IN THE SUPREME COURT OF FLORIDA

JAMES HITCHCOCK,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 82,350

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE FACTS

The state significantly downplays the extensive testimony of its expert in which he tells the jury that Mr. Hitchcock was and is a pedophile. At page 10 of its Answer Brief the state relegates to one paragraph the hours-long pedophile profile testimony which constituted nearly the whole of the state's "rebuttal" case, as recounted in the Initial Brief at pages 9-13 and 25-33.

The state's statement of facts is otherwise incomplete and argumentative, in particular demeaning the testimony in mitigation. Answer Brief 6-9.

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.

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

The state re-cites cases pointed out in the Initial Brief, and argues door-opening. Answer Brief at 16. Appellant addresses this issue in the Initial Brief.

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

The State argues lack of preservation, but at footnote 22 of the Initial Brief appellant has detailed the overruled objections to the challenged material. A relevancy objection preserves the argument that questions about child sex abuse are irrelevant, contrary to the state's contention. When an objection is overruled, it is not necessary to move for a mistrial, or to continue the futile gesture of repeated objections. Simpson v. State, 418 So. 2d 984, 985 (Fla. 1982);[1] Hunt v. State, 613 So. 2d 893, 898 n.4 (Fla. 1992). Even if

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[1] In Simpson, the defense objected to an improper line of cross-examination, and the trial court overruled the objection. This Court rejected the state's argument that a motion for mistrial was required to preserve the matter for appeal:

> Under these circumstances, where clearly a timely objection to the improper comment was made by defense counsel, and where the judge unequivocally and without hesitation overruled the objections, the issue of the admission of such testimony and comments before the jury is properly preserved for appeal. It is evident that a motion for mistrial at either juncture in the trial where defense counsel's objections were overruled would have been futile. To require such a motion would be to place form above

this Court finds lack of error preservation as to some of the testimony challenged here, all of the objectionable material must be considered in assessing the harm done. Whitton v. State, 649 So. 2d 861, 865 (Fla. 1994) ("The reviewing court must examine both the permissible evidence on which the jury could have legitimately relied and the impermissible evidence which might have influenced the jury's verdict").

The substantive impropriety of the cross is otherwise addressed in the Initial Brief.

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

The State argues its expert's testimony that Mr. Hitchcock meets the pedophile profile was offered in rebuttal of the defense expert's testimony that he was not a pedophile. Answer Brief at 21-22 ("Moreover, unlike *Flannigan* [sic] and *Turtle*, the pedophilia testimony in this case came in rebuttal to Hitchcock's own expert testimony that he *is not* a pedophile. (*TR 523-4*). Contrary to Hitchcock's claim, the rebuttal testimony was proper impeachment of the testimony proffered by the defense"). This is an alarming misrepresentation of the record. The state's argument is intended to mislead this Court into believing that the defense offered expert testimony that Mr. Hitchcock was not a pedophile when the defense did no such thing. The pedophilia issue was raised first on the state's cross-examination of the defense expert, as the pages cited in the state's Answer Brief show.

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substance and would seriously hinder the administration of justice. We should seek to avoid, not foster a hypertechnical application of the law.

The state's cross begins at page 514. At pages 523-24 of the state's cross, the following occurs (emphasis supplied):

> Q. [PROSECUTOR]: Why have you not evaluated Mr. Hitchcock in reference to the dynamics as they relate to the crime itself?
>
> A. Because his dynamics exist independent of any act.
>
> Q. *Could pedophilia be one of those dynamics?*
>
> A. Well, it could be. But there is certainly no case of that.
>
> Q. Have you endeavored to find any evidence of that?
>
> A. Yes.
>
> Q. And what efforts have those been?
>
> A. Both in the taking of the history, one, and two, in his dynamics as shown in his evaluation are not compatible with people who engage in pedophilia.
>
> Q. What about the dynamics of his evaluation are not consistent with a person who commits pedophilia?
>
> A. People who commit pedophilia tend to be completely immature.

It was the prosecution that introduced pedophilia into the defense expert's testimony. There *was* no pedophilia testimony "proffered by the defense" Answer Brief at 22. It had not been mentioned in the defense expert Dr. McMahon's direct examination, R 487-514. After the cross the defense expert repeatedly testified this line of questioning had nothing to do with her evaluation, and would not matter to her evaluation. R 517, 523, 530-31 (even if expert had known Mr. Hitchcock had "forcibly molested" children, it would have no bearing on her opinion). The state cannot open its own door to collateral matters. There was no defense door opening and what the state categorizes as "proper impeachment" is not.

In Caruso v. State, 645 So. 2d 389, 394 (Fla. 1994), this Court restated the familiar rule that a party cannot open its own door to

collateral or irrelevant matter and then introduce evidence to impeach the witness:

> It is well established that if a witness is cross-examined concerning a collateral or irrelevant matter, the cross-examiner must 'take' the answer, is bound by it, and may not subsequently impeach the witness by introducing extrinsic evidence to contradict the witness on that point. *E.g. Patterson v. State*, 157 Fla. 304, 313, 25 So. 2d 713, 717, *cert. denied*, 329 U.S. 789, 67 S.Ct. 352, 91 L.Ed. 676 (1946); *Stewart v. State*, 42 Fla. 591, 594, 28 So. 815, 816 (1900); *Gelabart v. State*, 407 So. 2d 1007 (Fla. 5th DCA 1981); *see generally*, Charles W. Erhardt, *Florida Evidence* Sec. 608.1 (1993 ed.). Even if there is some relevancy, the evidence is subject to exclusion if its probative value is substantially outweighed by the danger of confusing the issues, unfair prejudice, misleading the jury, or needless presentation of cumulative evidence. *See Lee v. State*, 422 So. 2d 928, 931 (Fla. 3d DCA 1982), *review denied*, 431 So. 2d 989 (Fla. 1983); 1 *McCormick on Evidence* Sec. 49 (John William Strong, ed., Practitioner Treatise Series 4th ed. 1992)(use of extrinsic evidence of collateral matters to contradict a witness's testimony 'is more restricted due to consideration of confusion of the issues, misleading the jury, undue consumption of time, and unfair prejudice.').

Caruso, 645 So. 2d at 394-395. The pedophile profile testimony was not sufficiently relevant to Dr. McMahon's testimony to permit impeachment by extrinsic testimony. "The test for relevancy and materiality is whether the cross-examining party could have, for any purpose other than impeachment, introduced evidence on the subject in its case in chief." Lawson v. State, 651 So. 2d 713, 715 (Fla. 2d DCA 1995). Since pedophilia is not an aggravating factor this evidence plainly would not have been admissible in the state's case in chief. See Erickson v. State, 565 So. 2d 328 (Fla. 4th DCA 1990) (error to admit testimony appellant was a pedophile in state's case-in chief). The defense did not open the door, and this emotionally charged,

irrelevant testimony should have been excluded when the defense objected[2].

As its alternative ground the state says testimony that Mr. Hitchcock met the pedophile profile is properly admitted as it is a "far cry from Flannigan [sic] v. State, 625 So. 2d 827 (Fla. 1993)." Answer Brief at 20. The state's distinguishing feature is that its expert relied on the Diagnostic and Statistical Manual of Mental Disorders. Answer Brief at 20-21. The criteria listed in the *DSMIII R*, the state says, "unlike the testimony at issue in *Flannigan* [sic] and *Turtle v. State*, 600 So. 2d 1214 (Fla. 1st DCA 1992), are accepted within the mental health community as the appropriate criteria for a diagnosis of pedophilia." Answer Brief at 21.

The state cites not one case to back its *DSM* distinction, and for good reason. There is no such case. That is because there *is* no distinction between the pedophile profile outlawed in Flanagan and Turtle and that pitched by the state's expert here. The pedophile profile is unreliable. Recognition of pedophilia as a mental disorder in the *DSM* does not override the exhaustive studies cited by Judge Ervin in Flanagan v. State, 586 So. 2d 1085, 1112-20 (Fla. 1st DCA 1991), and relied upon by this court, Flanagan, 625 So. 2d at 828-9, which show a lack of consensus in both judicial opinions and scholarly work that a pedophile profile is reliable. As Judge Ervin wrote: "For example, one group of commentators has stated: 'Nothing in the professional literature suggests that experts on child sexual abuse

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[2] The state does not argue waiver, and it cannot. As shown in footnote 29 of the Initial Brief, multiple objections to this testimony that it was irrelevant, nonstatutory aggravation, collateral crime evidence, and lack of mitigation rebuttal were overruled. R 659, 665-666, 683. The error is preserved. Simpson (motion for mistrial unnecessary when objection overruled); Hunt 613 So. 2d at 898, n. 4 ("futile efforts are not required to preserve matters for appeal").

possess special knowledge or expertise that allows them to identify the *perpetrator* of sexual abuse.'" Flanagan, 586 So. 2d at 1115.

This unreliable, irrelevant, misleading, character-smearing nonstatutory aggravation overwhelmed the proceeding below. The failure to exclude it was reversible error.

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.

The state argues the hearsay testimony was offered to rebut Dr. McMahon's contention that information about "other sexual molestation" would have no effect on her opinion. Answer Brief at 25. The error in using extrinsic testimony to impeach on a collateral matter is discussed above. The state further argues that the hearsay testimony of L D was cumulative because some of the testimony was admitted in the redirect of Ms. D . Answer Brief at 25-26. The Initial Brief instead shows that through hearsay the state expert parroted detailed testimony which is much more dramatic in its impact on the jury. Initial Brief at 33-34.

The state totally ignores, and therefore concedes, the errors raised as to the unlawful hearsay testimony of R D , R M , and Richard Hitchcock, which are independent grounds for reversal as discussed at pages 37-38 of the Initial Brief.

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

The state claims lack of preservation, saying there was only one objection. This is not true. The defense objected to the state expert's testimony about the demeanor of R D . R 676-678. Even if this Court finds the claims of bolstering of L D s not preserved, the error contributes to the prejudice of the bolstering of

R M . Whitton, 649 So. 2d at 865. As to M 's' testimony, the state admits a timely objection was made. Answer Brief at 27. Its argument is that the testimony was not bolstering and is relevant to rebut a charge of recent fabrication.

The testimony is not admissible to rebut a charge of recent fabrication. 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). A prior consistent statement would be one made in the years before M spoke with the state's expert, but none were proffered by the state. The "consistent" statements to the state's expert were made shortly before this penalty phase, not in the years "prior." The 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). These bolstering statements were not admissible. See, Parker v. State, 476 So. 2d 134, 137 (Fla. 1985).

On the merits, the state completely omits from its quote the answer given by the expert to the question concerning M veracity. The questions and answers at transcript page 701 are:

> Q. You were in the courtroom when Mr. M was testifying, weren't you?
>
> A. Yes.
>
> Q. Did you observe his demeanor and testimony?
>
> MS. CASHMAN: Objection to bolstering the credibility of another witness and testifying about his demeanor.
>
> MR. ASHTON: I didn't ask the demeanor testifying.
>
> THE COURT: I will overrule the objection.

BY MR. ASHTON:

Q. Was your observation of him consistent with the way when you first spoke to him, that you told us about?

A. He was kind of vague to me. I'm not quite --

Q. In terms of shakiness, was that the way he was when he told you the story originally?

A. He was upset. This shakiness was a little different that what shakiness I saw.

The state's expert had already testified that for L D it was traumatic at first to talk about these things and that it takes time to gather confidence. He concluded by saying she was a victim of child sexual abuse in light of his observations of her demeanor. R 675. He also referred to demeanor and presentation when assessing R D , although he gave no final opinion on his truthfulness. R 678. Against this backdrop, the expert's comparison of "shakiness" at the interview with that at trial is a comment that M was truthful in testifying he had been sexually abused. The law precluding this bolstering testimony is set forth in the Initial Brief, and the state cites no law to the contrary, hence waiving any argument.

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

By citing no relevant cases, the state concedes the issue. Appellant relies on the Initial Brief.

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 state sinks to more name-calling in its answer to this point, but does not address the applicable factors governing the right to a speedy trial, due process and to be free from cruel and unusual punishment as set out in the Initial Brief at pages 45-50. It relies solely on its reading of United States v. Ewell, 383 U.S. 116, 121, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966), and United States v. Loud Hawk, 474 U.S. 302, 311-312, 106 S.Ct. 648, 88 L.Ed.2d 640 (1985), for the proposition that these cases mean "Hitchcock has no constitutional basis for his claim." Answer Brief at 32. The state has misread Ewell and Loud Hawk. These cases do not mean delay in appellate review is never a due process or speedy trial violation. In fact, Loud Hawk specifically holds "[t]he *Barker*[3] test furnishes the flexibility to take account of the competing concerns of orderly appellate review on the one hand, and a speedy trial on the other." 474 U.S. at 314.

In Loud Hawk the Court did rule in favor of the government on the speedy trial claim. Its reasoning is instructive. In discussing the delay occasioned by the appeals of Mr. Loud Hawk, the Court found that his "position was so lacking in merit that the time consumed by this appeal should not weigh in support of respondents' speedy trial claim." Id., 474 U.S. at 318, 106 S.Ct. at 657. Unlike Mr. Loud Hawk, Mr. Hitchcock was successful in his appeals, so the time consumed cannot be attributed to him and does weigh against the state.

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[3] Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

Mr. Hitchcock has specifically identified the resulting prejudice, to which the state has not responded in any way. Relief should be granted.

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.

Appellant relies on his Initial Brief.

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.

Mr. Hitchcock relies on the initial brief, except to add:

A. Denial of proposed instructions.

1. Duty to consider mitigation.

The state's argument ignores that the refusal to instruct the jury that it must consider mitigation led directly to the state's improper argument, T 808-11, that the jury could ignore unrebutted mitigation. Thus, although there are cases saying that Florida's standard instruction is sufficient in the abstract, the instruction was inadequate at bar to prevent an illegal refusal to consider mitigation. See James v. State, 615 So. 2d 668 (Fla. 1993) (reversing where court could not say beyond reasonable doubt that instruction did not affect recommendation in view of state's argument).

2. Individual consideration of mitigation.

The state's argument relies on Waterhouse v. State, 596 So. 2d 1008, 1017 (Fla. 1992), which states: "Waterhouse claims that the jury instructions failed to specify that each juror should make an individual determination as to the existence of any mitigating circumstance. These issues have been waived because counsel did not object to the instruction. Walton v. State, 547 So. 2d 622 (Fla. 1989), cert. denied, 493 U.S. 1036, 107 L.Ed.2d 775, 110 S.Ct. 759 (1990). In any event, Florida law does not require such an instruction." In relying on Waterhouse, the state ignores that: 1) Unlike Waterhouse, appellant has preserved the issue for appeal. 2) Waterhouse's proposed instruction was that each juror should make an

individual determination, whereas McKoy v. North Carolina, 110 S.Ct. 1227, 1233 (1990) requires only that each juror "be permitted" to individually determine mitigation. Appellant's requested instruction tracks McKoy and Mills v. Maryland, 108 S.Ct. 1860 (1988). Hence, the court erred in refusing the instruction. It is impertinent to suggest that Waterhouse overrules the Supreme Court of the United States.

6. Doubling of Circumstances.

The state argues[3] that there were no circumstances which the jury could have doubled. This argument ignores that the state itself urged to the jury that proof of the felony murder circumstance was sufficient to also prove the avoid arrest circumstance.[4] See James. The trier of fact may merge the felony murder and avoid arrest circumstances where, as here, it can determine that the same aspect of the offense supports both. Thus in Bruno v. State, 574 So. 2d 76 (Fla. 1991) the trial court merged the felony murder and avoid arrest circumstances where the defendant murdered the victim during a robbery. The trial court's refusal to give the instruction at bar allowed improper consideration of both circumstances where the jury may have found facts supporting only one.

8. Acts committed after decedent's death.

The state argues that the jury could not have been misled by the refusal to give the proposed instruction. The state ignores that it

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[3] The state also argues that, by citing a case on point and stating the argument succinctly, appellant has argued the point insufficiently. The absurdity of such a plea for verbosity speaks for itself.

[4] The state argued to the jury: "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 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." T 798.

urged the jury to consider post mortem acts in support of the circumstance: At transcript page 802, while arguing for application of the circumstance, the state urged the jury to consider that appellant "threw her in the bushes. Went inside, washed his clothes, washed off the blood, went to sleep. That's the way he left her, ladies and gentlemen."

POINT V

WHETHER THE STATE ENGAGED IN IMPROPER ARGUMENT

Appellant relies on the initial brief, except to add the following in reply to the state's brief:

Relying on Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994), the state seeks to excuse its improper argument on the ground that defense counsel did not move for a mistrial after the trial court overruled the defense objections. In Spencer, the trial court sustained the defense objection but then denied a motion for mistrial. Hence, this Court held that the matter was preserved for appeal. Needless to say, Spencer does not support the proposition that, when a court has ruled against a party that party must seek further relief by moving for a mistrial. The rule is that, once the trial court has overruled an objection, the defense need not futilely seek further relief. Simpson (when trial court overruled objection, motion for mistrial not required to preserve issue for appeal), Thomas v. State, 419 So. 2d 634 (Fla. 1982), Williams v. State, 414 So. 2d 509 (Fla. 1982), Spurlock v. State, 420 So. 2d 875 (Fla. 1982), Holton v. State, 573 So. 2d 284 (Fla. 1991). Thus Hunt states at 613 So. 2d at 898, n.4:

> The fact that no formal motion to enforce the plea agreement was filed does not preclude us from granting relief. Once the trial court erroneously determined that it was Hunt who had breached the agreement, a formal motion to enforce the State's agreement to postpone her sentencing until after Fotopoulos' trial and further argument on that subject would have been futile. Such futile efforts are not required to preserve matters for appeal. [Cit.]

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

In its brief, the state dices and splices out of order sentences and half-sentences out of its argument. By this exercise it tries to establish that the argument on parole eligibility went only to rebut mitigation. Its argument at trial refutes its argument on appeal. Its

argument to the jury was that the choice was between death or early release on parole. Thus, it concluded its argument to the jury:

> This is the point in the anlysis [sic] where the law can give you very little help. This is a decision that each and every one of you have to make, based on what you have seen and heard in this case. Which of these sets of things are more important, which have moral weight, which have more significance in deciding this kind of case?
>
> But what you must ask yourselves is this: based on the weighing of aggravating and mitigating circumstances, if the defendant is given a sentence of life, with a 25-year minimum mandatory and at the expiration from the date that he began to serve that sentence or some point thereafter, the parole commission decides to parole him.
>
> [Defense objection overruled.]
>
> Based on the weight of these aggravating circumstances, can you say to yourself, that's enough, he's paid his debt, the books are balanced? Based on the weighing of these aggravating and mitigating circumstances, can you say to yourself if Mr. Hitchcock is ever released on parole that will be justified based on the weighing of these circumstances?
>
> I will submit to you that it's not, that allowing Mr. Hitchcock even the possibility of ever walking the streets again, is not justice based on the weighing of these mitigating and aggravating circumstances, and that the only just decision in this case is death, death for James Ernest Hitchcock; for what he did to Cindy Driggers and for the kind of man that he really is, death is the only fair sentence.

R 820-21 (emphasis added). This was the sort of consideration condemned by Norris v. State, 429 So. 2d 688 (Fla. 1983) and Teffeteller v. State, 439 So. 2d 840, 844-45 (Fla. 1983). That it had an effect on the penalty verdict is undeniable, given the jury's question about parole eligibility. This Court should reverse and remand for resentencing before a new jury.

C. Improper argument respecting mitigation.

The state argues that "even if the prosecutor's argument was improper, it was harmless because it was cured by the instructions to the jury." Answer brief, page 57. This ignores that the trial court

improperly refused to instruct the jury that it must consider mitigation. Thus, the standard instruction, coupled with the prosecutor's argument urging the jury to illegally ignore mitigation, violated the teachings of Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 262 (1987). James.

POINT VI

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

Appellant relies on his Initial Brief.

POINT VII

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

Appellant relies on his Initial Brief.

POINT VIII

THE TRIAL COURT IMPROPERLY FOUND OR CONSIDERED ALL FOUR AGGRAVATORS.

The state's proffered preservation barriers to appellant's challenge to the trial court's finding of the aggravators is contrary to settled law. This Court reviews the legal and factual basis of aggravating circumstances found by the trial court without regard to an objection. See Allen v. State, 20 Fla. L. Weekly S397 (Fla. July 20, 1995)(even where valid waiver of mitigation and defendant personally urged jury to vote for death this Court reviews validity of aggravators on appeal).

POINT IX

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

The state again misreads the record. Objection to the instruction was made at R 8 when the defense said its instruction was proper as submitted. See Simpson; Hunt. On the merits, the state cites no contrary authority. This Court should reverse.

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.

Appellant relies on his Initial Brief.

POINT XI

DEATH IS DISPROPORTIONATE.

Appellant relies on his Initial Brief.

CONCLUSION

Mr. Hitchcock's sentence 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 15th day of November, 1995.

Of Counsel