitchcock's empathy, concern for others and absence of racial prejudice. In the proffer Mr. Greene relates how appellant became close to David Washington, a black inmate executed in 1984. Mr. Hitchcock was sad at the execution and spoke of his concern for Washington's family. S 26-28. When Greene himself witnessed an execution, Mr. Hitchcock wrote him a comforting letter asking after his well-being: "And I considered it very moving on his part, considering the situation he was in, that he would stretch himself out to me." S 29.

While Shriner v. State, 386 So. 2d 525 (Fla. 1980) held irrelevant a descriptive account of an electrocution, the proffer below never went into the barbarities of an execution. The proffer addressed the effect of the execution of a close black friend, and how Mr. Hitchcock showed sympathy and concern to Greene after he witnessed the execution. The error in excluding this testimony of Mr. Hitchcock's lack of racism, sympathy and concern for others violates the holding of the Supreme Court. As evidence of positive character traits showing Mr. Hitchcock will get along well in prison, they mitigate against a penalty of death. See Skipper, 106 S.Ct. at 1671.

2. Also proffered was testimony that Mr. Hitchcock's development was dramatic and one of the most tremendous changes Greene had seen in a prisoner. S 24-27. Greene saw maturity and self-reflection in Mr. Hitchcock. S 24. Greene's opinion that Mr. Hitchcock showed more improvement than virtually any prisoner he had seen and showed

[52] The defense did not pursue the fourth matter.

maturity and self-reflection were admissible.[53] Skipper. Where character is a direct issue, actual incidents showing character are material under section 90.405. Opinion as to what these incidents show is admissible under section 90.701, just as lay opinion on sanity and competency is admissible. See Garron v. State, 528 So. 2d 353, 356-7 (Fla. 1988)[54].

The court also suppressed proffered testimony by Greene based on hearsay statements of G.E. Motley, Lee Baker and Charlie Hitchcock (appellant's uncle). All three are now deceased. Greene obtained the statements preparing for appellant's clemency hearings. S13-14.

Baker, who had been a Deputy Sheriff and Town Marshal in appellant's tiny hometown of Manila, Arkansas. S 15 "He first met Ernie when, at or around the time that Ernie's father was dying of cancer. Ernie's father had a, a facial cancer that slowly ate away parts of his face and caused him to die." S 15. He said the father's death greatly affected Ernie Hitchcock for many years and left the family in severe financial straits. S 15-16. Young Ernie[55] was very concerned about helping out the family in any way possible. S 15. Marshal

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[53] Although section 90.405(2) does not mention opinion testimony as a means of proof when character is at issue, Gardner v. State, 480 So. 2d 91 (Fla. 1985), held there was no error to allow the opinions of a police officer on an accomplice's character and personality.

[54] In the previous appeal, this Court wrote of this testimony and the previously mentioned testimony about Mr. Hitchcock's empathy and absence of prejudice that "some people might view [these items] as tending to show that Hitchcock might be able to rehabilitate himself." Hitchcock, 578 So. 2d at 689-90. This Court went on to find the exclusion harmless because "most of Hitchcock's other witnesses testified how they believed he had changed since being imprisoned." The harmlessness finding does not apply here because this penalty phase did not contain nearly as much testimony about Mr. Hitchcock's change while on death row as did the prior penalty phase, when a number of death row inmates testified.

[55] He was six when his father died. T 410.

Baker never saw him be violent. Id. Ernie was upset by his step-father's drunken violence toward his mother. Id. He had a reputation for hard work in the community, never had problems getting along with anyone on the job and there was not violent. S 16.

Mr. Motley owned a farm on which Ernie Hitchcock worked and stated he was an excellent worker, working often 10 hours a day picking cotton with never a complaint. S 14. Ernie began work at a young age to support his family R851. Motley never saw Ernie Hitch-cock fight with his fellows. S 17.

Charley Hitchcock said the death of Ernie's father devastated him and the family, and Ernie made every effort to help out. S 18. Charley had supervised Ernie every day at a farm and said "that Ernie had been an excellent worker there. He was willing to work long hours. And he never complained about work. He also said that Ernie got along well with everyone on the job. That he never saw any evidence of fighting or violence in him." S 19. Ernie began working at around age 10. Id. Once Charley fell into the river and "Ernie jumped in, at some risk to himself, and saved Charley's life." Id.[56]

Section 921.141 authorizes hearsay unless the defendant has no fair opportunity to rebut. See Perri v. State, 441 So. 2d 606, 608 (Fla. 1983). Even if the law required giving the state an opportunity

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[56] The exclusion of hearsay testimony also compounded the prejudice to Mr. Hitchcock due to the delay in his case. See Point II. The exclusion was all the more harmful since Wayne Hitchcock, who testified at the 1988 penalty phase, had died since then. His previous testimony was read to the jury (T 477-487). He was one of the few people who could provide firsthand testimony about Ernie Hitchcock's childhood, in particular the firsthand account of the time Ernie saved his father from drowning. The absence of Wayne's live testimony further heightens the error of excluding Greene's account of what Charlie Hitchcock told him about Ernie, particularly saving his life.

to rebut defense hearsay,[57] the state had such an opportunity here. As in Rhodes, the state could cross-examine the witness testifying to the hearsay of others. The fact that the witness was an attorney gathering information for his client does not make the hearsay unrebuttable. See Buenoano v. State, 527 So. 2d 194 (Fla. 1988) (prosecutor may testify to hearsay details of previous crime). Other witnesses were available who had observed Mr. Hitchcock during this same time, so the excluded testimony was fairly rebuttable since the state could question those witnesses to clarify fact and introduce rebuttal evidence, if it had any to offer. See King v. State, 514 So. 2d 354, 359 (Fla. 1987).

More fundamentally, the prosecutor had a fair opportunity to rebut because he had the precise testimony the defense sought to offer here from the penalty phase that occurred in 1988. This is in addition to the detailed road map of potential defense testimony from five years of post-conviction and clemency litigation. The Motion to vacate filed May 3, 1983, also detailed these statements[58]

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[57] The state has no due process rights implicated in criminal proceedings: the Due Process Clause protects "persons" from unjust loss of life, liberty, or property at the hands of the state. The state is not a "person" for the purposes of due process. South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966). Its life, liberty, or property is not at stake in a criminal trial.

[58] A fair opportunity to rebut should not be read to require the party offering hearsay to hand rebuttal evidence to their opponents. Had the State wished, it could have sent investigators to Arkansas. Further, Sonny and Fay Hitchcock were amenable to process and friendly to the state. Richard Hitchcock was available and testified. They were familiar with the period in question and could have presented rebuttal evidence. Where the State had actual knowledge of the subject matter and friendly witnesses who could testify to rebuttal evidence, a fair opportunity exists. In fact, the State did little to contest the accuracy of the statements made by those who did testify to Ernie Hitchcock's early life. The lack of any rebuttal evidence in these circumstances does not mean the State was deprived of an opportunity to find it: it means none exists.

In Green v. Georgia, 442 U.S. 95 (1979), the Court ruled unconstitutional the exclusion of defense hearsay evidence in capital sentencing. The evidentiary ruling that the evidence was excludable hearsay was wrong where the witnesses were dead and other alternatives existed to the complete exclusion of the evidence. That the hearsay was gathered in the course of a clemency proceeding could certainly have been brought out on cross exam of Greene; but that goes to the weight, not admissibility, of the testimony. The exclusion of relevant mitigating evidence on hearsay grounds violated Lockett.

(b) Exclusion of portions of testimony of mental health expert Dr. McMahon

The court granted, R 29, the state's motion, R 85, to limit Dr. McMahon's testimony and related argument by counsel as to:

> "1. the results or any reference to a study comparing inmates on death row to inmates who received life sentences.
>
> 2. her recommendation to the Clemency Board as to this or any other inmate or her report to that body."

Dr. McMahon examined appellant in preparation for clemency and again shortly before testifying below and opined that he had matured. Her proffered testimony was that, based on a study comparing the demographic and psychological characteristics of a representative sample of life-sentenced and death-sentenced murderers in Florida, appellant's characteristics more closely matched those receiving life sentences. SR 44-56. She related Mr. Hitchcock's characteristics, deduced from her interviews, to the need for death as a punishment. It was relevant mitigation whose exclusion violated Lockett.

(c) Exclusion of portions of Radelet testimony

The state moved to limit Michael Radelet's testimony and the related comments of counsel as follows:

"1. That the Defendants execution would not deter others from committing murder.

2. The cost of execution compared to the cost of imprisonment for life.

3. Lingering doubt as to the confession.

4. The conditions the Defendant would face if given a life sentence.

5. The level of premeditation in the killing in light of the Defendants educational level."

R 84-85. The court reserved ruling pretrial, R 22-23 29, but at trial limited the testimony as the prosecutor had asked. T 566.

The Memorandum of Planned Testimony, accepted by the court as a proffer, details the testimony. S 60-64. Radelet would have testified that executing Mr. Hitchcock, given the nature of his crime, would have no deterrent effect, that executing him would cost more than keeping him in prison for life, that lingering doubt often plays a role when the primary evidence against a defendant is, as here, a retracted confession, and that a life sentence and the conditions Mr. Hitchcock would face under such a sentence would be adequate retribution given his character and family ties.

The testimony would have related the crime and the defendant with the proper punishment. The rules of evidence permit expert testimony on any subject which will help the jury understand or evaluate the evidence. "[T]he opinion is admissible only if it can be applied to evidence at trial." § 90.702. Radelet's testimony would have helped the jury and applied to the facts of the case, and it was admissible under 90.702. It constituted independent mitigation relating Mr. Hitchcock's character and the crime to relevant sentencing factors offered by the defense. Its suppression violates Lockett.

(d) Exclusion of the plea offer

The court barred evidence that the state had once deemed that the case deserved a life sentence. The defense introduced an affidavit signed by Micetich, Assistant State Attorney at the trial of this matter, showing the State had offered to recommend a life sentence in exchange for a plea of guilty. S 65-66. The offer to recommend a life sentence was relevant mitigation under Lockett. The prosecutor was an expert who examined facts of the case, and using his judgement decided that life was appropriate. Elam v. State, 636 So. 2d 1312, 1315 (Fla. 1994) (Reducing to life noting "[t]he state itself originally concluded that the crime did not warrant the imposition of the death penalty and agreed to a plea bargain of life imprisonment until (the defendant) himself insisted otherwise"). Certainly, if the prosecutor told the jury at the sentencing phase he recommended a life sentence, it would be relevant. The problem with the proffered evidence is not that it is irrelevant, but that it is too relevant. Barring mention of this favorable recommendation by the prosecution violates Lockett.

POINT IV

THE COURT'S REFUSAL TO GIVE PROPER JURY INSTRUCTIONS RENDERED THE SENTENCING UNCONSTITUTIONAL AND PERMITTED THE STATE'S UNCONSTITUTIONAL ARGUMENT THAT THE JURY IGNORE MITIGATION AND CONSIDER AGGRAVATING CIRCUMSTANCES UNCONSTITUTIONALLY.

The court must instruct the jury on the law. Fla. R. Crim Proc. 3.390(a). Improper penalty instructions violate the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Espinosa v. Florida, 112 S.Ct. 2926 (1992). Due process requires exact instruction on each element the state must prove. Screws v. United States, 325 U.S. 91, 107 (1945). It is fundamental error to instruct incorrectly as to what the state must prove. State

v. Delva, 575 So. 2d 643 (Fla. 1991) (error in instruction on element not fundamental where element not in dispute).

The same rules apply to instructions on defensive issues. Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (1945) ("The same would necessarily be true when the same character of error is committed while charging on the law relative to the defense."). Arguments of counsel do not substitute for instructions by the court. Taylor v. Kentucky, 436 U.S. 478, 488-489 (1978), Mellins v. State, 395 So. 2d 1207, 1209 (Fla. 4th DCA 1981). Thus the prosecutor below cogently argued: "I cannot argue a legal proposition that the court has not informed the jury of." T 775-76.

A. The court violated the foregoing in denying proposed defense instructions not covered by the standard instructions used at bar:

1. Duty to consider mitigation.

Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) condemn any procedure in which mitigation has no weight at all. See also Barclay v. Florida, 463 U.S. 939, 961, n.2 (1983) (Stevens, J., concurring). The standard instructions given at bar do not inform the jury of its duty of consider mitigation -- they leave the matter to the jury's discretion.[59] Hence, the court erred in refusing to instruct the jury: "You must consider all evidence of mitigation. The weight which you give to a particular mitigating circumstance is a matter for your moral, factual, and legal judgment.

[59] Over objection, T 292-93, 766, the court instructed: "Among the mitigating circumstances you may consider, if established by the evidence, are the age of James Ernest Hitchcock at the time of the crime and any other aspect of James Ernest Hitchcock's character or record, and any other circumstances of the offense." T 838 (e.s.).

However, you may not refuse to consider any evidence of mitigation and thereby give it no weight." R 382, T 766.[60]

2. Individual consideration of mitigation.

The court refused to instruct: "Unanimity is not required for the finding of a mitigating circumstance; each juror may individually determine whether he or she believes a mitigating circumstance exists." R 373. The instruction correctly states the law under Mills and McKoy v. North Carolina, 110 S.Ct. 1227, 1233 (1990) ("Mills requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death.").

3. Aggravating circumstances must outweigh mitigation.

The defense proposed instructions that the jury was to vote for death only if the aggravating circumstances outweighed the mitigating circumstances and that the state had the burden of proving that a death verdict was appropriate. R 348, 351, 386, 387, 406, 407, T 289-90, T 747 ff. The instructions were correct under Arango v. State, 411 So. 2d 172, 174 (Fla. 1982) ("A careful reading of the transcript ... reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.") (e.s.) and Parker v. Dugger, 111 S.Ct. 731, 735 (1991) ("The death penalty may be imposed only where sufficient

[60] The court's ruling permitted the state's improper argument respecting mitigation discussed below.

aggravating circumstances exist that outweigh mitigating circumstances.").

4. Most aggravated, least mitigated murders.

The defense sought these instructions: "The death penalty is warranted only for the most aggravating and unmitigated of crimes. The law does not require that death be imposed in every conviction in which a particular set of facts occur. Thus, even though the factual circumstances may justify the sentence of death by electrocution, this does not prevent you from exercising your reasoned judgment and recommending life imprisonment." R 389, 350 (similar instruction), T 748. "With regard to your recommendation of life or death, the Court hereby instructs you that the death penalty is intended for only the most aggravated and unmitigated of cases." R 390. These proposals correctly state the law. E.g., State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973) ("Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes."),[61] Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975), Downs v. State, 386 So. 2d 788 (Fla. 1980).

5. Instruction on unproven aggravating circumstances.

Since the death penalty is reserved for the most aggravated and least mitigated first degree murders, State v. Dixon, the defense

[61] This Court likewise stated at page 8 that the provision of appellate review of the sentence evidences "legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes."

sought an instruction[62] that there were other aggravating circumstances not applicable at bar. Without such instruction, the jury could not find this was among the most aggravated of murders so as to require a death sentence.

6. Doubling of Circumstances.

The court refused instructions to prevent doubling of aggravators under Provence v. State, 337 So. 2d 783 (Fla. 1976). R 395.[63] Such instructions ensure proper use of aggravating circumstances. Castro v. State, 597 So. 2d 259 (Fla. 1992).

7. Circumstances not to be counted.

The court denied instructions that the penalty verdict was not to be reached by merely counting sentencing circumstances,[64] which

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[62] "The Legislature has established eleven (11) Statutory aggravating factors, but you will be instructed on only ___ number, since those are the only ones arguably applicable to the Defendant." R 392.

[63] "The State may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two (2) or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance." R 395. "Where the same aspect of the offense at issue gives rise to two (2) or more aggravating circumstances, that aspect can only be considered as one aggravating circumstance." R 396.

[64] "In determining whether to recommend life imprisonment or death, the procedure you are to follow is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but, rather, you are to exercise a reasoned judgment as to what factual situations require the imposition of death and which situations can be satisfied by life imprisonment in light of the totality of the circumstances." R 397. "It must be emphasized that the procedure to be followed by the jury is not a mere counting process of the number of aggravating circumstances and the number of mitigating circumstances, but, rather, a reasoned judgment as to what factual situations require the imposition of death and which situations can be satisfied by life imprisonment in light of the totality of the circumstances." R 398. "You are to use a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of circumstances present. You are not to use a counting process in determining whether aggravating circumstances outweigh mitigating circumstances." R 399.

rightly state the law under, e.g., State v. Dixon and Hargrave v. State, 366 So. 2d 1, 5 (Fla. 1978) ("the statute does not comprehend a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum").

8. Acts committed after decedent's death.

The court refused to instruct that "acts committed after the death of the victim are not relevant in considering whether the homicide was 'especially heinous, atrocious, or cruel.'" R 401. The refused instruction correctly states the law. Halliwell v. State, 323 So. 2d 557 (Fla. 1975); Scott v. State, 494 So. 2d 1134 (Fla. 1986). The refusal let the jury consider an invalid theory for application of the circumstance. The presentation of an invalid circumstance violates the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Stringer, Espinosa.

9. Premeditation does not make a murder heinous, atrocious, or cruel.

The court refused to instruct that "premeditation does not make a killing 'especially heinous, atrocious, or cruel.'" R 402. The instruction correctly stated the law under Armstrong v. State, 399 So. 2d 953 (Fla. 1981) and Lewis v. State, 398 So. 2d 432 (Fla. 1981). It is not covered by the standard instructions, and jurors might reasonably believe that any premeditated first degree murder is "especially heinous, atrocious, or cruel." Godfrey v. Georgia, 446 U.S. 420, 429 (1980), Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1987). The ruling let the jury consider a flawed theory for application of the circumstance in violation of Stringer, and Espinosa.

10. Proffitt definition of HAC.

The court refused the following instruction:

> The aggravating circumstance of heinous, atrocious or cruel may only be applied in torturous murders. Torturous murders are those that show extreme and outrageous depravity as exemplified either by:
>
> a) the desire to inflict a high degree of pain, or
>
> b) utter indifference to, or enjoyment of, the suffering of another.

R 405. The instruction correctly defined the statute by limiting it as approved in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976). See also Shere v. State 579 So. 2d 86 (Fla. 1991), and Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

11. Consideration of mercy.

Mercy is a significant part of sentencing decisions. See Presnell v. Zant, 959 F.2d 1524 (11th Cir. 1992) (citing cases). "Not only must mercy be allowed, but now only the merciful may be permitted to sit in judgment." Morgan v. Illinois, 112 S.Ct. 2222, 2242 (1992) (Scalia, J., dissenting). Nevertheless, the court refused to give this instruction: "Mercy is a consideration which may be considered by a jury in recommending sentence." R 408. The refusal was error, since the standard jury instructions do not inform the jury of the role of mercy in its sentencing determination.

12. Nonstatutory circumstances.

The court denied defense jury instructions on non-statutory circumstances including lack of deliberate intent to kill, 403, 409, lack of calculation or planning of killing in considerable advance, 410, influence of alcohol at time of homicide, 411, childhood and upbringing saddled him with an emotional handicap, 412, unlikelihood that the defendant will endanger others while serving a sentence of

life in prison, 413, mercy, 408, employment history, R 361, T 756, pro-social change, R 362, T 756, amenability to rehabilitation, R 363, T 756-57, not being a danger to others in prison, R 365, T 757, protection of the public afforded by a life sentence, R 366, T 757, a deprived childhood, R 370, 371, T 757-58, exemplary deeds, R 372, T 758-59, stresses and environment influences, R 368-69, T 757-58. These nonstatutory factors must receive independent treatment on a like footing with statutory ones. Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990). It was error to refuse to instruct on circumstances supported by evidence.

13. Death sentence never automatic.

The court refused these instructions: "You are never under a duty to impose death unless you conclude as a matter of your own independent moral judgment that death is the appropriate penalty." R 354, T 750. "To recommend a life sentence it is not necessary to find evidence of a specific mitigating circumstance, if all of the circumstances of the case and of the defendant convince you that such a recommendation is appropriate." R 355, 378 (similar instruction), T 751, 763-64. "It is not necessary to attach a title or label to evidence you find as mitigating. If the evidence taken as a whole causes you to conclude that mercy is appropriate, that can be weighed as a mitigating circumstance to warrant a life sentence recommendation." R 375, T 761. Section 921.141(2) requires weighing of circumstances but has no requirement of a death verdict even where there are substantial aggravating circumstances and no mitigation.

14. Definition of mitigation.

The court refused instructions defining mitigation.[65] These instructions are not covered by the standard instructions (which do not define mitigation), and are correct statements of the law under Woodson v. North Carolina, 428 U.S. 280, 304 (1976), and Coker v. Georgia, 433 U.S. 584, 590-91 (1977). The Eighth Amendment requires the giving of such instructions. Spivey v. Zant, 661 F.2d 464, 471 (11th Cir. 1981).

B. The court likewise in giving unconstitutional instructions on the heinousness (HAC) and imprisonment circumstances.

1. In Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992), this Court wrote of HAC: "The United States Supreme Court recently has stated that this factor would be appropriate in a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim.' Sochor v. Florida, 112 S.Ct. 2114, 2121 (1992). Thus, the crime must be both conscienceless or pitiless and unnecessarily torturous." See also Williams v. State, 574 So. 2d 136, 138 (Fla. 1991) ("This factor is permissible only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another."), Shere v. State, 579 So.

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[65] "A mitigating circumstance is anything about James E. Hitchcock or the crime which, in fairness and mercy, should be taken into account in deciding punishment even when there is no excuse or justification for the crime. Our law requires consideration of more than just the bare facts of the crime; therefore, a mitigating circumstance may stem from any of the diverse frailties of human kind." R 357, T 753. "A mitigating circumstance does not justify or excuse the offense but in fairness should be considered as extenuating or reducing the degree of moral culpability and punishment." R 358, T 754-55. "Mitigating circumstances are any facts relating to Mr. Hitchcock's age, character, environment, mentality, life and background or any aspect of the crime itself which may be considered extenuating or reducing his moral culpability or making him less deserving of the extreme punishment of death. You may consider as a mitigating circumstance any circumstance which tends to justify the penalty of life imprisonment." R 381, T 765.

2d 86 (Fla. 1991) (HAC is "proper only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another."), McKinney v. State, 579 So. 2d 80 (Fla. 1991) (error to use HAC absent torturous intent), Santos v. State, 591 So. 2d 160 (Fla. 1991) (error to find HAC where "The present murders happened too quickly and with no substantial suggestion that Santos intended to inflict a high degree or pain or otherwise torture the victims."). Phillips v. State, 608 So. 2d 778 (Fla. 1992) ordered resentencing in part because of the failure to present evidence of a lack of the capacity to form the requisite intent for HAC.

Despite the foregoing, the court refused to instruct on the torturous intent element. T 739-45. This refusal let the state focus its argument on HAC entirely on Ms. D. ' state of mind. T 799-803. The state was unconstitutionally relieved of its burden of proving torturous intent, and the jury did not find it. Sandstrom v. Montana, 442 U.S. 510, 524, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). Hence, the death sentence is unconstitutional under Article I, Sections 2, 9, 12, 16 and 17 of the state Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution. Espinosa, Motley, Screws, Taylor, Mellins.

2. Over defense objection, the court granted the state's request to instruct the jury that parole satisfied the requirements of the imprisonment circumstance. T 775-76. This instruction removed this element from the jury's consideration and renders the death sentence unconstitutional pursuant to Article I, Sections 2, 9, 12, 16 and 17 of the state Constitution and the Fifth, Sixth, Eighth and Four-

teenth Amendments to the federal Constitution. Francis, Espinosa, Motley, Screws, Taylor, Mellins.

POINT V

WHETHER THE STATE ENGAGED IN IMPROPER ARGUMENT

The state threatened the jurors that, unless appellant was put to death, the state would free him in a few years to prey on Florida's children. It turned mitigation into reasons for execution, mislead the jury as to the nature of the aggravating circumstances and its duty to consider mitigation. In overruling defense objections to the state argument, the trial court signalled to the jury that the state's argument was correct. The state's improper argument injected irrationality into sentencing in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and Article 1, Sections 2, 9, 15, 16, 17, 21, and 22 of the state Constitution.

A. The court improperly let the state argue parole eligibility.

"At sentencing the trial judge voiced concern over the possibility that Norris could be paroled someday, an improper consideration by judge or jury. See Miller v. State, 373 So. 2d 882 (Fla. 1979)." Norris v. State, 429 So. 2d 688 (Fla. 1983); Teffeteller v. State, 439 So. 2d 840, 844-45 (Fla. 1983) ("If this were a matter of first impression in this jurisdiction, there might arguably be some justification for counsel's indulging in such elocution, but this Court has previously condemned this type of conduct. The failure to heed what the Court has said before in this area thus necessitates a sentencing retrial"). Nevertheless, the court below let the state urge this improper matter to the jury over objection. The court erroneously relied on Harvey v. State, 529 So. 2d 1083 (Fla. 1988). T 727-38, 820-21. In Harvey, the defense contended incorrectly that the defendant

could not be paroled under Florida law, and the court ruled the state could respond by mentioning that the defendant would be eligible for parole consideration in 25 years. Harvey did not overrule Norris and Teffeteller and did not authorize what the state did here.

As a result of the court's ruling, the state skillfully laid before the jury the threat of Mr. Hitchcock's early release, indicating that he would rape and kill if released. T 820-21, 816-17, 814-15. This argument led inexorably to the jury's use of that possibility as a reason to vote for death. The court's response to the jury's question on this point worsened the error, as discussed below. The jury's question shows it relied on this irrelevant consideration, so that the sentencing decision was contrary to statutory and constitutional requirements that it narrowly focus on aggravating and mitigating factors. As in Teffeteller, the state's argument on parole eligibility was "patently and obviously made for the express purpose of influencing the jury to recommend the death penalty." The state urged to the jury that it would release the defendant to rape and kill unless he was put to death. Such argument requires reversal.

B. Over objection, the court let the state argue that the imprisonment circumstance receives "significant weight" because Mr. Hitchcock was on parole at the time of the murder. T 795.[66] When the defense objected to further argument about aggravation, the court ordered the defense to cease objecting. T 796. The state then wrongly told the jury concerning the "avoid arrest" circumstance: "If a person is killed because they have witnessed a crime, then this aggravator is proven, even if it's not a situation where the arrest or prosecution

[66] In fact, the circumstance's weight is "diminished" when the defendant is not in prison. Songer v. State, 544 So. 2d 1010 (Fla. 1989).

is imminent. Arrest or prosecution can be general or only speculative, but if the defendant believes this witness is a witness to a crime, the confession says that very clearly."[67] T 798.

C. Taking advantage of the court's refusal to define mitigation for the jury, R 357, 358, 381, 383, the state made its own restrictive definition which it urged to the jury over repeated defense objection. Over objection, the state told the jury that it could disregard factors that did not relate directly to why Mr. Hitchcock committed the murder, T 804, 806-808, and the jury could determine what constitutes mitigation. T 794. Over objection, it told the jury to ignore valid mitigating circumstances, arguing that an impoverished childhood was not mitigation, T 808, that Mr. Hitchcock's work record was not mitigation, T 809, and that his rehabilitation of himself was little in the way of mitigation. T 810-11. As to the last of these matters, the state argued that the self-rehabilitation was unimportant because Mr. Hitchcock had nothing else to do on death row. Id.[68]

These matters are mitigating as a matter of law, Campbell v. State, 571 So. 2d 415, 419, n.4 (Fla. 1990), as the court should have instructed the jury. The state's improper argument, coupled with the trial court's rulings, vitiated the defense presentation of mitigation.

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[67] The state misrepresented the law: knowing the person witnessed a crime is not enough. Perry v. State, 522 So. 2d 817 (Fla. 1988). Even where the victim may know the defendant, this factor does not apply unless the state shows witness elimination was the dominant reason for the murder. Perry; Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Caruthers v. State, 465 So. 2d 496 (Fla. 1985). "The mere fact that the victim knew and could identify the defendant, without more, is insufficient to prove this aggravating factor beyond a reasonable doubt." Geralds v. State, 601 So. 2d 1157 (Fla. 1992).

[68] The state could make this argument because it had successfully objected to defense testimony comparing Mr. Hitchcock's efforts with those of other death-row inmates. T 435.

The court's approval of these arguments signalled to the jury that the state was correct.

POINT VI

THE TRIAL COURT ERRED IN ANSWERING THE JURY'S QUESTION RESPECTING PAROLE ELIGIBILITY.

While deliberating, the jury sent a written question ("Does time served count towards 25 years minimum?") concerning parole eligibility. T 847-56, R 417. When the court accepted defense argument that it should tell the jury that it was an improper consideration under Norris v. State, 429 So. 2d 688 (Fla. 1983), T 847-52, the prosecutor objected saying that such an instruction "is going against whatever argument I made. I made an argument about whether or not they should consider nonviolence [sic], and you're telling them they can't consider my argument." T 852. The court then said it would instruct "that they should not speculate as to when the defendant make [sic] become eligible for parole or if he will be paroled. However, whatever time served on this case would be credited toward the 25 years mandatory sentence if the life sentence is imposed." T 854. Overruling defense objection to the jury's consideration of time served, it instructed the jury accordingly. T 855-56.

The court erred. Under Norris, the question addressed an irrelevant matter. The court should have made clear that the jury should not consider parole eligibility. When the jury issues a question about an irrelevant matter, the court has a duty to clarify the matter. Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402 (1946), wrote of the duty in responding to jury questions during deliberations:

> "The influence of the trial judge on the jury is necessarily and properly of great weight," Starr v. United States, 153 U.S. 614, 626, and jurors are ever watchful of the words

> that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.
>
> * * *
>
> ... Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge clear them away with concrete accuracy.

Id. (e.s.).

The court's answer injected irrationality into the penalty verdict procedure in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and Article 1, Sections 2, 9, 15, 16, 17, 21, and 22 of the state Constitution.

POINT VII

FLORIDA STATUTE 921.141(d), THE FELONY MURDER AGGRAVATOR, IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

An aggravating circumstance that mirrors an element of murder is unconstitutional. See Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990) ("Since premeditation already is an element of a capital murder in Florida, section 921.141(5)(i) [cold, calculated, and premeditated circumstance] must have a different meaning; otherwise it would apply to every premeditated murder."), Collins v. Lockhart, 754 F.2d 258, 264 (8th Cir. 1985) ("We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function.")

Florida Statute 921.141(5)[69] violates both the Florida and United States Constitutions. Its use renders the death sentence unconstitutional pursuant to Article I, Sections 2, 9, 12, 16 and 17 of the state Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution.

Appellant filed a motion to declare this aggravator unconstitutional, R 164-70, but the trial court denied the motion. R 316. The jury was instructed on this as an aggravating circumstance and the trial court found it as an aggravator.

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

Under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two requirements. (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235, 249 (1983). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Id. 2742.

The felony murder aggravator fulfills neither of these functions. It performs no narrowing function: everyone convicted of felony-murder qualifies. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there

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

was no premeditation. However, persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with "heightened premeditation." See Fla. Stat. 921.141(5)(i). Rogers v. State, 511 So. 2d 526 (Fla. 1987). It is irrational to make one who does not kill and/or intend to kill ipso facto eligible for the death penalty while one who kills with a premeditated design is not automatically eligible for the death penalty. Hence the circumstance violates the Eighth and Fourteenth Amendments under Zant.

Three state supreme courts have ruled this aggravator improper. State v. Cherry, 257 S.E.2d 551 (1979); Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317, 341-347 (Tenn. 1992); Tennessee v. Middlebrooks, 113 S.Ct. 1840 (1993) (granting certiorari); Tennessee v. Middlebrooks, 114 S.Ct. 651 (1993) (dismissing writ of certiorari as improvidently granted).

In State v. Cherry, the court held that when a defendant is convicted of First Degree Murder under the felony murder rule, the court is not to submit to the jury at the penalty phase the aggravating circumstance concerning the underlying felony. The court wrote that once the underlying felony has been used to obtain a conviction, it has become an element of that crime and may not thereafter be the basis for additional prosecution.

This Court should follow these courts and declare this aggravator unconstitutional pursuant to the Eighth Amendment to the United States Constitution and Article I, Section 17, of the Florida Constitution.

POINT VIII

THE TRIAL COURT IMPROPERLY FOUND OR CONSIDERED ALL FOUR AGGRAVATORS.

a. Use of the imprisonment aggravator on a parolee who committed murder in 1976 violates due process and ex post facto principles, constitutes double jeopardy, violates the equal protection of the laws, and creates an unconstitutionally irrational aggravator.

Mr. Hitchcock was on parole at the time of the offense. In 1977, the trial court did not find the imprisonment aggravator,[70] but the court below found that the parole status sufficed to apply it. R 429. The court denied defense objections to its use, based on due process, double jeopardy, the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal Constitution and the equivalent protections of the state Constitution. R 126-27, 315.

Use of the aggravator for a 1976 crime is unconstitutional. The court followed a construction of the statute first applied by this Court in Aldridge v. State, 351 So. 2d 942 (Fla. 1977), cert. denied, 439 U.S. 882 (1978). No post-Furman case before Aldridge had applied or construed the imprisonment aggravator to include parolees. In State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), this Court rejected an attack on section 921.141 and announced constructions of the aggravators to insure they were constitutional.

> Considered in that vein, Fla.Stat. Section 921.141(6), subsections (a) and (b), F.S.A., prescribe the death penalty for a capital felony committed by a prisoner or by one previously convicted of a capital felony.

Id. at 9 (emphasis added). This Court followed a narrow construction after Dixon. In Swan v. State, 322 So. 2d 485 (Fla. 1975), the court noted without disapproval that the trial court had rejected the

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[70] The capital felony was committed by a person under sentence of imprisonment. § 921.141(5)(a), Fla. Stat.

aggravator when the defendant had pled guilty to a separate crime, committed the murder in question, and then was sentenced. Although the court approved use of the aggravator for escapees in Songer v. State, 322 So. 2d 481 (Fla. 1975), no decision as of July 1976 held the imprisonment aggravator applied to a parolee.[71] Given this body of law that the aggravator applied to "prisoner" and no suggestion from the cases that the aggravator would apply to parolees, the court in January 1977 refused to find the aggravator, interpreting the statute not to include parolees.[72] Retroactive application of the 1977 construction to a 1976 offense violated the Ex Post Facto Clauses of Article I, Section 10 of the federal Constitution and Article I, Section 10 of the state Constitution. The bar to ex post facto laws applies to judicial enlargement of statutes. Bouie v. City of Columbia, 378 U.S. 357, 353-4 (1964); Marks v. United States, 430 U.S. 188, 192 (1977); Wilson v. State, 288 So. 2d 480, 482 (Fla. 1974).

Judicial expansion is unforeseeable and hence a violation of ex post facto and due process bars when it overrules prior case law on the topic. Marks.[73] The 1977 construction was unforeseeable as shown above. The trial court took the Dixon definition at face value,

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[71] In Darden v. State, 329 So. 2d 297 (Fla. 1977), cert. dismissed, 430 U.S. 704 (1974), the defendant was on furlough from prison at the time the crime was committed; even if the trial court found the imprisonment aggravator, this Court would still have applied it to one who had prisoner status.

[72] Judge Formet noted this change of law occurred after the original trial in his sentencing order. R 429. On direct appeal this Court stated the trial court "would have been justified" in finding the aggravator, citing Aldridge. Hitchcock v. State, 413 So. 2d 741, 747 n.6 (Fla. 1982).

Marks held the test for obscenity in Miller v. California, 413 U.S. 190 (1973) was an unforeseeable change of law given the lower court's interpretation of the plurality opinion obscenity standards of Memoirs v. Massachusetts, 383 U.S. 413 (1966). 430 U.S. at 194.

evidencing that this Court's later construction was unexpected. Hence, the Aldridge construction that the statute applied to parolees violates ex post facto principles as incorporated by the due process clause.[74] Since this new construction decreased Mr. Hitchcock's substantive rights by increasing the chance of a death sentence, its ex post facto use violates due process. See Miller, 107 S.Ct. at 2450-1; Higginbotham v. State, 101 So. 2d 233, 235 (Fla. 1924).

The circumstance also should have been excluded on double jeopardy grounds. Where the sentencer did not find it at the original sentencing, its use now gives the state an unfair second bite at the apple. While double jeopardy usually does not bar resentencing, capital sentencing proceedings are so trial-like to implicate double jeopardy. See Arizona v. Rumsey, 467 U.S. 203, 209-210 (1984); Bullington v. Missouri, 451 U.S. 430, 444-6 (1981); Brown v. State, 521 So. 2d 110, 112 (Fla. 1988).

Double jeopardy bars retrial of a defendant on a greater charge after a verdict of guilt for a lesser offense is reversed. See Price v. Georgia, 398 U.S. 323 (1970); Green v. United States, 355 U.S. 184 (1957). Since the first trial judge found the evidence insufficient to find the imprisonment aggravator, using it now is the same as putting Mr. Hitchcock in jeopardy again on an 'element' of the

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[74] Even if the change of law was 'foreseeable,' it violates ex post facto and due process principles. Legislative changes do not apply retroactively whether foreseeable or not: fair notice is not the only value protected by the ex post facto prohibition. See Miller v. Florida, 107 S.Ct. 2446, 2451 (1987). No reason exists to treat judicial expansions of criminal statutes differently. See Rubino v. Lynaugh, 845 F.2d 1266 (5th Cir. 1988) (ex post facto/due process principles protect not only fair notice concerns, but also prevent judicial arbitrariness and vindictiveness); cf. North Carolina v. Pearce, 395 U.S. 711, 725-6 (1969) (due process protects against even the appearance of judicial vindictiveness).

offense.[75] See Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989). The Double Jeopardy Clause bars use of aggravating circumstances for the first time at resentencing.[76]

This Court has construed the aggravator to exclude probationers, including those who had served time as a condition of probation before release on probation. See Peek v. State, 395 So. 2d 492, 499 (Fla. 1981). Thus, probationers who commit a murder are not, without more, eligible for a death penalty while parolees are. This arbitrary and irrational classification violates equal protection and due process.

The Equal Protection Clause requires "that all persons similarly situated should be treated alike." City v. Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). A legislative classification will be held invalid if not "rationally related to a legitimate state interest." Id. at 440. Although punishment is a legitimate state interest, treating parolee murderers and probationer murderers differently is irrational. The Supreme Court recognized the essentially equal status of the two by requiring nearly identical procedures for a parole and probation revocation. See Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Drastically different punishments of similarly situated classes without reason cannot stand even deferen-

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[75] See Dixon, 283 So. 2d at 9 ("The aggravating circumstances ... actually define those crimes ... to which the death penalty is applicable in the absence of mitigating circumstances").

[76] But see Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90.L.Ed.2d 123 (1986); Spaziano v. State, 433 So. 2d 508, 571 (Fla. 1983), aff'd, 468 U.S. 447 (1984); Delap v. State, 440 So. 2d 1242, 1256 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984); contra Davis v. Kemp, 829 F.2d 1522, 1432-3 (11th Cir. 1987), cert. denied, 108 S.Ct. 1099 (1988).

tial scrutiny under the Equal Protection Clauses of the state and federal constitutions.

This arbitrariness also constitutes cruel and unusual punishment.[77] Arbitrariness in death sentencing is unconstitutional. See Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). It is arbitrary to distinguish probationers who have been to prison before release on probation and parolees. Basing a death sentence on such a distinction does not comport with the reasoned use of the penalty required by the Eighth Amendment. See McCleskey v. Kemp, 107 S.Ct. 1756, 1774 (1987).

Retroactive application of Aldrich to Mr. Hitchcock violates his constitutional speedy trial right as set out elsewhere in the brief.

Since the court did not find the circumstance at the first sentencing, it may not be applied here. In Cannady v. State, 620 So. 2d 165 (Fla. 1993), this Court ruled that it could not apply the prior violent felony circumstance on appeal where it had not been used at sentencing.

b. The findings do not support an element of the sexual battery aggravator and indeed make no finding supporting that element and the court retroactively applied the sexual battery aggravator to an offense occurring when the statute made rape, not sexual battery, an aggravator.

There is a reasonable doubt whether Mr. Hitchcock used force or threat thereof in having sex with Cynthia Driggers; his statement, as adopted by the trial court,[78] shows he had sex with Cynthia, who had not had sex before, and used force only after she decided to tell her mother. Force or threat is an element of sexual battery. Cynthia was

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[77] Both the Eighth Amendment, and Article I, Section 17 of the Florida Constitution prohibit cruel and unusual punishment.

[78] At R 429 the sentencing order adopts the taped statement as setting out "the circumstances of the murder."

surprised by the act and felt pain from the intercourse, but had not been subject to actual physical force or threat of deadly force.

Mr. Hitchcock never said he used force or threat to have sex with the victim. The state relied on, and the court accepted, his statement that the beating and choking occurred after sex was complete. The body showed no evidence of genital injury, aside from a tear in the hymen which occurred only because she lost her virginity. The court did find that Cynthia Driggers said she had been hurt during sex. R 430. It is not only reasonable, but probable, that she felt pain from the tear in her hymen and her first intercourse.

Use of the sexual battery (as opposed to rape) aggravating circumstance is an ex post facto application of the law, violating Article I, Section 10 of the federal Constitution and Article I, Section 10 and Article X, Section 9 of the state Constitution. The Ex Post Facto Clause applies to:

> Every law that aggravates a crime, or makes it greater than it was, when committed.... Every law changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.

Calder v. Bull, 3 Dall. 386, 391 (1798); see Miller; Higginbotham.

The court below applied the sexual battery aggravator to events before its enactment. In 1972, the Florida Legislature revised the death penalty statute and included a list of aggravating circumstances to be considered. One was whether the offense occurred during a rape. Ch. 72-72, § 1, Laws of Fla. When the statute was passed, the crime of sexual battery did not exist; the sexual battery statute was passed in 1974. Ch. 74-121, §§ 1 and 2, Laws of Fla. While the underlying felony of felony murder was changed to sexual battery in 1975, Ch. 75-298, the Legislature did not change the aggravating circumstance to sexual battery until 1983. Ch. 83-216, § 177, Laws of Florida.

Since the Legislature did not change the law until 1983, passing an opportunity to amend it when the felony murder statute was reformed in 1975, the statute in 1976 made rape, not sexual battery, an aggravating circumstance. This Court cannot change the elements of the rape aggravator without running afoul of the Ex Post Facto Clause. See Wilson v. State, 288 So. 2d 480 (Fla. 1974) (retroactive application of rape statute to include males as victims violated Ex Post Facto Clause). Judicial expansion of statutory language can violate the ex post facto prohibition as noted above.

The law applied below disadvantaged appellant because lack of consent under the sexual battery statute is a wider concept than lack of consent under the rape statute. Using this expanded aggravator deprived him of a correct and more favorable statement of the law regarding a disputed issue of this aggravating circumstance.

The elements of rape were ravishment and carnal knowledge of a female by force or against her will. Askew v. State, 118 So. 2d 219 (Fla. 1960). Failure to instruct that the jury must find the act forcible and against the victim's will was error. Christie v. State, 114 So. 2d 450 (Fla. 1927). Lack of consent under the rape statute was not shown by protests or unwillingness alone. Hollis v. State, 27 Fla. 387, 9 So. 67 (1891); Johnson v. State, 118 So. 2d 806 (Fla. 2d DCA 1960); O'Bryan v. State, 324 So. 2d 713 (Fla. 1st DCA 1976). The sexual battery statute gives a more restricted meaning of consent -- it must be knowing, intelligent, voluntary and uncoerced -- expanding the scope of criminal behavior. Hufham v. State, 400 So. 2d 133, 135 (Fla. 5th DCA 1981) ("'consent' is a relative term to be viewed under the circumstances of each case, but by the standards established by the new statute, rather than the old...."). Whether a 13 year old's

lack of objection to sex is knowing and voluntary would be a jury issue under the new statute, whereas consent under rape law required more than a mere lack of objection despite the victim's age. Hollis, 9 So. 2d 69-70; Johnson, 118 So. 2d at 809. In Hollis and Johnson, teenagers had sexual relations despite their protests and told their mothers about it soon after. In both cases, this Court held the evidence insufficient to prove the acts were against the will of the complaining witnesses. If the judge and jury believed the statement of August 4, they could not have legally found lack of consent under the old rape statute. But use of consent under the sexual battery statute expanded the aggravator to encompass a "shocked" submission to sex by a child; even if the jury believed Mr. Hitchcock's statement, they still could have found this element of sexual battery. Thus, the consent element of sexual battery was retroactively applied here.

Aggravators must be found to sentence a defendant to death and in weighing against mitigating evidence to determine if death is appropriate. Expansion of an aggravator on a disputed element widens the scope of death eligibility and makes death more likely.[79]

The expanded aggravator also affects substantive, not procedural, rights. Obviously, the change which allows imposition of death or increases its likelihood is not procedural. Increasing the scope of death eligibility and the chance to be condemned has more substantive

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[79] This expansion of an aggravator differs from the situation in Combs v. State, 403 So. 2d 418 (Fla. 1981) which rejected an ex post facto challenge to the coldness aggravator. Combs reasoned that the new aggravator inured to the benefit of the defendant since it limited consideration of premeditation, a factor already found in the jury's conviction of the defendant, to heightened premeditation. Id. at 421; see Justus v. State, 438 So. 2d 358, 368 (Fla. 1983), cert. denied, 465 U.S. 1052 (1984); Preston v. State, 444 So. 2d 939, 946 (Fla. 1984). In contrast, the new definition of consent had expanded the scope of conduct the judge and jury can consider in aggravation. The retroactive application of sexual battery law disadvantages Mr. Hitchcock.

effect than the changes in how the length of prison terms are determined held substantive in Miller, 107 S.Ct. at 2453. The expanded aggravator not only violates the state and federal Ex Post Facto Clauses, but also the principle which prevents retroactive application of criminal laws and punishments, regardless in whose favor the law falls. See Castle v. State, 330 So. 2d 10 (Fla. 1976). Where the legislature changes the nature or degree of punishment, it cannot be applied retroactively.[80] Since expansion of this aggravator changes the degree of punishment for Mr. Hitchcock's behavior, the 1983 change of law should not have applied to an event occurrent in 1976.

c. The evidence does not support the avoid arrest aggravator.

When a victim is not a police officer, evidence must show "that the dominant or only motive for the murder was the elimination of witnesses." E.g. Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979). Ability to identify the defendant is not enough. Bates v. State, 465 So. 2d 490, 492 (Fla. 1985). The State must prove aggravating circumstances beyond a reasonable doubt. See Eutzy v. State, 458 So. 2d 755, 757-8 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985). "[T]he trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984)." Robertson v. State, 611 So. 2d 1228 (Fla. 1993).

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[80] State v. Jefferson, 340 So. 2d 1189 (Fla. 4th DCA 1976) (sentencing should proceed under first degree murder statute after change in felony murder statute redefined defendant's crime as second degree murder); Allen v. State, 383 So. 2d 674 (Fla. 5th DCA 1980) (statute providing punishment as youthful offender could not be retroactively applied); Lovett v. State, 33 Fla. 389, 14 So. 837 (1894) (statute eliminating degree from offense of manslaughter and changing penalties could not be retroactively applied).

To move from the idea that Mr. Hitchcock desired to prevent Cynthia Driggers from yelling and telling her mother he had sex with her to finding a purpose to avoid lawful arrest pyramids inferences. First, he must have had a subjective awareness that he had committed a crime, not just done something which would anger his brother and sister-in-law. Given his immaturity, intoxication and life experience, he would not have realized he committed a sexual battery, assuming that he in fact did. Without that subjective awareness, he could not have formed a purpose to avoid arrest. Actual, subjective, awareness of an impending arrest must be proved beyond a reasonable doubt. In Garron v. State, 528 So. 2d 353, 360 (Fla. 1988), proof that the victim was actually calling the police when killed was insufficient.

Second, the court would have to infer that he did not react impulsively to the yells of Cynthia, but rather with a plan to eliminate her as a witness in some future criminal case. Cook v. State, 542 So. 2d 964, 970 (Fla. 1989) states:

> Next Cook attacks the finding Mrs. Betancourt was killed to avoid arrest, arguing that his statement that he shot her 'to keep her quiet because she was yelling and screaming' was insufficient to support the trial court's findings. We agree. The facts of the case indicate that Cook shot instinctively, not with a calculated plan to eliminate Mr. Betancourt as a witness.

See also Green v. State, 583 So. 2d 647 (Fla. 1991). The facts here also show an instinctive reaction, brought on by panic, immaturity and intoxication. The court erred in using this aggravator.

d. The record does not support the heinousness circumstance.

The trial court erred in finding the heinousness aggravator because the evidence does not show a torturous intent so as to set this crime above the norm of capital felonies. See Richardson.

While the court found that the victim suffered pain before death, there was no finding of purpose to cause pain.[81] No direct evidence of such purpose exists. It is reasonable and probable, accepting the trial court's version of events, that Mr. Hitchcock had no purpose to cause extra pain. When he carried Cynthia from the house, he still tried to dissuade her from telling her mother about the sexual encounter. He did not then mean to kill her; else why speak to her and give her a chance to call for help? Even assuming an intent to murder,[82] there was no evidence that he chose choking to cause extra pain. He had no weapon he put aside to choke her. He panicked, and impulsively, drunkenly reacted to a situation gone out of his control. The record did not show intent to cause unnecessary pain.

POINT IX

THE COURT ERRED IN INFORMING THE JURY THAT THE PRIOR DEATH SENTENCE WAS OVERTURNED.

Mr. Hitchcock sought an instruction adequately and accurately informing the jury about the prior death sentence. The court rejected his proposed instruction, and over objection, opted for an inaccurate and improper instruction proposed by the state. The instruction given unlawfully minimized the reason the earlier sentence was vacated, and led the jury to believe this penalty phase proceeding was a formality. The death sentence thus violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 19, 21 and 22 of the Florida Constitution.

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[81] As already noted, the trial court denied the existence of this element at the charge conference. T 743.

[82] The statement of Mr. Hitchcock does not show such an intent; at his guilt trial, the State proceeded on both premeditation and felony murder theories, and the jury was instructed on both.

After initial remarks, the trial court told the prospective jurors the reason they were there:

> First of all, this case is back before you for consideration because a jury previously recommended that James Ernest 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.

T 23. This is the instruction proposed by the state, R 323, T 7-9, and it was given over defense objection T 8-9[83].

Shortly after, to jog the memory of prospective jurors about the case, the trial court reinforced the improper instruction, saying:

> I want to make clear to you that Mr. Hitchcock has already been tried in this case and found guilty of murder in the first degree. And as I read the first instruction to you, he was previously sentenced to death in this case, but it's been sent back by an appellate court.

T 53.[84] At T 96, the court again explained the case had been reversed for the wholly unsatisfactory reason that an appellate court "said something was not right" with the prior penalty phase:

> The Court: Okay, in this particular case, it is true that he was tried once and found guilty of the charge, and I also instructed you that a death penalty was imposed, but there has been an appellate court that looked at that penalty phase, said something was not right, and therefore, we have to go back and have to do this again. And we have to have other people look at this and again tell us whether or not death is an appropriate sentence.

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[83] The defense proposed the following instruction:

> A jury previously recommended that James Ernest 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 (italics supplied). The state's instruction substituted the "incomplete" for "improper." The defense objected, saying its instruction was proper as submitted T 8.

[84] The state played the issue to a prospective juror, saying that "some day an appellate justice is going to read this." Defense objection was sustained. T 86-87.

The defense objected to jurors having the "damning" knowledge of a prior death sentence without the explanation in its proposed instruction. Else, "the jury will likely believe the death sentence was thrown out on a technicality". R 293. Altering and diluting the defense instruction to suit the state, that is what the court did. It told jurors they were there on a technicality: the previous jury's death verdict was overturned because of an "incomplete" instruction.

The defense instruction was designed to give the jurors a legitimate reason why the case was before them. Defense counsel wrote in their memorandum supporting the instruction that they "believe[d] there is no question but that the penalty phase jury to be impaneled for Mr. Hitchcock's case will conclude that a sentence of death was previously imposed". R 293. They requested a cautionary instruction "to ameliorate or diminish the obvious and fatal damage such juror knowledge would normally do to a fair determination of sentence."

"Lawyers and judges may realize that 'technicalities' generally are legal safeguards designed to ensure that the accused receives a fair trial. Experienced criminal defense lawyers recognize, however, that this is not always the view of the layman...." Gates v. Zant, 863 F.2d 1497, 1499 (11th Cir. 1989). Knowledge that another jury has already found a defendant guilty or recommended death for the same crime devastates the defense. Such juror knowledge in the retrial of a guilt phase has been consistently held reversible. In Weber v. State, 501 So. 2d 1379 (Fla. 3d DCA 1987), at retrial, the jury wrote to the court that it had learned of the prior conviction had been reversed because of a technicality. The court denied a motion for mistrial, instructing the jury not to concern itself with the prior

conviction. The court individually polled the jurors to ensure they would not be affected. Yet the Third District reversed, holding:

> Courts which have confronted the discrete issue posed by the present case have uniformly concluded that the prejudice arising from the exposure of jurors to information that the defendant was previously convicted of the very offense for which he is on trial is so great that neither an ordinary admonition of the jurors nor the jurors' ritualistic assurances that they have not been affected by the information can overcome it.

Id. at 1382; accord Cappodana v. State, 495 So. 2d 1207 (Fla. 4th DCA 1986); Jennings v. State, 512 So. 2d 169 (Fla. 1987), and Teffeteller v. State, 495 So. 2d 744 (Fla. 1986).

The prejudice from knowledge of a prior conviction is great. "Indeed, we are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged." United States v. Williams, 568 F.2d 464, 471 (5th Cir. 1978). The same is true of knowledge of a previous death sentence. It tells the jurors that other members of the community already decided death was the right punishment in this very case, only they were thwarted by the courts. Compare, Romano v. Oklahoma, 114 S.Ct. 2004 (1994) (Eighth Amendment not necessarily violated by telling jury that defendant under death sentence in *another case*, though that sentence is later vacated).

This Court holds that:

> A prior sentence, vacated on appeal, is a nullity. It offers the sentencing jury no probative information on any of the aggravating or mitigating factors weighed in such proceedings and could conceivably be highly prejudicial to a defendant.

Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986).

The Court held in Teffeteller that mention of the sentence was not there reversible, since: defense counsel waived objection for cause on jurors aware of the prior sentence and elicited the informa-

tion about the prior sentence; the prior sentence did not play a significant role in the proceeding; and the jury was not told the previous jury had recommended death, only that a death sentence had been imposed. Id. 746-747; see Weber, 501 So. 2d at 1384. Similarly, this Court has denied relief where the effect on the proceeding was negligible, Sireci v. State, 587 So. 2d 450, 452 (Fla. 1991), or (as in this case on the last appeal) the jury learned of the previous death sentence, but did *not* learn that the prior jury had recommended death. Hitchcock v. State, 578 So. 2d at 692.[85]

This was no mere mention of a prior death sentence. It was a defining event, since the trial judge explicitly told the venire of it in the introduction to the case. They heard that a previous jury had recommended death; that Mr. Hitchcock had been given death, and that an appellate court had overturned it on a technicality. He had no chance of a fair penalty phase after they heard this. One juror candidly admitted that knowing the death penalty had previously been imposed made him likely to vote to impose it again. T 96-97 ("If they have been tried once, I don't believe in two").

It is true the defense requested an instruction revealing the prior death sentence, but that request was contingent on the court giving a particular proposed instruction accurately explaining that the case was not back on a technicality. Since the prior sentence is a "nullity" and "offers the sentencing jury no probative information

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[85] Accord, Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991) ("there is absolutely nothing in this record that the jurors knew anything about what transpired in the previous trial"); Jennings v. State, 512 So. 2d 169, 174 (Fla. 1987) ("There is no indication that the jurors knew what had occurred at appellant's previous trial"). See also Valle v. State, 581 So. 2d 40, 45 (Fla. 1991) (claim that jury knew of second previous death sentence in the case rejected due to defense door opening and because it was unlikely jury knew there had been a second sentencing proceeding).

on any of the aggravating or mitigating factors weighed in such proceedings," Teffeteller, 495 So. 2d at 745, when the trial court decided not to give the defense instruction, the only lawful alternative was not to give the state's proposed instruction, either.

But the trial court decided to instruct the jury as the state urged, and to tell them the case was back because of an "incomplete" instruction. The trial court may as well have told the jury the case was back on a technicality, because instructing the jury that the prior jury's recommended death sentence was overturned because of "an incomplete instruction" is the same thing[86]. "Incomplete" means:

"1. lacking a part or parts; not whole; not full.

2. not finished; as the building is *incomplete*.

3. imperfect; not thorough."

Webster's New Universal Unabridged Dictionary, 2d Ed. at 924. The defense request was that the jury hear a reasonable explanation why Mr. Hitchcock's fate was again being decided, not the unreasonable reason the court gave. That is why the defense asked the court to tell the jury the death sentence was overturned because the previous jury had been given *improper* instructions. "Improper" would have told them the case was back because the instructions in the first case were: "1. not suitable or consistent with the circumstances; ill-adapted; unfit. 2. not in accordance with the truth, fact or rule; wrong; incorrect." Id. 917. This is a far cry from what the jury was

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[86] The trial court's instruction here was also inaccurate. The death sentence was not vacated because of an "incomplete" instruction. It was vacated based on the Court's decision in Espinosa v. Florida, __ U.S. ____, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). Hitchcock v. Florida, ____ U.S. ____, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). Espinosa describes the improper "heinous, atrocious or cruel" instruction which required resentencing here as "unconstitutionally vague" and thus an "invalid" (not incomplete) aggravating circumstance.

told, and having failed to give the proposed defense instruction, it should have given none at all[87].

POINT X

THE SHOW OF SOLIDARITY BETWEEN WITNESSES AND MEMBERS OF THE COURTROOM AUDIENCE UNCONSTITUTIONALLY AND UNLAWFULLY INVITED THE JURY TO BASE ITS DECISION ON IMPROPER GROUNDS.

Several trial observers wore yellow "victim's rights" ribbons saying "crime doesn't pay, victims do". T 309-310[88]. The defense objected to such a show of solidarity by way of "a united front that wants to see my client executed". T 308-309. The court refused to make the observers remove their ribbons, but ruled that witnesses would not be allowed to wear their ribbon while on the stand. T 310-311[89]. Yet L D , the victim's sister, wore her ribbon during her testimony. T 399-401. The court erred in denying the defense mistrial motion T 400-401; 404-406.

The communication of community support for a death sentence is not admissible evidence[90]. The yellow ribbons worn by spectators below was not evidence at all: it was public pressure. In Woods v. Dugger,

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[87] This is not just a linguistic exercise. Because of the primacy of the trial court's instructions every word is crucial. See Victor v. Nebraska, 114 S.Ct. 1239 (1994) (discussing difference between "grave certainty", an unconstitutional standard for reasonable doubt, and "moral certainty," which in context is a constitutional standard).

[88] The ribbon is Court Exhibit 1, and a copy was made by the Clerk of this Court and included in the record. While the state said the it is "probably an inch by two inches" T 310, measurement of the ribbon shows it is three inches long and over an inch and a half wide.

[89] The court cautioned the observers not to call attention to themselves or the ribbons, or he would consider it "an act of trying to influence the jury." T 311.

[90] See Hall v. State, 579 So. 2d 329, 331 (Fla. 1st DCA 1991) ("We do not construe Article I, section 16 of the Florida Constitution to permit victims or their families to actively participate in the conduct of the trial by sitting at counsel table or being introduced to the jury").

923 F.2d 1454 (11th Cir. 1991), the court vacated a conviction and death sentence in the killing of a corrections officer in part because uniformed corrections officers were in the courtroom. As here, where the yellow-ribboned "victim's rights" supporters showed solidarity with the victim's sister,

> The officers in this case were there for one reason: they hoped to show solidarity with the killed correctional officer. In part, it appears that they wanted to communicate a message to the jury. The message of the officers is clear in light of the extensive pretrial publicity. The officers wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message.

Id. 1459-60 (footnote omitted).

A death sentence must be based on "reason rather than caprice or emotion." Gardner, 430 U.S. at 358. The highly prejudicial testimony of L D: focused on claims that Mr. Hitchcock had sexually abused both her and her sister, the decedent. The bolstering show of support from the gallery magnified the prejudice. A penalty phase is not supposed to be a referendum on "victim's rights." The mistrial motion should have been granted. Its denial violated Mr. Hitchcock's rights under the fifth, sixth, eighth and fourteenth amendments to the United States Constitution Article I, sections 9, 16, 17 and 22 of the Florida Constitution, and Section 921.141, Florida Statutes.

POINT XI

DEATH IS DISPROPORTIONATE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). It is reserved

solely for "the most aggravated, most indefensible of crimes," Dixon, 283 So. 2d at 8, and this is not one of them[91].

At the time of the killing, Ernie Hitchcock was sharing a household with family. After he and Cynthia Driggers had sexual intercourse, she threatened to tell her mother, and he panicked and killed her. This Court has long recognized that the powerful emotions unleashed in a family dispute makes the death penalty for the resulting killing inappropriate: "'this Court has stated that when the murder is a result of a heated domestic confrontation, the death penalty is not proportionally warranted.' Garron v. State, 528 So. 2d 353, 361 (Fla. 1988)." Blakely v. State, 561 So. 2d 560, 561 (Fla. 1990). Accord, Farinas v. State, 569 So. 2d 425 (Fla. 1990) (decedent's pleas for mercy in frenzied fear unheeded by defendant as he unjammed gun; reduced to life due to domestic confrontation); Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986) (5 year old cousin stabbed walking into fight, and defendant's father was then "brutally beaten while attempting to fend off the blows before he was fatally shot;"reduced to life due to domestic confrontation). See also Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985) (where defendant killed wife with a blunt instrument but was drinking at the time, sentence reduced to life); Blair v. State, 406 So. 2d 1103, 1105 (Fla. 1981) (dispute between defendant and ex-wife, and she threatened to go to the police. Though defendant appeared to have planned the killing by

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[91] As in another case reduced on proportionality grounds, the pretrial life plea offer for Mr. Hitchcock shows "[t]he State itself originally concluded that the crime did not warrant imposition of the death penalty and agreed to a plea bargain of life imprisonment until [the defendant] himself insisted otherwise." Elam v. State, 636 So. 2d 1312, 1315 (Fla. 1994).

digging a burial site and arranging for others to be away when he killed her, death disproportionate under the circumstances).[92]

This Court has reduced death sentences as disproportionate when there was substantial mitigation and it struck aggravators. Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988); Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984); Blair v. State, 406 So. 2d 1103, 1109 (Fla. 1981). The court below found four aggravators: (1) under sentence of imprisonment (parole), (2) felony murder, (3) avoid arrest, and (4) heinous, atrocious or cruel. R429-430. But it also found "substantial evidence of mitigating factors and circumstances". R431. First, it found Ernie Hitchcock's age of 20 years at the time of the crime, "considered with [his] lack of maturity, coping skills and emotional development" was a "significant mitigating factor". R431. Turning to non-statutory mitigation, the court found (but gave reduced weight to) "four areas of deprivation suffered by the defendant:

> (1) A background of extreme poverty,
> (2) Lack of formal education,
> (3) Emotional deprivation during his formative years,
> (4) Abuse, both physical and mental, observed and experienced as a child."

R 431. While rejecting the contention that the defense had proved "positive character traits" the court found the evidence presented proved positive incidents in the defendant's life, including that he was a "hard worker," though the court found that factor weighed less because he had to do so out of "economic necessity". R 432. It found as mitigating, though not significant, that Ernie Hitchcock: had saved

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[92] Even where the defendant and victim are not members of the same family, the fact that a killing was preceded by a quarrel has convinced this Court that life is the appropriate sentence. Buckrem v. State, 355 So. 2d 111 (Fla. 1987); Neary v. State, 384 So. 2d 881, 885-885, 888 (Fla. 1980). See also Banda v. State, 536 So. 2d 221 (Fla. 1988).

his uncle from drowning; had come to Florida to help Fay and Sonny Hitchcock while Fay recovered from surgery; while in prison writes his mother frequently, sending pictures and cards, and writes his two nieces regularly. R 432.

Respecting prison conduct, the court did not find the evidence rose to proving positive character "traits," but did find the testimony of death row inmates "established specific limited incidents demonstrating" generosity, acts of kindness, teaching others, helpfulness, and absence of racial prejudice. R 432. It found nonstatutory mitigation that "the fact that the defendant is now capable of being a mediator/ peacemaker through improved verbal skills; that he has the ability to succeed in and will not be dangerous in the future to the general prison population; and that he has taken strides to improve himself while in prison". R432. It gave "added weight" to use of alcohol and drugs prior to the murder. R433.

The impropriety of the aggravating circumstances is briefed. If any of the aggravators is stricken, it is clear that Ernie Hitchcock's sentence should not be death.[93] In DeAngelo v. State, 616 So. 2d 440 (Fla. 1993), the defendant strangled a woman he and his wife had taken in as a roommate. The jury recommended death, and the trial court imposed it. This Court denied a state appeal of the trial court's

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[93] This Court has reduced the sentence to life where aggravators were stricken, and there was a death recommendation. Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988) (after striking an aggravating circumstance, court determines mitigation it found "counterbalance" the remaining aggravators); Rembert v. State, 455 So. 2d 337, 340 (Fla. 1984) (where court struck aggravating factors and there was "considerable" nonstatutory mitigation not found by the trial judge, sentence reduced to life); Blair v. State, 406 So. 2d 1103, 1109 (Fla. 1981) ("because of the existence of a mitigating factor, and the improper inclusion of several aggravating factors, we must reduce to life"), and Kampff v. State, 371 So. 2d 1007 (Fla. 1979).

refusal to find HAC, and reduced to life where there was one aggravator (CCP) and significant nonstatutory mitigation.

Even if no aggravator is stricken, the mitigation outweighs the aggravation and compels reduction to a life sentence. See Santos v. State, 629 So. 2d 838, 840 (Fla. 1994) (where defendant went to estranged lover's home, chased her and children screaming down street, shot her and the children, sentence reduced to life as "the case for mitigation is far weightier than any conceivable case for aggravation that may exist here"); Kramer v. State, 619 So. 2d 274 (Fla. 1993) (reduction based in part on model prisoner mitigation: Court "is required to weigh the nature and quality of those [aggravating and mitigating] factors as compared with other similar reported death appeals")[94]. The "gravity" of the "imprisonment" aggravating factor "is somewhat diminished by the fact that [appellant] did not break out of prison" but was merely on parole. Songer, 544 at 1011. The other three aggravators are modulated by Ernie Hitchcock's age, immaturity, upbringing, and impairment by alcohol at the time of the crime.

The mitigation showing adjustment to prison life, status as a conciliator at the prison, and future nondangerousness in prison, are substantial reasons for reducing a sentence to life. Kramer (proportionality reduction in beating death in part due to model prisoner mitigation: "[t]his necessarily implies a potential for rehabilitation and productivity within a prison setting"); Songer; Cooper v. State, 526 So. 2d 900, 902 (Fla. 1988). See Holsworth v. State, 522 So. 2d 348, 355) (Fla. 1988) (death is a "total rejection of the possibility

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[94] Death sentences are reduced where the "entire picture of mitigation and aggravation ... does not warrant the death penalty." Smalley v. State, 546 So. 2d 710, 723 (Fla. 1989); Songer, 544 So. 2d at 1011; Proffitt v. State, 510 So. 2d 896 (Fla. 1987).

of rehabilitation"). See also Skipper v. South Carolina, 106 S.Ct. 1669 (1986). Mr. Hitchcock's impoverished and traumatic childhood, continuing devotion to family members and kindness toward others are reasons for reducing his death sentence. Songer; Spivey v. State, 529 So. 2d 1088, 1095 (Fla. 1988); Brown v. State, 526 So. 2d 903, 905 (Fla. 1988); Holsworth, 522 So. 2d at 354; Caruthers v. State, 465 So. 2d 496, 498-99 (Fla. 1985). The youth of the defendant at the time of the crime, a statutory mitigating factor found here, coupled "with the defendant's lack of maturity, coping skills and development" is a significant factor in reducing a death sentence. See Morgan v. State, 639 So. 2d 6 (Fla. 1994); Livingston; Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985); Swan v. State, 322 So. 2d 485, 488 (Fla. 1975).

Though the jury did not hear evidence of it, the trial judge "considered at some length and gave added weight to Mr. Hitchcock's use of alcohol in this case." R 433. This Court has ruled that "evidence [of drug or alcohol abuse] must be considered in mitigation, Fead v. State, 512 So. 2d 176, 178 (Fla. 1987); Cannady v. State, 427 So. 2d 723, 731 (Fla. 1983); Buckrem v. State, 355 So. 2d 111, 113-14 (Fla. 1987), especially where established by evidence uncontroverted in the record." Hardwick v. State, 521 So. 2d 1071, 1076 (Fla. 1988). Intoxication alone has been repeatedly considered by this Court to mitigate a killing without reference to statutory mitigating factors. Fead; Buckrem; Norris v. State, 429 So. 2d 688, 690 (Fla. 1983). It has played a huge role in this Court's conclusion that only a life sentence is appropriate in many cases, even where the jury recommends death. Smalley, 546 So. 2d at 723; Proffitt, 510 So. 2d at 898; Ross. The intoxication of Ernie Hitchcock played a significant part in this killing, and is a substantial reason for reducing his sentence to life.

Others whose sentences have been reduced to life committed equally or more disturbing crimes. In Reilly v. State, 601 So. 2d 222 (Fla. 1992), the defendant raped, beat and strangled a four year old boy. But the jury recommended life and the death sentence was Teddered.[95] See also Bedford v. State, 589 So. 2d 245 (Fla. 1991) (victim strangled during sex; reduced to life under Tedder). The same is true in death recommendation cases. In Chaky v. State, 20 Fla. L. Weekly S107 (Fla. Mar. 2, 1995), the defendant killed his spouse with "two very forceful blows" to the back of her head. A prior attempted murder was found in aggravation, but as it occurred years before in Vietnam, it was discounted. The sentence was reduced to life. In Banda v. State, 536 So. 2d 221, 225 (Fla. 1988), a dispute over borrowed money resulted in the victim's death by "several crushing blows to the skull," and possibly strangulation. This Court reduced the sentence, finding "death would not be proportionate in this instance." See also Halliwell v. State, 323 So. 2d 557 (Fla. 1975) ("Appellant grabbed a 1-inch breaker bar and beat the husband's skull with lethal blows and then continued beating, bruising and cutting the husband's body with the metal bar after the first fatal in juries to the brain. That conduct alone justified a finding of premeditated murder, but we see nothing more shocking in the actual killing than in a majority of cases decided by this Court." Sentence reduced to life), Rembert v. State, 445 So. 2d 337 (Fla. 1984) (robbery-murder victim beaten to death, sentence reduced to life), and Swan v. State, 322 So. 2d 485 (Fla. 1975) (victim's "hands, neck and left foot were tied so that any efforts she might have made to free herself could have choked

[95] Tedder v. State, 322 So. 2d 908 (Fla. 1975).

her to death," and "death resulted from the severe beating." Swan was nineteen at time of crime; sentence reduced to life).

When Mr. Hitchcock's case was reviewed by this Court for the first time in 1982, two Justices found death disproportionate. Hitchcock v. State, 413 So.2d 741, 748 (Fla. 1982) (MCDONALD, joined by OVERTON, dissenting). In 1982, the dissenting Justices said:

> In this case, there was testimony that from childhood Hitchcock's mind had not been entirely normal. Prior to commission of this crime Hitchcock had been drinking heavily and smoking marijuana. Returning from his 'night on the town,' he entered the bedroom of the thirteen year old victim and engaged in sex with her. When she announced that she had been hurt and was going to tell her mother he reacted impulsively. From the record I can discern no basis for the jury or the trial judge's failure to find that the defendant committed this crime while under the influence of extreme mental or emotional disturbance or that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Certainly his actions fall far short of showing a reasoned planning or reasoned knowledge of what he was doing when he strangled the victim.

Hitchcock, 413 So. 2d at 748. Concurring in the 1983 denial of post-conviction relief, the two Justices expressed a "continuing belief that the death penalty is not appropriate for Hitchcock." Hitchcock v. State, 432 So. 2d 42, 44 (Fla. 1983) (McDonald and Overton, concurring). After the second penalty phase at which the state presented the same aggravating evidence as at the first, two different members of this Court, Justices Kogan and Barkett, would have reduced the sentence to life on proportionality grounds; Justice Shaw dissented for unstated reasons. Hitchcock v. State, 578 So. 2d 685 (Fla. 1991), vacated, Hitchcock v. Florida, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). Reduction to life is the only proper remedy in this case that has so troubled this Court so deeply for so long.

CONCLUSION

Mr. Hitchcock's snetence of death should be vacated, and this cause remanded for a new sentencing proceeding, or reduction to life in prison.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to KENNETH NUNNELLEY, Assistant Attorney General, 125 North Ridgewood Avenue, Daytona Beach, Florida 32114, this this 8 day of June, 1995.

Of Counsel