IN THE SUPREME COURT OF FLORIDA

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| NEIL WILSON WILDING,<br><br>Appellant,<br><br>vs.<br><br>STATE OF FLORIDA,<br><br>Appellee. | ) | CASE NO. 82,696 |

# INITIAL BRIEF OF APPELLANT

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## TABLE OF CONTENTS

## AUTHORITIES CITED

UNITED STATES CONSTITUTION

## PRELIMINARY STATEMENT

Appellant was the defendant and appellee the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For Indian River County, Florida. In this brief the parties will be referred to as they appear before this Court.

The symbol "R" will denote the Record on Appeal.

The symbol "T" will denote the trial transcript.

The symbol "SR" will denote the supplemental record.

The symbol "ST" will denote the supplemental transcript.

## STATEMENT OF THE CASE

On June 17, 1992, Appellant, NEIL WILSON WILDING, was charged by indictment with premeditated murder R12. Appellant was also charged with aggravated burglary and sexual battery R13. Jury selection began on July 6, 1993 T97. At the close of the state's case, and at the close of all the evidence, Appellant moved for judgments of acquittal T1057-60, 1090. Appellant's motions were denied T1059,1061,1090. Appellant was found guilty of murder in the first degree, aggravated burglary and sexual battery R547.

The trial court struck the jury for the penalty phase T1229. A new jury was empaneled for the penalty phase. The penalty phase commenced on September 8, 1993 T1666. The jury's recommendation was 9-3 for the death penalty R505. On October 4, 1993, the trial court sentenced Appellant to death for the murder conviction R539-545,549. The trial court departed from the recommended guideline sentence of 9-22 years R538, and sentenced Appellant to life imprisonment for the aggravated burglary R555, and life imprisonment for the sexual battery R555. On October 7, 1993, the trial court filed its sentencing order R539-545, Appendix.

A timely notice of appeal was filed R567.

## STATEMENT OF THE FACTS

## GUILT PHASE

The relevant facts are as follows.

Mrs. Emma Dickenson testified that on August 27, 1988, her daughter, Marsha Ross, came over for dinner T477,479. At 11:00 the next morning Dickenson called Ross T482. She called all day long, but there would be a busy signal T482-83. Marsha Ross had narcolepsy and would fall asleep if not taking her medication T478. Dickenson and her husband went to their daughter's residence at 8:00 p.m. T483. They found Marsha Ross dead on the couch T484. Mr. Dickenson called the police T484-85.

Members of the Vero Beach Police Department described what they observed at Marsha Ross' residence. Marsha Ross was on a couch. Her hands were bound with a white phone cord T504,519. There was a hair wrapped in this cord T523,525. A brown cord from a lamp had been wrapped around her neck and tied into a double knot T504,520,537. The lamp was located behind Ross' head on the couch T537. There were no signs of struggle to the lamp shade T537. The cord was plugged in, but the cord was severed T537. A knife was found nearby T503. Decomposition had already started and Ross' face and hands were a dark purple T492.

A full bottle of a drug used for treatment of narcolepsy was collected from the scene T632. A window in Ross' residence was open and the screen was pushed in so that someone could easily reach through and touch the door area T504. An open purse was on the counter T503. A package of grapes was found T503. An ashtray contained a grape stem, a green grape and cigarette butts T503. A seat cushion of the couch was found on the floor T503. A large towel and wash cloth were found

next to the cushion T503,565. There was also a tube of Neosporin and some packaging on the floor T503. There were brown stains on the floor that appeared to be Ross' blood T503,519. The television set was on T532. Hairs were found at the sink, couch and on Ross T526. The bedroom had two sliding glass doors that were open T529. Due to the opening being covered by cobwebs, it did not appear that anyone had recently passed through this doorway T539. Clothing and jewelry were found lying around T529. A small lamp in the southeast section of the residence was on T532. Plane tickets to Akron with a departure date of September 1st were found at the scene T608.

An argon laser was used to search for hairs, fibers, seminal fluid, latent fingerprints and blood stains T530. Hairs in the apartment were found and turned in for analysis T541. They turned out to be those of Marsha Ross T541. No semen was found within Ross nor on the sofa cushion T543. Fingernail scrapings were performed on Ross T543. No skin, particles, blood or anything of significance was found T543. No prints of evidentiary value other than those of Ross and her family were found T582. The blue towel found near the cushion was taken into evidence T565.

Detective Frank Divincenzo of the Vero Beach Police Department testified that a general statement regarding the murder was released to the press stating that a female was strangled with a cord T629. Several articles were written in the paper T629. The press determined that a telephone cord had been used T629. Over objection, Divincenzo testified that an anonymous tip gave the name Neil Wilding T622. None of the hairs, fibers, or blood found at the scene matched Appellant's T633.

On August 4, 1992, Marsha Ross' wallet was found underneath a shed located at the south side of Ross' residence T634,638.

Medical Examiner, Raul Vila, performed the autopsy on Marsha Ross on August 29, 1988 T751. Ross had started to decompose T753. The orbits of her eyes were hemorrhagic T754. Ross' lips were contused or bruised T754. There were bruises and scrapes around the neck consistent with a cord behind tied around the neck and squeezed, or with it being loosened and tied again T755. Ross had a recent scrape on the right thumb and ligature marks around her wrists T758,760. There was a laceration along with an area of redness on the superior aspect of the vagina T763. This can be consistent with sexual battery T763. The laceration could also be caused by things other than sexual battery T773. It could be caused by the use of a feminine product by Ross if the infection could be caused by medication in the tube T772. The inflammation in the vagina was chronic -- which means that it was older as opposed to more recent T773. Vila did not do any tests to determine of there was any Neosporin within the vaginal area T772. Vila could not say that Ross was raped T774. Vila could not tell whether the redness inside the vagina was due to decomposition or trauma T764,770. There was no trauma to the external genitalia T771. Vila also examined the contents of Ross' stomach T765. The stomach contained what appeared to be grapes or other fruit T766. Vila concluded from his examination that asphyxia was the cause of death T767. Vila estimated the 5 to 7 minutes is the longest time that somebody can go without taking air T768. The length of time varies according to the individual T768. Ross was 5 feet 8 inches tall and weighed 230 pounds T771.

Daniel Nippes of the regional crime laboratory testified that he examined the housecoat worn by Ross, a towel found near Ross, a sex crimes kit of Ross and a bedsheet used to transport Ross T704-05,706,709. There were some blood stains and a small amount of semen stains on the housecoat T705. There was too little semen to test T705. There were also blood stains on the bedsheet T705. The blood stains were all consistent with Ross T728. There was nothing significant in the sex crimes kit T706. There was no finding of spermatozoa, pubic hairs or anything else foreign to Ross T706-07. No semen was found in the vagina T739. The fingernail scrapings performed on Ross had nothing of forensic value T707. The towel contained semen stains, blood stains and some caucasian hairs T709. The two caucasian pubic hairs were similar to pubic hairs of Marsha Ross T711. Hair taken from Ross' hands and the cord around her neck were body hairs that were not suitable for forensic comparison T711. Semen stains were cut out of the towel for DNA analysis T710. Nippes performed a PCR analysis on the semen stain and compared it to the blood standards of Appellant T726. The semen stains were mixed with some other bodily fluid T724. In some areas the two were not separated T725. The semen stains matched the blood sample of Appellant T730. According to Nippes, approximately 99.8% of the population would not match the semen stain found on the towel T730. Nippes was not able to eliminate Appellant from being the donor of the semen stain T730. The data base Nippes was relying on was based on 2,000 individuals in Florida T736. Nippes recognized that 600 people in Florida could have matched the semen stains T1736. Nippes also testified that the towel could have come from any location T740. Appellant was not the contributor of the pubic hairs found on the towel T740-41.

Lisa Bennett was employed by Lifecodes Corporation in 1988 and at that time received towel and bed sheet cuttings in this case T950-51. The towel cuttings contained semen and blood stains T951. A DNA print was obtained from one of the towel cuttings T961. The other towel cutting did not yield a DNA print T961. A DNA print was obtained from the bedsheet T963.

Richard Cunningham was employed by Lifecodes Corporation and in 1991 was asked to process certain items regarding the murder of Marsha Ross T982. Cunningham had blood samples from Linda Manuel and Tosha Wilding and was asked to perform a paternity test on an unknown sample that another scientist had previously tested T983. This was an unusual case because Cunningham had never been asked to process a sample where a mother and child's blood was submitted T987. Cunningham compared the semen stain (State's Exhibit 48) to the DNA of the mother and child T996. About a year later Cunningham was sent a blood sample to compare with the semen stain T997. It was submitted as the blood standard of Appellant T998.

Michael Baird works at Lifecodes as the vice-president of laboratory operations T1015. Baird reviewed the work done in this case T1023. Baird testified that the semen stain taken from the towel cutting could not be excluded as originating from the biological father of the child (Tosha Wilding) T1030. Baird calculated that the probability of paternity was 99.96% T1030-31. Based on this figure, assuming that there are 10 million people in Florida, 50% of which are male of which 60% could produce semen, there are between 1,200 and 2,000 individuals that could have provided that particular semen sample T1052. Baird testified that there was a DNA numerical match of the semen stain and the towel cutting to the blood standard of Appellant

T1037. The DNA positions of the semen stain and the blood standard of Appellant appeared to be very similar T1038. The frequency of the patterns that were matched would be about one in every twelve million caucasian individuals T1048. Baird testified that he was familiar with the "ceiling" principle, but that Lifecodes did not abide by the ceiling principle in calculating frequencies T1053. The ceiling principle would result in a more conservative frequency T1053. Lifecodes is a profit company T1020. Lifecodes was paid $1200.00 for Baird's court appearance T1053.

Elizabeth Lowden testified that in August of 1988 she lived with Appellant and his brother, Gerald Sturgess T798. There was a time in late August, a couple of days before Gerald's birthday which was August 28, that Appellant went out and came back later T802-03. Appellant and his brother's talking woke Lowden T084. Appellant asked Lowden if she wanted some grapes T805. Lowden heard Appellant tell his brother that a couple of girls picked him up on the bridge and took him to the beach and were feeding him grapes T805-06. The next morning Lowden saw a tray of grapes on the nightstand T806. They were in a styrofoam container T806.

Krisken Robinson testified that his memory was not fully intact, but that specific parts of his memory were intact T827. Robinson worked at Treasure Coast Masonry and knew Appellant T827-28. One day there was a discussion among the work crew concerning a murder that occurred in Vero Beach T830. Robinson doesn't remember Appellant being on the work crew this day T830. Approximately two days after hearing about the murder, Robinson saw that Appellant had 4 deep scrapes on his arm T831. Robinson saw Appellant on the job site every day, but this was the first time he saw the scratches T834. Appellant said he had

cut himself on the block T831. One day later Appellant did not turn up for work for the next couple of weeks T833. When Appellant returned to work he continued to work there for some time T834-35.

Officer Terry Franklin of the Soles Police Department in Soles, Oklahoma, testified that on April 4, 1992, he pulled over a Ford Grenada that was driving over the center line T903. Franklin arrested Appellant T904. Franklin asked him for his name T904. Appellant identified himself as Neil W. Wilding T904. Appellant did not have a driver's license, but indicated that he had one at one time T904. Franklin asked from what state T904. Appellant replied from Florida T904. Franklin went to run the information T904-05. Before the information came back, Appellant said "that it could come back possibly with a warrant for murder" T905.

Sandi Schmidt testified that she lives in Shelley, Montana, and has three sons -- Kim, Gerald and Appellant T867-68. Gerald is Appellant's half brother T869. Kim and Appellant resulted from separate births, but they look almost identical T890. In September of 1988, Appellant phoned Schmidt and said that he thought he was in trouble T871. He said he had met a girl in a cafe or something T873. Schmidt didn't remember exactly where Appellant had said T873. Appellant was invited to her place where her boyfriend would be T873. They went to a motel room T873. These people asked Appellant to untangle a phone cord T873. Appellant untangled the cord and when Appellant gave the phone to the woman she told him to "put it down anywhere" T874. The people knew Appellant's brother Kim T873. The woman told Appellant, "tell Kim now we're even" T875. Kim was in Vero Beach at a drug rehabilitation center at this time T876,890. Appellant told Schmidt there had been a murder and the purpose of untangling the

cord was to get his fingerprints on the cord T875. He thought he was being framed because he had heard in the media that there was a phone cord involved T888.

Appellant called Schmidt several times after that T876. After Schmidt learned that Appellant was wanted for murder, she spoke with him and told him to clear it up T881. Appellant said that he would T881. The next time Appellant called was from Oklahoma T882. Appellant told Schmidt that he had been arrested T883. Appellant said that he had no idea who Ross was and he had never seen her before an attorney showed him her picture T884.

Julie Britt testified that she lived in Ashville, North Carolina, and never knew a person by the name of Neil Wilding T931. Britt identified Appellant as the person she knew as John Sturgess in 1990 T934. Appellant moved in Britt's place of business T935. Appellant moved out in April of 1992 T936.

## PENALTY PHASE

During the penalty phase the state repeated much of the testimony of the police, medical examiner, Daniel Nippes, that was introduced during the guilt phase of trial. Collen Ross also testified that her mother was 49 years old when she died and identified her mother's wallet T1752.

Della Wooten testified that she lives in Marshall, North Carolina, and that Appellant worked for her family from 1989 to 1992 T1850. Appellant picked strawberries and blackberries, cut and hung tobacco, laid block and a number of different things T1851. Appellant would never take breaks when the others would and would only take 15 minutes for lunch and would be back to work before anyone else T1853. Appellant outworked the other employees T1853. He was the best worker they had and was always very respectful to Wooten's family T1854. Wooten understands that Appellant has been convicted of murder in the first degree, but if given the opportunity Wooten would rehire Appellant "in a heartbeat" T1854-55.

Jean Hensley testified that Della Wooten is her daughter T1858. Hensley knew Appellant by the name of John Sturgess which was his stepfather's name T1859. Appellant did such work as picking strawberries and cutting tobacco T1859. Appellant also helped rebuild the house after it burned down T1859. Appellant did not request to be paid for that work T1860. Hensley's husband told Appellant that they did not have money to pay him T1860. Appellant replied that he wasn't there for the money; he was there to help friends T1860. Appellant was a good hard worker T1860. He would not take breaks T1860. He would only stop for dinner long enough to eat a bite T1860. Hensley knows that Appellant has been convicted of murder in the first degree, but

would rehire him and give him a place to live if given the chance T1861.

Appellant's mother, Sandi Schmidt, testified that Appellant's father died two days before Appellant's first birthday T1867. Schmidt remarried with a man named Sturgess T1867. Schmidt worked two jobs when Appellant grew up T1868. She worked from 6:00 a.m. to 3:00 p.m., then would come home for 3 or 4 hours and then would work until 2:00 or 3:00 in the morning T1868. Mr. Sturgess would have responsibility for the children T1868. When Appellant was 15 years old he called his mother at work T1868. Appellant told her he was not going to return home until his mother got him T1869. She asked why T1869. He said, "I'm not going to be beat any more" T1869. Schmidt had an inclination about what had been happening T1869. Sturgess had been beating Appellant T1826. Schmidt later found out that Sturgess had frequently beaten Appellant T1870. When Schmidt was home Sturgess seemed like the perfect father, but Schmidt found out when she was gone his behavior was different T1873. When the family would go to town shopping, leaving Sturgess at home, the necks of animals, kittens and the dog, would be broken T1872-73. Sturgess also killed three horses T1874. Schmidt believes that Sturgess may have killed the children's animals in order to keep them silent about the abuse T1874. In Schmidt's opinion the fear of violence kept the children silent and it was when they were 500 miles away before they finally felt free to say anything T1875.

Dr. Mary Hicks, recognized by the court as an expert in the field of mental health, testified that she interviewed Appellant for four hours and his mother for one hour T1904-05. From the background information Dr. Hicks received, Appellant experienced a lot of abuse

at the hands of his stepfather T1907. What happens to a person in childhood and adolescence influences what happens when he or she is an adult T1952-53. Appellant received the beatings at a very important stage of his life when he was trying to establish some sense of identity T1907-08. Animals were important to Appellant because of his unfortunate relationship with his stepfather T1912. Appellant told Dr. Hicks that his stepfather killed his favorite dog T1911. The cat died of a broken neck T1911. Appellant's schooling was affected and he dropped out and got a job washing dishes T1910. Appellant got mixed up in drugs T1910. Appellant smoked marijuana regularly T1916. Appellant told Dr. Hicks that on the night of the crime he smoked marijuana and that his tongue got numb and he had a blackout T1914. This could cause some sort of extreme emotional disturbance T1915. Dr. Hicks has no information as to whether Appellant was under the influence of an extreme mental or emotional disturbance on the night Marsha Ross was killed T1937.

Dr. Hicks testified that Appellant's potential for rehabilitation is "very high" T1919. Appellant is capable of acquiring a sense of responsibility to himself and others T1945. Appellant is capable of making commitments that he previously has not been capable of making T1945. Appellant has a lot of good qualities in terms of care and compassion T1919. Everyone who knows Appellant talks about his concern for other people T1919. Appellant has a number of skills T1919. He is mechanical and artistic T1919. Since he has been incarcerated, Appellant has recognized for the first time that he has a really good brain T1922. Dr. Hicks has had a lot of people try to "con" her T1913. Dr. Hicks does not feel that Appellant was malingering or conning her T1912.

William Holland testified that he is a minister involved with the ministry in the jail T1897. Appellant participated in classes taught by Holland at the jail T1898. It was a 14 week course involving counselling for alcohol and drug addiction T1898. Appellant had individual counselling with Holland T1898. Appellant went to all the classes and graduated successfully T1899. Appellant had a normal relationship with others in the class T1899. Appellant related very well in class T1901. Appellant always exhibited a good attitude T1899. Holland has seen personal growth in Appellant's life and changes in his thinking T1899.

Sergeant Michael York, the transportation supervisor for the Indian River County Sheriff's Department, testified that he has been in contact with Appellant five or six times T1822. During this time, Appellant's conduct has been good T1823. York has had problems with 30% of the inmates T1824.

Shelby Strickland, a corrections employee, testified that he has worked in Appellant's area and has never had any problems with Appellant T1826. Appellant has never been disrespectful or failed to follow orders T1827. Appellant has exhibited good jail conduct T1827. Strickland has had problems with 25% of the inmates T1827.

George Stubbs, a transportation officer, testified that he brought Appellant to court at least five times T1830. Stubbs has also had contact with Appellant while waiting for court T1830. Appellant's conduct has been good and he has never given Stubbs any problems T1830-31. Appellant has had no problems with other inmates T1833.

Burt Bach, a transportation officer, testified that he has transported Appellant with other inmates T1835. Appellant has never

given any problems and has never been disrespectful T1835. Sometimes, but not often, Back has had problems with other inmates T1836.

Bud Roode, a transportation officer, has had contact with Appellant four or five times T1839. Appellant has never exhibited a bad attitude and has never been any problem T1839. Roode has had problems with other inmates -- such as running their mouths, giving a hard time and doing things they are not supposed to do T1840.

Lieutenant Rick Sinclair testified that he is the watch commander and shift supervisor at the jail T1843. Sinclair supervises the staff in the care, custody and control of the inmates T1843. Any problems are made know to Sinclair T1843. Sinclair knows Appellant and has been in contact with him approximately 2 dozen times T1844. Sinclair has developed a rapport with Appellant since having continuous contact since May of 1992 T1845. Appellant's jail conduct has been good T1845. There was only one problem which was insignificant T1845. Appellant was found with 2 or 3 Tylenol that he had not taken T1846. This was not considered a major infraction T1848. It was pretty low in the spectrum of rule violations T1848.

## SUMMARY OF THE ARGUMENT

1. Evidence was presented that police received a tip which gave Appellant's name as a suspect. Such testimony as to a tip from a non-testifying witness provides an inescapable inference that the witness has furnished evidence of Appellant's guilt. It was reversible error to admit such testimony.

2. The prosecutor made misleading comments as to the effect of DNA evidence and made comments unsupported by the evidence. The arguments deprived Appellant of due process and a fair trial.

3. Appellant attempted to cross-examine a state DNA witness regarding the autoradiographs that he had testified about on direct examination. The trial court prohibited Appellant from doing so. This was reversible error.

4. The evidence was insufficient to prove that a sexual battery was committed. It was reversible error to deny Appellant's motion for judgment of acquittal.

5. The charging document failed to charge the crime of sexual battery where it never alleged the essential elements of sexual battery. It was reversible error to convict Appellant of a crime not charged.

6. The admission of DNA evidence in this case denied Appellant due process and a fair trial.

7. There was evidence that one or more of the jurors in this case were not free from distraction and concerns outside the evidence. This denied Appellant's right to a fair and impartial jury.

8. Appellant should have been tried on the evidence in this case, and not on the common practice of what occurs in other cases. Such evidence denied Appellant due process and a fair trial.

9. Only the grand jury has the authority to amend an indictment. It was reversible error to constructively amend the indictment in violation of the Grand Jury Clause.

10. The indictment never alleged felony murder. It was reversible error to proceed on a felony murder theory which was not noticed.

11. It was reversible error to introduce evidence that Appellant was the subject of the "America's Most Wanted" show.

12. The trial court reversibly erred in refusing to allow release, or at least in camera review, of the Grand Jury testimony.

13. It was reversible error to deny Appellant's motion for mistrial where there was insufficient evidence that the DNA evidence presented to the jury came from the crime scene.

14. The trial court reversibly erred in finding the aggravator that the offense was especially heinous, atrocious or cruel (HAC).

15. Appellant was denied due process and a fair, reliable sentencing due to the prosecutor's improper comments during sentencing.

16. Appellant was denied due process and a fair, reliable sentencing due to the introduction of nonstatutory aggravating circumstances during the sentencing phase.

17. The death penalty is not proportionally warranted in this case.

18. It was reversible error to sustain the state's objection to the statement that the law has a presumption of life.

19. The trial court used the wrong standard in rejecting drug abuse as a mitigating factor. This was reversible error.

20. The trial court received ex parte material during sentencing. It was error to fail to state on the record whether the

material was relied upon. Also, the nature of the material denied Appellant due process and a fair, reliable sentencing.

21. It was reversible error to allow instruction on anal and oral penetration where such an instruction was not applicable to the facts of this case.

22. The trial court gave undue weight to the jury recommendation. This was reversible error.

23. The instruction on the HAC aggravator in this case was unconstitutional.

24. The trial court reversibly erred in overruling Appellant's objection to the requirement of "extreme" mental or emotional disturbance and "substantial" impairment for mitigating circumstances.

25. The trial court did not file a written sentencing order contemporaneous with pronouncement of sentence. This cause must be remanded for imposition of a life sentence.

26. Allowing the state to present its version of Appellant's guilt in the penalty phase, while prohibiting Appellant from challenging such a version, was reversible error.

27. The trial court erred in admitting hearsay evidence at sentencing.

28. The felony murder aggravator is unconstitutional.

29. The trial court erred in failing to adequately define the nonstatutory mitigating circumstances.

30. It was reversible error to deny Appellant's requested jury instruction that mitigating evidence does not have to be found unanimously.

31. The aggravating circumstances used in this case are unconstitutional.

## ARGUMENT

### POINT I

**THE TRIAL COURT ERRED IN ADMITTING HEARSAY EVIDENCE OVER APPELLANT'S OBJECTION.**

Over Appellant's hearsay objection R622, Detective DiVencenzo was permitted to testify that he had received a tip which gave him Appellant's name as a suspect in this case R622. The admission of such evidence is reversible error.

Testimony as to a tip from a non-testifying witness which yields the defendant as the suspect is inadmissible hearsay as it provides an inescapable inference that the witness has furnished the police with evidence of the defendant's guilt. Postell v. State, 398 So. 2d 851 (Fla. 3d DCA 1981). In Postell, reversal was required where an officer testified that based on a conversation with a woman the defendant was arrested. The Court held that such hearsay evidence provided an inescapable inference that the non-testifying witness furnished police with evidence of the defendant's guilt and the defendant's right to confrontation was abridged even though the content of the conversation was never elicited:

> We hold that where, as in the present case, the inescapable inference from the [challenged] testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated.

398 So. 2d at 851 (footnotes omitted); see also Davis v. State, 493 So. 2d 11 (Fla. 3d DCA 1986) (reversible error to allow officer to testify to hearsay that he had asked a number of people about attempted murder incident which led him to evidence which led to defendant -- the inescapable inference was that the non-testifying witnesses had furnished evidence of defendant's guilt to police).

Likewise, in this case, there was an inescapable inference that the non-testifying witness had given police evidence of Appellant's guilt. This hearsay denied Appellant of his rights of confrontation and a fair trial.

Evidence of an out-of-court tip does not fall within any recognized exception to the hearsay rule. Thomas v. State, 581 So. 2d 993 (Fla. 2d DCA 1991). In Thomas, the appellate court noted that the defendant was unable to cross-examine the tipster as to the truth of the assertion in that case -- someone resembling the defendant had drugs. Likewise, in this case, Appellant was unable to cross-examine the tipster who had implicated him in this case. It was error to admit the hearsay evidence.

The hearsay tip cannot be used to link Appellant to the crime charged. Beatty v. State, 486 So. 2d 59 (Fla. 4th DCA 1986) (error to permit hearsay evidence of phone call which would help identify the defendant as the perpetrator of the crime).

Nor is the hearsay evidence admissible to show subsequent actions of the police. Conley v. State, 620 So. 2d 180 (Fla. 1993). In Conley, this Court held that a hearsay tip that a man chasing a female had a gun was not admissible to explain an officer's subsequent actions or to show the sequence of the investigation. Conley, supra, at 182-183; see also State v. Baird, 572 So. 2d 904, 907-908 (Fla. 1990); Harris v. State, 544 So. 2d 322, 324 (Fla. 4th DCA 1989). The actions of the police are not in issue in this case. Rather, the issue is who is involved in the killing of Marsha Ross. Even if the officer's actions were in issue, the hearsay should not have been admitted. State v. Baird, supra (officer should testify to actions he

took rather than identifying hearsay which caused him to take actions).

The admission of the improper evidence violated Appellant's rights to confrontation, due process and a fair trial. Fifth, Sixth and Fourteenth Amendments, United States Constitution; Article I, Sections 2, 9 and 16, Florida Constitution. This cause must be remanded for a new trial.

## POINT II

**APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL DUE TO THE PROSECUTOR'S MISLEADING ARGUMENT CONCERNING DNA EVIDENCE.**

During the closing argument, the prosecutor told the jury that the DNA evidence showed "99.8 percent that Neil Wilson Wilding was the contributor of that semen stain on the towel" T1122. Soon afterward, the prosecutor again stated that DNA comparison showed "99.96 percent that he was a contributor" T1122. The prosecutor further stated that the DNA evidence was a "match" and then equated it with the odds of drowning in a bathtub:

> Match, ladies and gentlemen. That's what you heard Dr. Baird say. Match. Not exclusion, not possibility of exclusion, not included, you heard match. You heard match five times.
>
> We had the PCR test, 99.8 percent, and then we had RFLP. And each probe that hit matched the suspect Neil Wilding. The suspect Neil Wilding, the unknown, match. Suspect, Neil Wilding, second probe, unknown, match. Third probe, suspect, Neil Wilding, unknown, match. Fourth probe, suspect, Neil Wilding, unknown, the evidence, match. Fifth probe, suspect, Neil Wilding, evidence, the unknown, match. Match, ladies and gentlemen, match, match, match, match, match, match, match. Five different probes. Every single one of them matched. Plus a PCR, plus a paternity test.
>
> The possibility of somebody else having the same DNA is one in twelve million. One in twelve million. The whole state of Florida, if every single person in the state of Florida was a white male that could produce sperm, that's your figure. The odds of drowning in your bathtub are one in 650,000. You would have to drown in your bathtub eighteen times to equal this.

T1124. Finally, in the penalty phase the prosecutor asked the leading question "That the semen left at the scene was one and the same as the defendant?" T1739.

The statistical frequency used in DNA analysis is relevant to show the probability that a random person might by chance have matched the forensic sample. DNA Technology in Forensic Science (1992) at 74 (hereinafter "NRC Report"). However, at this point in time DNA technology is unable to identify anyone to a particular DNA sample.[1] By arguing to the jury that the DNA evidence 99.8 percent identified Appellant as the source of the semen stain, the prosecutor was misleading the jury. In addition, the jury was mislead due to the unwarranted assumption and argument that the DNA sample originated from a white male. See Point VI, part 1.

Such misleading statements to the jury constitute reversible error. See Hummert v. State, 170 Ariz.Adv.Rep. 17 (Ariz.Ct.App. July 26, 1994) (error to admit testimony that declared a "match" of DNA samples identifying the defendant as the contributor).

For example, in United States v. Massey, 594 F.2d 676 (8th Cir. 1979) reversal was warranted due to the prosecutor's mischaracterization of the frequency of mathematical odds to identifying the defendant as the perpetrator:

> The defendant does not challenge the opinion evidence that certain hairs within the ski mask were microscopically identical to his hair. The fundamental challenge relates primarily to the prejudicial effect of the use of mathematical statistical probability as elicited and interpreted by the trial judge and argued by the prosecutor.

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[1] NRC Report at 74. Unique identification is theoretically possible provided that enough sites in the human genomes are compared. However, the technology today only allows for comparison of a small number of sites (i.e. usually 3 to 5), thus, exclusion of sources rather than identification of sources is the present use of DNA technology in criminal cases. Id.

* * *

> The prosecutor argued: *... A handful -- 3 to 5 out of 2,000 -- that's better than 99.44%; it's better than Ivory Soap, if you remember the commercial. It's very very convincing.*
>
> Now hair samples are not like fingerprints. It is not positive identification. There is a theoretical possibility (and it actually happened in the case of this examiner in 3 to 5 times out of say, 2,000) where the hairs of two different heads can look the same when you examine the whole range of their characteristics.
>
> However, it is infinitesimally rare, and when we talk about the range of proof which we can use in deciding questions for us, those kinds of percentages are higher than the percentage we use in any other area I can think of in terms of making a decision.
>
> * * *
>
> By using such misleading mathematical odds the prosecutor "confuse[d] the probability of concurrence of the identifying marks with the probability of mistaken identification" of the bank robber. McCormick on Evidence § 204, at 487 (E. Cleary ed. 1972). In other words, the prosecutor has infused in the minds of the jury the confusion identifying the hair with identifying the perpetrator of the crime.

594 F.2d at 679-680, 680, 681 (emphasis added). Likewise, in this case it was reversible error to infuse in the jurors' minds that the DNA evidence had identified Appellant as the producer of the semen sample.

In addition, the prosecutor's reference to "odds of drowning in your bathtub are one in 650,000" (T1124) constitutes reversible error. There is absolutely no evidence to support such a statistic. The prosecutor improperly pulled the numbers out of thin air in order to bolster her case. In People v. Collins, 438 P.2d 33, 36 (Cal. 1968) the prosecutor presented probability statistics through its expert and argued that the expert's statistics (1 in 12 million) was conservative and that the real statistics were one in one billion. The Court reversed in part because the prosecutor's statistics were unfounded and constituted improper testimonial assertions. Likewise, the prosecutor's statistics in this case about drowning in a bathtub are totally

unfounded and a testimonial assertion of facts not in evidence. See Huff v. State, 437 So. 2d 1087 (Fla. 1983). The improper statements cannot be deemed harmless where the prosecutor used them to mislead the jury so as to bolster the strength of its case. The improper comments mislead the jury to the very heart of this case (T1164), and thus constitute fundamental error. See Doyle v. State, 483 So. 2d 89 (Fla. 4th DCA 1986). The improper statements denied Appellant due process and a fair trial contrary to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

## POINT III

**THE TRIAL COURT ERRED IN RESTRICTING APPELLANT'S CROSS-EXAMINATION OF A KEY STATE WITNESS.**

During trial the state presented Richard Cunningham as a DNA witness. Cunningham testified to the autoradiographs involved in this case T990-1005. On cross-examination, Appellant attempted to examine Cunningham as to the sizings of the autoradiographs T1007. The trial court prohibited Appellant from doing so T1007. The restriction of cross-examination was reversible error.

"The right of a criminal defendant to cross-examine adverse witnesses is derived from the Sixth Amendment and its due process right to confront one's accusers." Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982). A person accused of a crime has an absolute right to full and fair cross-examination. Coco v. State, 62 So. 2d 892 (Fla. 1953).

By its very nature, cross-examination is limited to the scope of direct examination. In this case the direct examination of Cunningham dealt with autoradiographs and their sizings T1001-1003. It was improper to restrict Appellant from following up on this line of

questioning. Similarly, in Coxwell v. State, 361 So. 2d 148 (Fla. 1978), this Court held that it was reversible error to restrict cross-examination based on the limited characterization of the scope of direct examination. First, this Court recognized the particular importance of the absolute right to cross-examination in a capital case:

> "a fair and full cross-examination of a witness upon the subjects opened by the direct examination is an absolute right, as distinguished from a privilege, which must always be accorded to the person against whom the witness is called and this is particularly true in a criminal case such as this wherein the defendant is charged with the crime of murder in the first degree.... Cross-examination of a witness upon the subjects covered in his direct examination is an invaluable right and when it is denied to him it cannot be said that such ruling does not constitute harmful and fatal error."

361 So. 2d at 151[2]. Next, this Court emphasized that direct examination opens a general subject and cross-examination should always be allowed relative to the subject matter brought up, and cannot be limited to the specific facts of direct examination:

> "'... when the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts ... or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief....'"

361 So. 2d at 151.[3] Finally, this Court reversed noting that the restriction of cross-examination of a key state witness as to a key

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[2] Quoting from Coco v. State, 62 So. 2d 892, 894-895 (Fla. 1953).

[3] Again quoting Coco v. State, 62 So. 2d 892, 895 (Fla. 1953).

issue -- identification -- gave the jury an incomplete picture and thus warranted a new trial:

> Here, as in Coco, the defendant in a capital case was denied the opportunity to elicit testimony from a key prosecution witness as to the most critical factual issue in the case -- identification. Here, as in Coco, the state's narrow characterization of the scope of direct examination ignores the expansive perimeters of subject matter relevance which the constitutional guarantee of cross-examination must accommodate to retain vitality. And here, as in Coco where the fingerprint expert "purportedly gave the jury a complete picture" yet in reality did not, Kilpatrick's abridged testimony concerning his conversations with Coxwell left an accusatory implication which Coxwell was barred from refuting.
>
> ... As in Coco, "we can only conjecture or surmise what the outcome would have been had the appellant been granted, rather than denied, his inalienable right of cross-examination."

361 So. 2d at 152 (emphasis added) (footnote omitted); see also, Elmore v. State, 291 So. 2d 617, 620 (Fla. 1st DCA 1974) (overruled on other grounds, 342 So. 2d 501) (when witness testifies to certain facts relating to transaction he should testify "to the whole of it" on cross).

Likewise, in this case it was error to restrict cross-examination on the DNA autoradiographs which were the subject of the direct examination. The error denied Appellant the right to due process and confrontation under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 15 and 16 of the Florida Constitution. The error was not harmless where the DNA autoradiograph was the primary instrument by which the state theorized Appellant was at the scene. This cause must be remanded for a new trial.

## POINT IV

**THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL TO THE CHARGE OF SEXUAL BATTERY WHERE THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT A SEXUAL BATTERY OCCURRED.**

At the close of the state's case, and at the close of all the evidence, Appellant moved for a judgment of acquittal on the charge of sexual battery T1058,1090. The ground for the motion was that the evidence was insufficient to prove that a sexual battery occurred T1058. The trial court denied Appellant's motions T1059,1090. This was error.

In support of its case for a sexual battery occurring the prosecution relied on the following circumstances: (1) a laceration on the superior aspect of the vagina; and (2) a semen stain on a towel and on the housecoat. These circumstances are not sufficient to negate all reasonable hypothesis of innocence nor prove beyond a reasonable doubt that the crime of sexual battery occurred as is required. See Golden v. State, 629 So. 2d 109, 111 (Fla. 1993); State v. Law, 559 So. 2d 187 (Fla. 1989); McArthur v. State, 351 So. 2d 972 (Fla. 1977).

First the medical examiner, Dr. Villa, did testify that there was a laceration on the superior aspect of the vagina and that this could be consistent with sexual battery T763. However, Dr. Villa further testified that the laceration could be caused by things other than sexual battery T773. Dr. Villa testified that it could be caused by use of a feminine product T772. Dr. Villa also testified that the inflammation in the vagina was chronic -- which means that it was older as opposed to more recent T773. Dr. Villa testified that he could not say the victim was raped T774. This evidence is insufficient to prove that a sexual battery occurred. Peters v. Whitley, 942

F.2d 937, 941 (5th Cir. 1991) (evidence failed to establish rape where "examining physician testified that there was no evidence of forced intercourse"); In the Interest of B.J.S., 503 N.E.2d 1198 (Ill.App. 4 Dist. 1987). For example, in B.J.S., supra, the conviction was reversed because of insufficient evidence for sexual assault where a physician testified that the victim's physical condition might be consistent with sexual abuse, but also noted the condition could be caused by other factors:

> The State further presented Dr. Warnick, who examined the victim. Although Dr. Warnick did find some physical abnormalities in the victim which might be consistent with sexual abuse, she noted that these abnormalities could also be caused by other factors. There was never any evidence presented to directly link the respondent to the allegation charged.

503 N.E.2d at 1201; see also, Golden v. State, 629 So. 2d 109, 110 (Fla. 1993) ("Two detectives admitted on cross-examination that there was no evidence of foul play and that there were no indications that the death did not result from an accident"). At best, the medical examination was wholly inconclusive in this case.

The discovery of the semen stains are totally inconsistent with sexual battery in this case. While there was semen found at the scene on a towel and on a housecoat, there was absolutely no semen found in the vagina of the victim. This certainly is not evidence of penetration. At best, the evidence shows a situation like in Hunt v. State, 371 N.W.2d 708 (Neb. 1985), wherein Hunt broke in the victim's home, strangled the victim, disrobed the victim, and then masturbated. Obviously, such a situation is repulsive, but it is not proof of a sexual battery. The semen stains are merely evidence of ejaculation. But to say that a sexual battery occurred, especially where the semen was absent from the vagina, is pure conjecture. The evidence was

insufficient to prove a sexual battery. Appellant's conviction and sentence for sexual battery must be reversed.

In addition, Appellant's death sentence must be reversed. One of the aggravators argued to the jury was that the killing occurred during the commission of a sexual battery. It cannot be said beyond a reasonable doubt that this may not have influenced the jury during its sentencing deliberations.

## POINT V

**IT WAS REVERSIBLE ERROR TO ADJUDICATE APPELLANT GUILTY OF A CRIME NOT CHARGED, SEXUAL BATTERY, WHERE THE ELEMENTS OF SEXUAL BATTERY WERE NEVER ALLEGED IN THE CHARGING DOCUMENT.**

Count II of the indictment charged Appellant in relevant part as follows:

> The Grand Jurors of the State of Florida inquiring in and for the body of the County of Indian River, upon their oaths do present that NEIL WILSON WILDING, on or between August 27, 1988 and August 28, 1988, did commit a sexual battery upon Marsha Ross, a person 12 years of age or older, without that person's consent, and in the process thereof used or threatened to use actual physical force likely to cause serious personal injury, in violation of Florida Statute 794.011(3).

(R13). Appellant was found guilty of sexual battery.

The sexual battery statute has essential elements that there be oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object. Section 794.011(h), Florida Statutes (1987).

In the present case the indictment wholly failed to allege the essential element involving penetration or union, by or with, the sexual organ of another. Instead, the indictment merely stated the generic term "sexual battery."

To pass constitutional muster the charging document must charge every element of the offense charged. Eg. United States v. Varkonyi,

645 F.2d 453 (5th Cir. 1981). Where the indictment or information wholly omits to allege one or more essential elements of a crime, it fails to charge the crime. Eg. State v. Gray, 435 So. 2d 816, 818 (Fla. 1983); State v. Dye, 346 So. 2d 538 (Fla. 1977); Walker v. State, 119 Fla. 240, 161 So. 278 (1935); Bradley v. State, 208 So. 2d 140 (Fla. 3d DCA 1968). For example, in Dye, supra, this Court noted that no essential element should be left to inference and that the omission of the allegation of defiance of an order to leave property would be fatal to a trespass charge:

> Our anxiety is not the product of an unconstitutional statute but is the function of an incomplete information.
>
> An information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference. In the instant case, the information is defective because it does not allege that "the offender defied an order to leave, communicated to him by an authorized person." Not only does it fail to state that a person with requisite authority demanded he leave, it does not even state that anyone ordered him to leave. An essential element of the offense is therefore omitted. Such an omission must be fatal.

346 So. 2d at 541 (citations and footnotes omitted) (emphasis added).

As noted before, in the present case the indictment wholly failed to allege the essential elements of sexual battery. Instead, the indictment merely used the generic term "sexual battery." It is well-settled that use of mere generic terms or title of statutes is not sufficient to charge a crime. Rosin v. Anderson, 21 So. 2d 143, 155 Fla. 673 (Fla. 1945); State v. Mayo, 19 So. 2d 883 (Fla. 1944) (information charging commission of a "lewd and lascivious act" without further definition failed to charge an offense); Leonetti v. State, 418 So. 2d 1192 (Fla. 5th DCA 1992) (information alleging "bookmaking" without alleging the elements of bookmaking, failed to

charge an offense); United States v. Nance, 533 F.2d 699 (D.C. Cir. 1976).

In Leonetti v. State, 418 So. 2d 1192 (Fla. 5th DCA 1992), in condemning an information alleging "bookmaking contrary to Florida Statutes 849.25" as wholly failing to charge a crime on the basis of the failure to allege all the essential elements, the court noted that alleging murder or burglary, without alleging essential elements would also be constitutionally deficient:

> In this case there are *no elements* expressed, thus the information is so vague and indefinite that it violates Article I, Section 16 of the Constitution of the State of Florida and Article VI of the Articles in Amendment of the Constitution of the United States of America. This information is, on its face, as constitutionally deficient as would be one which merely charged that one "did in violation of Florida Statute 784.04 commit the crime of murder" or that one "did in violation of Chapter 810 engage in burglary" or that one "engaged in theft in violation of Florida Statute 812.014."

418 So. 2d at 1194. Likewise, Count II the indictment in this case fails to charge a crime.

The error in this case is fundamental error. In State v. Gray, 435 So. 2d 816 (Fla. 1983), this Court noting a long line of cases, held that the failure of the charging document to allege an essential element of the offense is a fatal defect which can be raised for the first time on appeal:

> Where an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state. Since a conviction cannot rest upon such an indictment or information, the complete failure to an accusatory instrument to charge a crime is a defect that can be raised at any time -- before trial, after trial, on appeal, or by habeas corpus. See e.g., State v. Black, 385 So. 2d 1372 (Fla. 1980); State v. Dye, 346 So. 2d 538 (Fla. 1977); LaRussa v. State, 142 Fla. 504, 196 So. 302 (1940); State v. Fields, 390 So. 2d 128 (Fla. 4th DCA 1980); Catanese v. State, 251 So. 2d 572 (Fla. 4th DCA 1971).

435 So. 2d at 818. Convicting Appellant of a crime not charged violates Article I, Sections 2, 9 and 16 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Appellant's conviction and sentence for sexual battery must be vacated.

## POINT VI

**THE ADMISSION OF DNA EVIDENCE DENIED APPELLANT DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FLORIDA AND FEDERAL CONSTITUTIONS.**

The admission of the DNA evidence in this case denied Appellant due process of law and the effective assistance of counsel required by Article I, Sections 2, 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. It also denied Appellant the unique need for reliability required by Article I, Section 17 of the Florida Constitution and the Eighth Amendment to the United States Constitution.

When DNA evidence first appeared on the scene it was accepted without scrutiny.[4] Testimony that is clothed with the trappings of science, but has not been accepted by the scientific community, is more misleading than it is probative. State v. Woodall, 385 S.E.2d 253, 259-60 (W.Va. 1989).

The test for determining the admissibility of scientific evidence is the Frye test. Flanagan v. State, 625 So. 2d 827, 828 (Fla. 1993). In Ramirez v. State, 542 So. 2d 352 (Fla. 1989), this Court held that

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[4] The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant, 42 Stanford L. Rev. 465, 466 (1990) ("Courts have lost all sense of balance and restraint in the face of this novel scientific evidence, embracing it with little scrutiny of its actual reliability and little concern for its impact on the rights of individuals").

a scientific predicate must be established prior to the introduction of the evidence:

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

542 So. 2d at 355 (emphasis added). The predicate must be established from independent evidence:

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

Many of the courts around the country have expressed the same basic analysis as Ramirez in terms of a showing of the reliability of procedures as a predicate to the admissibility of the DNA evidence in a given case. These courts have consistently held that even if the theory of DNA is acceptable, there must be a sufficient predicate as to the reliability of the scientific evidence. United States v. Two Bulls, 918 F.2d 56, 61-62; rehearing en banc granted at 925 F.2d 1127 (8th Cir. 1991); appeal dismissed on death of the defendant Id.; Ex

Parte Perry, 586 So. 2d 243, 249 (Ala. 1991); People v. Castro, 545 N.Y.S.2d 985, 999 (Supp. 1989); People v. Pizarro, 12 Cal.Rptr.2d 436, 449-450 (Cal.App. 5th Dist. 1992); State v. Houser, 490 N.W.2d 168 (Neb. 1992). Pizarro is particularly instructive here. In Pizarro, the only expert who testified to the validity of the two procedures run by the F.B.I. was their own expert (Dr. Adams). 12 Cal.Rptr. at 451. The Court rejected this type of self-serving expertise as qualifying as an independent predicate:

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

Id. at 451.

The National Research Council in 1992 published a report by its Committee on DNA Technology in Forensic Science, DNA Technology in Forensic Science (1992) (hereinafter -- "NRC report"). This report is a consensus statement of the scientific community on what constitutes scientifically reliable DNA methodology. In light of recent cases and consensus statement by the National Research Council on the appropriate methodology to be used for DNA typing, this Court must reverse. Lifecodes did not utilize methodology and statistics which are generally accepted in the scientific community. Numerous problems are present with the DNA evidence used in this case.

1. Statistical frequencies

There are a number of problems with the statistical evidence that the state used in this case.

A. Statistical evidence was irrelevant

Dr. Baird of Lifecodes testified that the frequency of the patterns that were matched would be about one in every twelve million Caucasian individuals T1048. By only relating the frequency to the Caucasian grouping, the frequency testimony is not relevant. Presentation of such statistical evidence presumes that the semen stain originated from a Caucasian. However, not a scintilla of evidence ever existed to justify the reliance on such a presumption. Thus, the statistics produced at trial were meaningless. Without meaningful statistics the DNA results are "meaningless." NRC Report at 75. The only effect of such evidence would be to mislead the jury.

B. Other groups

When the DNA comparison is made only to Caucasian data base it is never known if the traits of the DNA sample were more consistent with another group such as Blacks or Hispanics. For all we know, the DNA traits of the semen stain in this case could be rare for Caucasians, but relatively frequent in the other groups. The National Research Council noted that exaggeration of statistical frequency occurs when the other groups, or substructure groups, are not compared to the subject sample:

> For example, a person who has one allele that is common among Italians is more likely to be of Italian descent and is thus more likely to carry additional alleles that are common among Italians. The true genotype frequency is thus higher than would be predicted by applying the multiplication rule using the average frequency in the entire population.
>
> To illustrate the problem with a hypothetical example, suppose that a particular allele at a VNTR locus has a 1% frequency in the general population, but a 20% frequency in a specific subgroup. The frequency of homozygote for the allele would be calculated to be 1 in 10,000 according to the allele frequency determined by sampling the general population, but would actually be 1 in 25 for the subgroup.

NRC Report at 11. The problem in this case is even more pronounced. Due to the failure of Lifecodes to compare the DNA sample to other groups, many other individuals were never eliminated. The frequency statistics in this case fail to eliminate a single Black or Hispanic.

C. Substructure groups

The NRC report found the problem of population substructure to be the source of considerable debate and decided it must assume population substructure exists until disproven. NRC Report at 80. There have been identifications of certain substructure groups within the Caucasian group:

> Clear examples of genetic drift can be found in Finland, whose population passed through a genetic bottleneck when a relatively small founding population migrated north to settle the region. Many genetic diseases that are rare in the rest of Europe are relatively common among Finns (and vice versa), indicating that the frequency of various disease-Causing alleles has drifted substantially (Norio et al. 1973). Similarly, Tay-Sachs disease is much more common among Eastern European Jews than it is among the rest of the human population.
>
> * * *
>
> The U.S. Caucasian population comprises many subgroups, including those from previously genetically isolated groups such as Eastern European Jews. The U.S. Hispanic population contains subgroups that draw genetic contributions in different measures from various European and North American Indian stocks. U.S. Blacks trace their genetic ancestry in varying degrees to both African and European ancestors. The U.S. Asian population includes individuals with Chinese, Japanese, Vietnamese ancestry.

Lander, Population Genetic Considerations in the Forensic Use of DNA Typing, Banbury Report 32: DNA Technology and Forensic Science 143, 145-146, 148 (1989) (emphasis added).

As the NRC Report found, the validity of the frequency statistics depend on the absence of subgroups and until the time that the existence of subgroups is disproven, only more conservative statistics can be used for DNA evidence. NRC Report at 80, 95. In the instant

case, Lifecodes totally ignored substructure groups and made an assumption that "random matching" occurs T1045. The NRC Report recognizes that population studies show that groups, including North American Caucasians, are not homogeneous groups, but are a mixture of subgroups due to the fact that random matching does not take place. NRC Report at 79.[5]

D. Ceiling principle

In this case, Dr. Baird of Lifecodes testified that Lifecodes did not use a ceiling principle for their statistical analysis T1053. In order to overcome the problems with DNA statistical analysis, the NRC Report recommends that a ceiling principle be applied to any statistical frequency which is relied on. The ceiling principle is the following:

> The ceiling principle should be used in applying the multiplication rule for estimating the frequency of particular DNA profiles. For each allele in a person's DNA pattern, the highest allele frequency found in any of the 15-20 populations or 5% (whichever is larger) should be used.
>
> In the interval (which should be short) while the reference samples are being collected, the significance of the findings of multilocus DNA typing should be presented in two ways: 1) If no match is found with any sample in the total databank of N persons (as will usually be the case), that should be stated, thus indicating the rarity of a random match. 2) In applying the multiplication rule, the 95% upper confidence limit of the frequency of each allele should be calculated for separate U.S. "racial" groups and the highest of these values or 10% (whichever is larger) should be used. Data on at least three major "races" (e.g. Caucasians, Blacks, Hispanics, Asians and Native Americans) should be analyzed.

NRC Report at 95. Courts have likewise recognized Lifecodes statistical problems. E.g., State v. Alt, 504 N.W.2d 38 (Minn.Ct.App. 1993)

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[5] [5] This also totally contradicts state witness Dan Nippes' testimony that "You can take Hispanic data, plug it into White data, it doesn't make any difference" T693.

(court refused to permit Lifecodes' statistical methods, but would permit methods in NRC Report). Unfortunately, because the DNA sample in this case was not compared to each of the populations, a conservative frequency by use of the ceiling principle cannot be determined. However, it should be noted that use of the 10% product rule would have resulted in a frequency 120 times greater than the frequency used in this case.[6]

2. Criteria for Matching

The NRC Report requires objective, quantifiable procedures for identifying sample patterns which cannot rely on comparisons between samples to determine the pattern. "It is not permissible to decide which features of an evidence sample to count and which to discount on the basis of a comparison with a suspect sample, because this can bias one's interpretation." NRC Report at 53. Indeed, Lifecodes has been soundly criticized for lack of criteria for matching:

> Furthermore, Lifecodes did not even adhere to this standard in Castro (citation omitted), when it used a new "averaging method" that was not scientifically sound and allowed it to decide a match....

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[6] In at least one case, Lifecodes probability numbers have been noted to be over 4 million times more damaging against a defendant than those used by the FBI:

> By using a stricter standard to determine the probability of a match in the population than that used to determine a match between two samples, Lifecodes grossly underrepresented the probability of a random match in the population. In fact, Lifecodes stated the probability of a random match in *Castro* as one in 100,000,000, and defense expert Dr. Lander recalculated the statistic using Lifecode's published procedure and obtained a one in 78 chance of a random match. Dr. Lander also calculated the probability using the approach adopted by the FBI and obtained a one in 24 chance of a random match. He concluded, "That Lifecodes claims and the FBI's methods produce such radically different results ... speaks volumes about the absence of a generally accepted procedure for performing DNA identification."

Note, The Dark Side of DNA Profiling, supra, at 492.

Note, The Dark Side of DNA Profiling, supra, at 486.

3. Band Shifting

The NRC Report states that no matches should be declared when bandshifting exists because there is no reliable way to measure the fragments' lengths. NRC Report at 61.

The case of People v. Keene, 591 N.Y.S.2d 733 (Supp. 1992) is instructive on this issue. The court in Keene excluded evidence from Lifecodes Corporation because of the band shifting problem. The court relied heavily on the recent report on DNA of the National Research Council. The court stated:

> The report of the NRC directly addresses the problem of utilizing monomorphic probes to correct for band shift.
>
> Testing for band shifting is easy, but correcting it is harder.... Little has been published on the nature of band shifting, on the number of monomorphic internal control bands needed for reliable correction, and on the accuracy and reproducibility of measurements made with such correction. For the present, several laboratories have decided against attempting quantitative corrections; samples that lie outside the match criterion because of apparent band shifting are declared to be "inconclusive." The committee urges further study of the problems associated with band shifting. Until testing laboratories have published adequate studies on the accuracy and reliability of such corrections, **we recommend that they adopt the policy of declaring samples that show apparent band shifting to be inconclusive.** (emphasis supplied).
>
> NRC Report, DNA Technology in Forensic Science at 2-11 (1992).
>
> The People's witnesses and defendant's witnesses were in complete disagreement on whether correcting for band shift by using monomorphic probes was generally accepted in the molecular genetics community.
>
> The fact that Lifecodes was the only forensic laboratory engaged in the practice is significant.
>
> The report of the NRC is of greater impact on the issue.
>
> While the DNA principle and RFLP analysis are generally accepted in the scientific community, this Court cannot find that the practice of using monomorphic probes to correct for

> band shift is a generally accepted test among molecular geneticists.
>
> DNA profiling still comes under the category of novel scientific evidence, even though one appellate court in this state has finally considered its admissibility in criminal cases. Thus, at this stage of the DNA forensic experience it would be judicial foolhardiness to submit the issue of whether Lifecodes performed scientifically **accepted** tests to the jury to determine the weight of such evidence. This is especially so when the scientific community itself recommends that band shifting results be declared inconclusive until testing laboratories have published adequate studies on the accuracy and reliability of monomorphic corrections.
>
> If scientists have reservations the courts should exercise caution in moving in.

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

4. Contamination

There are a number of forms of contamination that create problems in DNA analysis. These include: (1) mixed samples from the crime scene; (2) contamination in the field and laboratory; and (3) product carryover contamination. NRC Report at 65-66. The state's expert in this case, Dr. Baird, and Lifecodes has been noted for use of contaminated probes in its DNA testing:

> In *Castro*, Dr. Michael Baird, Director of Forensic and Paternity Testing at Lifecodes, testified that the company knowingly continued to use contaminated probes, "a procedure virtually inviting the occurrence of false positives and false negatives." Despite the fact that scientific controls to test for bacterial contamination in probes exist, Lifecodes did not employ such controls. Thus, when Lifecodes chose to discount two extra bands on the autoradiograph from the watch stain in order to declare a match between that sample and the sample of blood from Mrs. Ponce, it had done no tests to prove that the two extra bands were bacterial and not human. This example illustrates the seriousness of the need to implement uniform controls to test for contamination.

Note, The Dark Side of DNA Profiling, supra, at 480 (footnotes omitted), and its lack of controls:

> Small samples with low molecular weight DNA are particularly susceptible to such misleading results. For example, in the

> Hispanic population, 90% of the bands produced by a probe used by Lifecodes in *Castro* have high molecular weights. In *Castro*, the sample of blood from the watch, which Joseph Castro claimed was his own blood, was very small and badly degraded. Thus, there was a high probability that the test did not detect bands in the high molecular weight region of the gel.
>
> Nevertheless, Lifecodes did not employ proper controls to ensure that an absence of bands in that region meant that none existed. The accepted control for degradation is the use of a nonpolymorphic probe. Nonpolymorphic probes bind to and produce pattern from an area of the DNA know to be shared by all humans. Thus, all human DNA should produce the same known banding pattern with such a probe. In *Castro*, Lifecodes should have used a nonpolymorphic probe on the watch sample that detects a band in the high molecular weight region of concern. If the nonpolymorphic probe detects the band, then the examiner can assume the polymorphic probe would have done so as well if a band had been present. If it does not detect the band, then the results are not reliable.

Note, The Dark Side of DNA Profiling, supra, at 483 (footnote omitted). In this case, there was evidence of contamination. There was no evidence that a nonpolymorphic probe was used T1024. As noted in the NRC Report, the contamination could also lead to spurious results in a PCR test:

> One of the most serious concerns regarding PCR-based typing is contamination of evidence samples with other human DNA. PCR is not discriminating as to the source of the DNA it amplifies, and it can be exceedingly sensitive. Potentially, amplification of contaminant DNA could lead to spurious typing results. Three sorts of contamination can be identified, as set forth below; each has its own solutions.

NRC Report at 65. In this case, we do know that the semen stain on the towel appeared to be mixed with other fluids T724. It is also known that the laboratory "in some areas didn't separate the two" fluids T725.

In light of the standards of the National Academy of Sciences on the accepted methodology, Lifecodes methods do not even meet the most liberal requirements for DNA evidence. This test lacks the indicia of reliability and was no help to the jury, as required by § 90.702,

Florida Statutes; it instead positively misled them by its pretense of scientific reliability. It was extraordinarily prejudicial to have admitted this thoroughly unreliable evidence. Fifth, Sixth, Eighth and Fourteenth Amendments, U.S. Const.; Art. I, §§ 2, 9, 16 and 17, Fla. Const.

## POINT VII

**THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL WHERE APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL JURY WAS VIOLATED.**

After the jury reached its verdict, the clerk's office was contacted and was informed that jurors were concerned that Appellant had access to the jury questionnaires in this case T1225-1227. The trial court stated "persons that were of that mind were afraid of the defendant" and if such jurors "had been identified at the beginning of trial, [they] probably would not have sat as jurors in this case" T1229-1230. The jurors were then examined by the trial court.

Juror Tresemar testified that she had called the clerk's office and that several jurors were concerned about Appellant having questionnaires that had names, addresses, phone numbers, and information regarding children T1241-1242. Tresemar testified that this caused anxiety amongst the jurors T1242. Four or five jurors were talking about it before the jury was selected T1242. The subject may have come up in the course of deliberations, but not in front of the whole jury T1243. There was talk about it after the jury was sworn T1243. Tresemar was concerned about the questionnaire being available to Appellant T1243. Tresemar broke down and cried visibly when questioned T1247.

Juror Holmes testified "there were a few of us concerned about the questionnaires" T1257. The concern was Appellant having the

information on the questionnaire T1258. Holmes knows that the subject was mentioned at least one time prior to the jury being sworn T1258. It was discussed in the jury room R1259. It was also discussed one time early in the case T1260. Holmes was not sure that this discussion occurred in the jury room T1260.

Other jurors remembered discussions concerning Appellant's access to information about the jurors before and after jury selection T1267, 1272,1276,1278,1281,1285,1289,1290.1292,1295-96.

After initially hearing from the clerk, the trial court found that it was "reasonable that persons that were of that mind were afraid of the defendant" T1229. The trial court went on to state:

> ... it seems to me that those sort of jurors, if they had been identified at the beginning of the trial, probably would not have sat as jurors in this case.

T1230. After hearing from the jurors, the trial court struck the jury for the purpose of the penalty phase stating that justice and fairness requires that jurors do not start out being afraid of Appellant T1299. Appellant moved for a mistrial for the guilt phase of the trial T1300. Although the trial court acknowledged that some jurors were concerned about Appellant due to the jury questionnaires, Appellant's motion was denied T1301. This was error.

The extraneous concerns denied Appellant due process and a fair trial. Fifth, Sixth, Eighth and Fourteenth Amendments; U.S. Const.; Art. I, §§ 2, 9, 12, 16 and 17, Fla. Const. The right to have the jury deliberate free from distraction and outside influence is a paramount right, to be closely guarded. Livingston v. State, 458 So. 2d 235, 237 (Fla. 1989).

> One of the most sacred and carefully protected elements of our system of criminal -- or civil, for that matter -- justice is the sanctity of an impartial jury that has not been infected by unlawful or improper influences. This is

> absolutely vital to the guarantee of a fair trial to an accused. The safeguarding of that ideal must be zealously guarded.

Meixelsperger v. State, 423 So. 2d 416, 417 (Fla. 2d DCA 1982).

The court erred by denying a mistrial. First, "If a single juror is improperly influenced, the verdict is as unfair as if all were." United States v. Delaney, 732 F.2d 639, 643 (8th Cir. 1989) quoting Stone v. United States, 113 F.2d 70, 77 (6th Cir. 1940); see also Cappadona v. State, 495 So. 2d 1207 (Fla. 4th DCA 1986) (three jurors exposed to improper material: mistrial required).

A mistrial must be declared despite a juror's protestations of impartiality. Cappadona, 495 So. 2d at 1207; United States v. Williams, 568 F.2d 464, 471 (5th Cir. 1978). See also Reilly v. State, 557 So. 2d 1365 (Fla. 1990); Hill v. State, 477 So. 2d 553, 555-556 (Fla. 1985); Singer v. State, 109 So. 2d 7 (Fla. 1959).

Jurors are entrusted with the power to decide one's freedom, and the exercise of that power demands impartiality. When this impartiality is compromised, the conviction must be reversed. As noted in United States v. Winkle, 587 F.2d 705 (5th Cir. 1979), influence of extrinsic matters is prejudicial and the burden is on the government to demonstrate the harmlessness of the matters:

> Such prejudice may be shown by evidence that extrinsic factual matter tainted the jury's deliberations; any "prejudicial factual intrusion" denies a defendant his rights to trial by an impartial jury and to challenge the facts adverse to him that are made known to the jury. *United States v. Howard*, 5 Cir. 1975, 506 F.2d 865, 866; *Remmer v. United States*, 1954, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654, 656.
>
> Where a colorable showing of extrinsic influence appears, a court must investigate the asserted impropriety:
>
> > The evidentiary inquiry before the district court ... must be limited to objective demonstration of extrinsic factual matter disclosed in the jury room. Having determined the precise quality of

> the jury breach, if any, the district court must then determine whether there Was a reasonable possibility that the breach was prejudicial to the defendant.... In this determination, prejudice will be assumed in the form of a rebuttable presumption, and the burden is on the Government to demonstrate the harmlessness of any breach to the defendant.
>
> *United States v. Howard, supra*, 506 F.2d at 869.

587 F.2d at 714.

This Court has long recognized that a jury should not consider extrinsic concerns. Burnette v. State, 157 So. 2d 65, 68 (Fla. 1963) (new trial ordered -- "It is not the province of a jury to allow the question whether a prisoner may or may not be paroled to enter into its deliberations"). Similarly, other courts have shared this recognition. See United States v. Heller, 785 F.2d 1524 (11th Cir. 1986) (new trial ordered where juror made ethnic slur about the defendant). In Heller, it was made clear that reversal was warranted due to the extraneous concerns even though inquiry was made of the jurors was made and the jurors affirmed that they could reach a decision independently of the extraneous concern:

> The trial judge concluded his questioning of each of the jurors in the case by asking them individually whether in light of what had occurred in the jury room they would still be able to reach a decision in the case based strictly on the evidence and the law without bias or prejudice. Each juror affirmed that he would be able to make such a decision. Then, following his individual conversations with each juror, the judge called all of the jurors into the courtroom at the same time and asked them to confirm their earlier promises to ignore "these extraneous outside matters that we have discussed." After all have given the necessary confirmation, the judge permitted the jurors to continue their deliberations despite several defense motions for mistrial.
>
> * * *
>
> It is inconceivable that by merely denying that they would allow their earlier prejudiced comments to influence their verdict deliberations, the jurors could have thus expunged themselves of the pernicious taint of anti-Semitism.

785 F.2d at 1526-1527 (footnote omitted). Likewise, in Sanchez v. International Park Condominium Association, Inc., 563 So. 2d 197 (Fla. 3d DCA 1990) a new trial was ordered despite the fact that the jurors testified that an extraneous concern did not affect or influence their decision. Thus, in this case it would be at no moment that the jurors stated that the extraneous concern played no part in their decision. Furthermore, one may not delve into a juror's thought process to determine whether the error is harmful. State v. Hamilton, 574 So. 2d 124 (Fla. 1991); Keen v. State, 639 So. 2d 597 (Fla. 1994); Burnette v. State, 157 So. 2d 65 (Fla. 1963). In the instant case, the trial court's finding was based on a finding that the jurors did not allow the concern to play a part in their deliberations T1301-02.

In Keen, supra, this Court held that evaluating the erroneous matter based on the juror's thought processes was error:

> There is no doubt from the record that the trial court inquired into the jurors' thought processes and made its decision based on the inappropriate inquiry. We cannot say beyond a reasonable doubt that the error was harmless.

639 So. 2d at 600. It cannot be said beyond a reasonable doubt that the extraneous concern did not influence the juror in some way. See Keen, supra, at 599. The state cannot prove its burden of showing the error in this case was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The error denied Appellant due process and a fair trial. Fifth, Sixth and Fourteenth Amendments, U.S. Const.; Art. I, §§ 2, 9 and 16, Fla. Const. This cause must be remanded for a new trial.

## POINT VIII

**THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND ALLOWING THE STATE TO PRESENT EVIDENCE OF WHAT OCCURS IN OTHER CASES AS EVIDENCE OF APPELLANT'S GUILT.**

It is well-settled that an accused has the absolute right to be tried on the evidence against him, and not the common practice of what occurs in other cases. Lowder v. State, 589 So. 2d 933, 935 (Fla. 3d DCA 1991) (error for officers to testify to other cases because "every defendant has the right to be tried based on evidence against him, not on the characteristics or conduct of certain classes of criminals in general"); United States v. Hernandez-Cuartas, 717 F.2d 552, 555 (11th Cir. 1983) ("Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officers ..."); Osario v. State, 526 So. 2d 157 (Fla. 4th DCA 1988) (officer's testimony regarding his experience with common drug courier practices was irrelevant); Hargrove v. State, 431 So. 2d 732 (Fla. 4th DCA 1983) (testimony of what drug dealers state in other cases was irrelevant); Kellum v. State, 104 So. 2d 99 (Fla. 3d DCA 1958) (testimony about other police officers committing larceny was irrelevant); Nowitzke v. State, 572 So. 2d 1346, 1355 (Fla. 1990) (testimony regarding other situations where drug addicts stole from their families was improper).

In the present case, on a number of occasions the state was allowed to present evidence of what occurred in other cases, over Appellant's objections, to bolster its case. Over objection, the state elicited from witness Beverly Skinner that in other cases it is not unusual not to find any finger prints T592-593. Over objection, the state elicited that in other cases the police have not been able to recover any semen samples from a sexual assault victim T708-709.

Over objection, the state elicited evidence that another rape investigation was going on at the same time this case was being investigated T610. The state bolstered its DNA results by eliciting evidence from its DNA expert that other laboratories also use criteria as to whether two DNA fragments match T1054-1055. The evidence of what occurs in other cases was clearly improper and prejudicial.

The prejudice of admitting this evidence is that the state uses such evidence to improperly bolster its version of the case. An example of this is United States v. Cruz, 981 F.2d 659 (2d Cir. 1992), where the government elicited testimony from an officer from his experience in other cases as to what drug dealers do during drug transactions. In its argument to the jury the government bolstered its [and its witness'] version of events by referring to the officer's testimony regarding other cases. 981 F.2d at 663. The conviction was reversed.

In this case it cannot be said beyond a reasonable doubt that the state's introduction of evidence of what occurred in other cases was harmless. State v. DiGuilio, 429 So. 2d 1129 (Fla. 1986). The state bolstered its version of the case by utilizing the facts from other cases. By introducing testimony that other DNA labs also use criteria to determine a match, the state had directly improperly bolstered its case. The introduction of other rape investigations, without tying them to Appellant is prejudicial by creating innuendo that Appellant is possibly involved in other crimes.

Each of the four improper occasions of the state improperly bolstering its case by what occurred in other cases was harmful. Moreover, even if one or two of the occasions could be deemed proper, the cumulative effect of two or more of the errors requires reversal.

The error denied Appellant due process and a fair trial. Fifth, Sixth, Eighth and Fourteenth Amendments, U.S. Const.; Art. I, §§ 2, 9 and 16, Fla. Const. This cause must be remanded for a new trial.

## POINT IX

**IT WAS REVERSIBLE ERROR TO CONSTRUCTIVELY AMEND THE INDICTMENT CONTRARY TO THE GRAND JURY CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.**

Article I, Section 15(a) of the Florida Constitution provides in pertinent part:

> No person shall be tried for capital crime without presentment or indictment by a grand jury....

The Fifth Amendment to the United States Constitution has the exact same requirement with regard to charging a capital crime.

In the present case the Grand Jury charged Appellant with first degree premeditated murder:

> The Grand Jurors of the State of Florida inquiring in and for the body of the County of Indian River, upon their oaths do present that NEIL WILSON WILDING, on or between August 27, 1988 and August 28, 1988, did unlawfully, with a premeditated design to effect the death of Marsha Ross, or any human being, kill and murder Marsha Ross, a human being, in violation of Florida Statute 782.04.

T12 (emphasis added). The grand jury did not charge felony murder T12. However, during trial the jury was instructed on felony murder T1143-1144, the prosecutor also argued for conviction on a theory of felony murder T1113-1114. Proceeding on the felony murder theory constituted a constructive amendment of the indictment. See eg. United States v. Davis, 679 F.2d 845, 851 (11th Cir. 1982) (constructive amendment occurs by jury instructions and evidence expanding the case beyond what is specifically charged); United States v. Cruz-Valdez, 743 F.2d 1547, 1553 (11th Cir. 1984).

Only the Grand Jury has the authority to amend an indictment. State ex rel. Wentworth v. Coleman, 163 So. 316 (1935); Pickeron v.

State, 113 So. 707 (Fla. 1927); Dickson v. State, 20 Fla. 800 (1884); Phelan v. State, 448 So. 2d 1256 (Fla. 4th DCA 1984); Russell v. State, 349 So. 2d 1224 (Fla. 2d DCA 1977). There is no jurisdiction to present a theory different than that charged by the Grand Jury. After all, that is the very purpose of the Grand Jury Clause. Florida's Grand Jury Clause for charging a capital crime is identical to the Grand Jury Clause of the United States Constitution.

In Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), the Court noted that the Federal Constitution's Grand Jury Clause prohibits amendment of an indictment by anyone other than the grand jury. In Stirone the Grand Jury Clause was violated even though there was no formal amendment of the indictment. The indictment was, "in effect," amended by the prosecutor's presentation of evidence and the trial court's charge to the jury which broadened the possible basis for conviction:

> And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same.

80 S.Ct. at 273. The Court went on to state the importance of the Grand Jury Clause protection from broadening what the Grand Jury specifically expressed in its indictment:

> The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

80 S.Ct. at 270-271. The Court made it clear that while there may be several methods of committing an offense, conviction may be only based on the method alleged in the indictment:

> The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference. It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened.

80 S.Ct. at 271. Later, in United States v. Miller, 105 S.Ct. 1811 (1985), the Court reiterated that it matters not that multiple methods of committing the offense are proceeded on by prosecution as long as they are all alleged in the indictment:

> The Court has long recognized that an indictment may charge numerous offenses or the commission of any one offense in several ways. As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means committing the same crime.

105 S.Ct. at 1815 (emphasis added).

As in Stirone, supra, the Grand Jury Clause was violated in this case where the indictment by the Grand Jury charged only one method (premeditation in this case), for violation of a particular law, but there was a constructive amendment of the indictment by instructing the jury on a different method (felony-murder in this case) for violation of a particular law. In Watson v. Jago, 558 F.2d 330 (6th Cir. 1977), the Court noted that a constructive amendment of an indictment, which only alleged premeditated murder, by adding a felony-murder theory would violate the Grand Jury Clause. However, the Court eventually reversed the conviction on the basis that the constructive amendment violated the right to fair notice. 558 F.2d at

338[7] In this case the amendment of the indictment violates the Grand Jury Clause as well as the right to fair notice. See Point X.

In Stirone, supra, the Court made clear that reversal was necessary due to the unauthorized constructive amendment which added a second method of proving the offense which might have been the basis for conviction and which would constitute a conviction on a charge that was never made by the grand jury:

> Here, as in the Bain case, we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with. Yet because of the court's admission of evidence and under it s charge this might have been the basis upon which the trial jury convicted on a charge the grand jury never made against him. This was fatal error. Cf. Cole v. State of Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644; DeJonge v. State of Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278.
>
> Reversed.

80 S.Ct. at 274 (emphasis added). Likewise, reversal is necessary here due to the unauthorized amendment of the indictment which violated the Grand Jury Clause. Art. I, Section 15, Florida Constitution; Fifth and Fourteenth Amendments, United States Constitution. Appellant's conviction and sentence for murder in the first degree must be reversed.

## POINT X

**THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PROCEED ON A THEORY OF FELONY-MURDER WHEN THE INDICTMENT GAVE NO NOTICE OF THE THEORY.**

The indictment in this case only charged premeditation as a theory of first-degree murder. This lack of notice denied Appellant due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and

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[7] Unlike in Florida, Ohio law permits amendment of indictments by others than the grand jury. 558 F.2d at 337.

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

The indictment in this case only charged premeditated murder R12. Defense counsel filed a motion to prohibit the use of a felony-murder theory due to lack of notice R182-184,T10. The trial court denied this motion R206,T10. The jury was instructed on two different theories of felony-murder (burglary and sexual battery).

An indictment or information is required to state the elements of the offense charged with sufficient clarity to apprise the defendant what he must be prepared to defendant against. Russell v. United States, 369 U.S. 749, 763-69, 82 S.Ct. 1038, 8 L.Ed.2d 249 (1962); Government of Virgin Islands v. Pemberton, 813 F.2d 626 (3d Cir. 1987); Givens v. Housewright, 786 F.2d 1378, 1380-81 (9th Cir. 1986). In Givens, the Ninth circuit held that it was a Sixth Amendment violation to allow a jury instruction and prosecutorial argument on murder by torture (under Nevada law analogous to Florida's felony-murder) where the information charged willful murder (analogous to Florida's premeditated murder). The failure to prohibit the felony-murder theory was harmful as there is virtually no evidence of premeditation.

Assuming, arguendo, the Court agrees that the evidence of premeditation is insufficient, the first-degree murder conviction must be reduced to second-degree murder. If the Court rejects Appellant's argument, a new trial is required as we cannot know if one or more of the jurors relied on felony-murder. See McGahagin v. State, 17 Fla. 665 (1880); Owens v. State, 593 So. 2d 1113 (Fla. 1st DCA 1992).

## POINT XI

**THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHERE EVIDENCE THAT APPELLANT WAS THE SUBJECT OF A NATIONAL SEARCH WAS INTRODUCED INTO EVIDENCE.**

Appellant made a motion in limine prohibiting the state from introducing evidence that Appellant had been the subject of "America's Most Wanted" television show. The trial court prohibited the state from conveying this information to the jury until its admissibility was determined T444. During trial, state witness Frank Divincenzo testified that Appellant had been the subject of "America's Most Wanted" television show T624. Appellant objected that this evidence was irrelevant and moved for mistrial T624-625. The trial court denied the motion T625. This was error.

Obviously, the fact that Appellant was the subject of the "America's Most Wanted" show was totally irrelevant to his guilt or innocence. See, Postell v. State, 398 So. 2d 851, 855 n.7 (Fla. 3d DCA 1981) (facts relating to arrest are irrelevant). This type of evidence has been recognized as extremely prejudicial. See United States v. Lord, 565 F.2d 831 (2d Cir. 1977) ("FBI's Ten Most Wanted List" was prejudicial and it was reversible error for trial court to fail to poll the jury as to exposure to news article which contained such prejudicial information); Maxwell v. City of Indianapolis, 998 F.2d 431, 434 (7th Cir. 1993) ("America's Most Wanted viewed by millions" and believed by people to "have a high degree of reliability"). The exposure to this denied Appellant due process and a fair trial in violation of Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This cause must be reversed for a new trial.

## POINT XII

**THE TRIAL COURT ERRED IN REFUSING TO ALLOW RELEASE, OR AT LEAST IN CAMERA REVIEW, OF THE GRAND JURY TESTIMONY.**

Appellant moved for release or in camera review of the grand jury testimony in this case T9,R178. The trial court's failure to grant release or in camera review of the grand jury testimony denied Appellant due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Defense counsel filed a motion for release or in camera review of grand jury testimony T9,R178. The trial court denied the motion T10.

The right to in camera review of otherwise confidential materials was extended by the United States Supreme Court in Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). In Ritchie, the defendant, charged with sexual assault on his daughter, moved to have her Children and Youth Services file produced as it "might contain the names of favorable witnesses as well as other, unspecified exculpatory evidence." Id. at 995. The Supreme Court held the defendant was entitled to in camera review despite public policy reasons and specific statutes making the material confidential. 107 S.Ct. at 1001-02.

Miller v. Dugger, 820 F.2d 1135, 1136 (11th Cir. 1987) and Hopkinson v. Schillinger, 866 F.2d 1185 (10th Cir. 1989), modified 888 F.2d 1286 (10th Cir. 1989) (en banc) apply the principles of Ritchie to grand jury testimony. In Hopkinson, supra, the Court held the defendant was entitled to in camera review because "exculpatory

evidence could have been presented" and in camera review preserves state confidentiality interests.

The trial court erred in failing to at least conduct in camera review of grand jury testimony for exculpatory materials. A new trial is required.

## POINT XIII

**THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHERE THERE WAS INSUFFICIENT EVIDENCE THAT THE DNA EVIDENCE PRESENTED TO THE JURY CAME FROM THE CRIME SCENE.**

Appellant moved for a mistrial on the ground that there was insufficient evidence that the DNA evidence presented to the jury came from the crime scene and thus the DNA evidence should not have been introduced T1060. The trial court denied the motion T1061. This was error.

The state presented testimony that a blue towel was found at the crime scene and collected in evidence T565. The towel contained a semen stain. Part of the towel was sent to Lifecodes for DNA analysis T727. However, Lifecodes' witness did not testify about this particular evidence. Instead, the towel which contained the sample Lifecodes examined was white and not the blue towel from the crime scene T977. Thus, the state failed to link the DNA evidence that was analyzed to that found at the crime scene on the blue towel. Consequently, the evidence was insufficient for conviction. See Coyle v. State, 493 So. 2d 550 (Fla. 4th DCA 1986) (evidence insufficient for conviction where state failed to link car in defendant's possession with car police claim was stolen). Appellant's convictions and sentences must be reversed.

## PENALTY PHASE

## POINT XIV

**THE TRIAL COURT ERRED IN FINDING THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.**

The trial court found the especially heinous, atrocious, or cruel aggravating circumstance (hereinafter "HAC") based on the facts surrounding the death. For the reasons stated below, it was error to find this aggravator.

**1. Especially HAC not applicable where victim may have been unconscious or semiconscious.**

This Court has recognized that where there is a possibility the victim was unconscious or semiconscious during the strangulation the especially HAC aggravator will not apply. In Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), this Court held that because "the victim may have been semiconscious at the time of her death" especially HAC did not apply:

> We note, however, that in the many conflicting stories told by Rhodes, he repeatedly referred to the victim as "knocked out" or drunk. Other evidence supports Rhodes' statement that the victim may have been semiconscious at the time of her death. She was known to frequent bars and to be a heavy drinker. On the night she disappeared, she was last seen drinking in a bar. In Herzog v. State, 439 So. 2d 1372 (Fla. 1983), we declined to apply this aggravating factor in a situation in which the victim, who was strangled, was semiconscious during the attack. Additionally, we find nothing about the commission of the capital felony "to set the crime apart from the norm of capital felonies." State v. Dixon, 283 So. 2d at 9.

Rhodes, 547 So. 2d at 1208. In Herzog v. State, 439 So. 2d 1372 (Fla. 1983), this Court held that the especially HAC aggravator did not apply, even though the victim was strangled by a telephone cord when at the time of strangulation there was a reasonable inference that the victim may have been semiconscious:

> As to section 921.141(5)(h), Florida Statutes (1981) (crime was especially heinous, atrocious, or cruel), we hold that

> this factor is not applicable in the instant case. The trial court articulated several facts in support of this finding. First, "that the defendant beat the victim, suffocated her with a pillow and then strangled her with a telephone cord....
>
> As to the manner by which death was imposed, we find that in this factual context the evidence is insufficient, standing alone, to justify the application of the section (5)(h) aggravating factor....
>
> In the instant case, there is evidence that the victim was under heavy influence of methaqualone previous to her death.... Further, both eyewitnesses stated that the victim was unconscious. The actual period of unconsciousness is unclear. However, she was in this state at least during the period of time between the pillow incident and the act that caused her death. It can also be reasonably inferred from the record that she was semi-conscious during the whole incident as there is evidence that the victim offered no resistance, nor did she make any statements during the attack.

Herzog, 439 So. 2d 1379-1380 (citations omitted); see also State v. Poland, 144 Ariz. 412, 698 P.2d 183 (Ariz. 1985) (placement of two possibly unconscious victims in weighted sacks and drowning does not qualify as heinous). In this case the evidence is consistent with the victim being strangled while she was unconscious or semiconscious. The killing occurred late at night while the victim was laying on the couch in her nightgown. The evidence showed that the victim suffered from narcolepsy and would fall asleep if not taking her medication T478.[8] The evidence showed that the victim had not used any of the medication for her narcolepsy.[9] Testimony indicated that without the medication the victim would have been unconscious due to narcolepsy

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[8] Narcolepsy has been defined as "a syndrome where you go to sleep more easily," Batterbee v. Texas, 537 S.W.2d 12, 13 (Tex.Cr.App. 1976), and as "a condition of frequent and uncontrollable desire for sleep," Webster's New World Dictionary, 2d Ed. (1974). Individuals suffering from narcolepsy may frequently "fall asleep watching television" and spend an inordinate amount of time sleeping. Winans v. Bowen, 853 F.2d 643, 646 (9th Cir. 1980).

[9] A full, unused bottle of the medication used for narcolepsy was found at the residence T632.

T478. Despite the break-in, the victim never moved from the couch and there were no defensive wounds on the victim. The evidence is consistent with the victim being unconscious, or semiconscious, during the strangulation. Thus, the especially HAC aggravator does not apply. Rhodes, supra; Herzog, supra.

**2. Especially HAC not applicable where the evidence did not show that Appellant intended to cause the victim unnecessary and prolonged suffering.**

In addition to the argument above, it is well-settled that the especially HAC aggravator does not apply unless it is clear that Appellant meant to cause unnecessary and prolonged suffering. Eg. Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990) (hypothesis consistent with crime not "meant to be deliberately and extraordinarily painful" and thus not HAC); Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Mills v. State, 476 So. 2d 172, 178 (1985); Lloyd v. State, 524 So. 2d 396, 403 (Fla. 1988); Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989).

For example, in Bonifay v. State, 626 So. 2d 1310 (Fla. 1993), this Court recognized that the crime was "vile and senseless" where the victim unsuccessfully begged for his life, but held that especially HAC did not apply because the record did not demonstrate that Bonifay intended to inflict a high degree of pain or to torture the victim:

> Both Bland and Tatum testified that Bonifay told them the victim begged for his life. Bonifay, himself, said this in his tape-recorded statement as did Barth in his live testimony. Even so, we find that this murder, though vile and senseless, did not rise to one that is especially cruel, atrocious, and heinous as contemplated in our discussion of this factor in State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The record fails to demonstrate any intent by Bonifay to inflict a high degree of pain or to otherwise

> torture the victim. The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that Bonifay intended to cause the victim unnecessary and prolonged suffering. Santos v. State, 591 So. 2d 160 (Fla. 1991).

Bonifay, 626 So. 2d at 1313 (emphasis added). Likewise, in Santos v. State, 591 So. 2d 160, 163 (Fla. 1991), especially HAC did not apply as there was "no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victim."

The facts of this case do not necessarily show an intent to cause prolonged pain and suffering. This can be shown by analysis of State v. Hunt, 220 Neb. 707, 371 N.W.2d 708 (Neb. 1985), which deals with a far more aggravated case. In Hunt the defendant entered the victim's house and tied the victim's arms and legs. Items were stuffed down the victim's throat. The defendant then strangled the victim with a nylon stocking until she was unconscious. The defendant removed the victim's robe. The victim would be found dead and no semen was found in the victim. The defendant did confess that after the strangulation he masturbated and ejaculated onto the victim's stomach. The Nebraska Supreme Court rejected HAC because there was "no evidence the acts were performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time":

> The evidence establishes that the victim was rendered unconscious within a short time of defendant's intrusion into her home. It therefore cannot be said that the murder was of the nature described in aggravating circumstance (1)(d), as specified in § 29-2523: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."
>
> To be sure, forcing items into the victim's throat and the strangulation itself were cruel, but not "especially so," for any forcible killing entails some violence toward the victim. There is no evidence the acts were performed for the satisfaction of inflicting either mental or physical

> pain or that pain existed for any prolonged period of time....
>
> Although the method by which defendant achieved sexual gratification may be accurately described as exceptionally heinous and atrocious, and as manifesting exceptional depravity by ordinary standards of morality and intelligence, the murder itself, given the inherent nature of a killing, cannot.

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

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

> Our concern is that if the c(4)(c) factor could be sustained on this evidence alone [method of killing] there would be no principled way to distinguish this case, in which the death penalty was imposed from many cases in which it was not.
>
> Because factor c(4)(c) focuses on the criminal's state of mind, it cannot be supported solely by reference to the means employed to commit the murder.

590 A.2d at 646. The point is, all murders are unnecessary. Almost all murders are brutal. It is only the designed intent to inflict pain and suffering which causes this aggravator to truly narrow the list of death eligibles.

The trial court's reason for finding HAC was the conclusion that the victim must have suffered intense pain. First, as explained in Teffeteller v. State, 439 So. 2d 840, 846 (Fla. 1983), the suffering

of the victim is not HAC as it does not set the murder apart from the norm of capital felonies[10]:

> The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

In addition, there was not sufficient evidence of prolonged suffering. The degree of pain could not be determined.

The trial court merely surmised suffering. This Court has specifically condemned the finding of HAC based on a trial judge's assumption as to pain, even where the assumption is based on a logical inference. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983) (where degree of pain not proven by state, offense is not HAC -- "logical inferences" by trial court will not suffice where state has not proved the aggravator); King v. State, 514 So. 2d 354 (Fla. 1987) (aggravator may not be based on what might have occurred).

The lack of evidence of intentional infliction of prolonged pain and suffering requires reversal of this aggravator. The error of finding HAC cannot be deemed harmless. There were only two aggravating circumstances considered in this case -- HAC and the commission of the murder during a felony. The felony murder circumstance was due to the contemporaneous offense. The jury could find the single episode was an isolated out-of-character act, instead of a representation of a propensity for violence as a prior separate felony could demonstrate. Once the aggravating circumstance of HAC is eliminated, it

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[10] Of course, if the defendant deliberately tries to torture or inflict a high degree of pain, HAC would apply. See Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Porter v. State, 564 So. 2d 1060 (Fla. 1990). But it is the intentional design of the perpetrator to torture or inflict pain rather than the pain itself which HAC is designed to cover. Mills v. State, 476 So. 2d 172, 178 (Fla. 1985) (whether victim lingers is pure fortuity, the intent of the wrongdoer is what needs to be examined).

cannot be said beyond a reasonable doubt that the jury's recommendation, or the trial judge's decision, would be the same. In fact, this court has consistently held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present. E.g. Clark v. State, 609 So. 2d 513 (Fla. 1992); McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Smalley v. State, 546 So. 2d 710, 723 (Fla. 1989); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Lloyd v. State, 524 So. 2d 396 (Fla. 1988). In this case there were significant mitigating factors present. The trial court found five mitigating circumstances in this case.[11] The trial court found that Appellant has a high potential for rehabilitation:

> The unrefuted testimony from Dr. Hicks is that the defendant has a high potential for rehabilitation. She testified that while incarcerated the defendant has come to realize he has potential and that he can become a responsible and contributing citizen. This is recognized as a mitigating circumstance and the court has given it substantial weight.

R544. This Court has held -- "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988).

The trial court also found the mitigating circumstance that Appellant had suffered from a physically and emotionally abusive childhood and recognized how this negatively impacted his adult life:

> The evidence reflects that between the ages of six and fifteen (when his mother separated and divorced Gerald Sturgis) the defendant and his brothers and sisters were regularly beaten by their step father. Dr. Hicks testified that the defendant was beaten by Mr. Sturgis approximately two times per month. The defendant's step father also

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[11] (1) Abuse of defendant as a child, both physical and mental; (2) Poor rural upbringing; (3) Good employment background; (4) Good conduct in jail; (5) Defendant's potential for rehabilitation R542-544.

> killed his favorite dog and several of the family's pets during this time. The defendant's mother testified that she was not aware of the physical abuse until the defendant told her at age fifteen. After hearing of the abuse the defendant's mother separated from then divorced Gerald Sturgis. The children's abuse stopped with their separation. The family (mother and children) then moved to Montana. At that time the defendant was sixteen years old, he had not done well in school, and he was not interested, so he decided to quit school. The defendant has been on his own since sixteen. Dr. Hicks testified that this abusive childhood contributed to the defendant's drifting as an adult and his difficulty in having relationships with adults. The court finds that the physical and emotional abuse suffered by the defendant at the hand of his stepfather and his upbringing is a mitigation circumstance and the court has given this some weight in the consideration of the defendant's sentence.

R543. Obviously, this is significant mitigation. The trial court also considered Appellant's good conduct in jail to be mitigating R544. This has been noted as important mitigation in that it shows "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison." Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986). The circumstance attains even greater weight when, as in this case, the evidence comes from jailers who owe no particular loyalty toward the defendant:

> The testimony of more disinterested witnesses -- and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges -- would quite naturally be given much greater weight by the jury. Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations.

Skipper, 106 S.Ct. at 1673 (emphasis added). Also found as mitigation was Appellant's record as a good worker R543. In this particular case, it is the nature of the testimony supporting this mitigator which makes it significant. Since the time of the offense the only evidence regarding Appellant's character came from the people he lived with and worked for in North Carolina for three years. This character evidence is best characterized by Della Wooten's testimony that

although she understands that Appellant has been convicted of murder in the first degree, if given the opportunity Wooten would rehire Appellant "in a heartbeat" T1854-55.[12] In addition, there was other mitigation such as Appellant's drug abuse (See Point XIX). Appellant's sentence must be vacated. Fifth, Eighth and Fourteenth Amendments, U.S. Const.; Art. I, §§ 2, 9 and 17, Fla. Const.

## POINT XV

**THE PROSECUTOR'S COMMENTS TO THE JURY DURING THE PENALTY PHASE DEPRIVED APPELLANT DUE PROCESS AND A FAIR AND RELIABLE SENTENCING.**

The prosecutor made a number of improper and prejudicial comments to the jury during the penalty phase of this case. These comments, individually and cumulatively, denied Appellant due process and a fair and reliable sentencing in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

### 1. Repetition of the facts of irrelevant aggravating circumstances.

It is well settled that egregious prosecutorial misconduct during the penalty phase of a capital murder trial may warrant vacating the death sentence and remanding the case for a new penalty phase proceeding. Garron v. State, 528 So. 2d 353, 359 (Fla. 1988); Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985). Such prosecutorial misconduct occurs when, in his or her determination to win a death sentence for

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[12] Appellant worked for the family for a three year period after the offense in this case. Appellant worked on the family farm and was noted as the best worker the family ever had T1854,1860. Appellant also donated his time to the family. He helped rebuild their house after it burned down T1859. The family told him they would not be able to pay him T1860. Appellant replied that he was not there for the money; he was there to help friends T1860. Jean Hensley also testified that she knew Appellant was convicted of murder in the first degree, but would rehire him and give him a place to live if given the chance T1861.

the defendant, the prosecutor makes comments that urge consideration of factors outside the proper scope of the jury's deliberations. Jackson v. State, 522 So. 2d 802, 809 (Fla. 1988), cert. denied, 488 U.S. 871 (1988). In Bertolotti, this Court described the prosecutor's duty during penalty phase argument as follows:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law. 476 So. 2d 134.

Accord, Jackson v. State, supra at 809.

The state sought to show the aggravators of pecuniary gain and CCP. The state asked questions bearing on those circumstances. The trial court ruled that it would not instruct the jury on those circumstances due to insufficient evidence T1978-79,1995. Thus, the state was constrained from arguing the facts of these aggravating circumstances.

In its closing argument the prosecutor argued facts that were only relevant to the circumstance of pecuniary gain. Specifically, the prosecutor described the location of the victim's purse and checkbook (T2026). Appellant's objection to these statements were sustained (T2026). A short time later, the prosecutor approached defense counsel and began to scream and point at Appellant. Appellant's objected to these actions and his objection was sustained (T2029). The prosecutor then argued allegations related to the CCP aggravator on which the jury would not be instructed such as the wiping of prints from the apartment (T2031). Appellant objected and the objection was sustained (T2031). Immediately, the prosecutor continued its argument alleging pecuniary gain (T2031). Appellant

again objected and the objection was sustained again (T2031). The prosecutor persisted in arguing allegations related to CCP and Appellant again objected (T2033). The trial court halted the proceedings and removed the jury from the courtroom (T2033). The trial court instructed the prosecutor to limit its argument to only the facts which had a bearing on the aggravating circumstances which were properly before the jury (T2033-2034). The prosecutor later argued that the reason for the sentencing proceeding was the victim, and not the defendant (T2041). Appellant's objection to this argument was sustained (T2041).

It is improper for the prosecutor to attempt to evade or circumvent a trial court's rulings by repeatedly continuing to make improper arguments after objections have been sustained. Cf., Taylor v. State, 640 So. 2d 1127, 1134 (Fla. 1st DCA 1994) (improper to place information before jury which the judge has previously ruled inadmissible). Appellant had moved for a mistrial due to the cumulative effect of the prosecutor's comments (T2043). While a prosecutor is at liberty to strike hard blows, he or she is not free to strike foul blows. The prosecutor should not seek to receive a death recommendation on matters which are outside the proper scope of jury deliberations. The repeated improprieties in this case require a new sentencing hearing despite the sustaining of Appellant's objections. See, Gonzalez v. State, 450 So. 2d 585 (Fla. 3d DCA 1984) (repeating questions to which objections had been sustained fundamentally tainted the trial); Garron v. State, 528 So. 2d 353, 358-359 (Fla. 1988) (prosecutor's repeated improper remarks could only be cured by mistrial).

**2. Golden Rule argument.**

During closing argument the prosecutor asked the jury to put itself in the place of the victim as follows:

> MS. ROBINSON: ... The mitigators, if they even get established, they're not even established. There is nothing to outweigh that, nothing.... What I asking you to do is contemplate the death of Marsha Ross, how it happened.

(T2042). Appellant objected to the prosecutor's argument (T2042). The trial court overruled the objection and the prosecutor continued making the argument (T2042). The prosecutor continued with its argument:

> How she felt, what was going through her mind when she was being strangled and raped. What was she feeling? The pain, the fear and the fact that she couldn't do anything about it.

(T2043). It was error to overrule Appellant's objection and thus allow the golden rule argument.

Clearly, the statement, "contemplate the death of Marsha Ross ... How she felt, what was going through her mind ... the pain, the fear [the defenselessness] ..." constitutes an improper Golden Rule argument. Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (improper Golden Rule argument for state to invite the jury "to imagine the victim's final pain, terror and defenselessness").

**3. Requesting the jury to impose the same penalty that the defendant imposed.**

In its last words to the jury, the prosecutor pleaded for the jury to impose the same penalty as the defendant imposed:

> MS. ROBINSON: ... What I'm asking you to do is impose the same penalty that Neil Wilson Wilding imposed on Marsha Ross the night of August 28th of 1988.

(T2043). This type of argument has been held to be an improper appeal calculated to influence the jury's sentencing decision:

> Finally, the prosecutor concluded his argument by urging the jury to show Rhodes the same mercy shown to the victim on the day of her death. This argument was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation.

Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989) (emphasis added).

**4. Improper statement that the sentencing was about the victim and was not about the defendant.**

The prosecutor told the jury that the sentencing was not about the defendant:

> MS. ROBINSON: ... Why are we here today? Is it because Neil Wilson Wilding or is it because of Marsha Ross? This sentencing is not about Wilding, this is about Marsha Ross and what Wilding did to Marsha Ross.

(T2041). This is a clear and egregious misstatement of law as capital sentencing is very much about the defendant and the background and character of the defendant must be considered for the sentencing to be an individualized process as required by the Eighth Amendment. See, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

**5. Arguing non-statutory aggravating circumstances.**

The prosecutor improperly argued that Appellant's mother was "used" and was another victim of Appellant:

> MS. ROBINSON: ... You also heard from Neil Wilding's mother, another victim of Neil Wilson Wilding. She's done what any mother would do, believe her son ... Neil Wilson Wilding used his mother, a feeble attempt at making an alibi.

(T2037-2038). Appellant objected, but the trial court overruled the objection (T2038). Clearly, the statement that Appellant had made his mother a victim by using her was unrelated to the statutory aggravating circumstances available by statute. Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985) (defendant entitled to new death penalty proceeding where jury heard argument that did not properly relate to any statutory aggravating circumstances, thereby tainting the jury

recommendation); eg. Jones v. State, 569 So. 2d 1234 (Fla. 1990) (prosecutor's comments regarding defendant's lack of remorse constituted impermissible nonstatutory aggravating circumstance); Robinson v. State, 520 So. 2d 1, 6 (Fla. 1988) (same). In addition, the prosecution commented that the victim "had seven children, six grandchildren" T1118. Appellant moved for mistrial on the ground that such evidence was irrelevant T1129. The size of the victim's family was "wholly immaterial, irrelevant, and impertinent to any issue in the case." Rowe v. State, 120 Fla. 649, 163 So. 22, 23 (Fla. 1935); King v. State, 623 So. 2d 486, 488 n.1 (Fla. 1993) (state concedes references to the victim as a mother were error).

The improper statements discussed in this point individually warrant a new sentencing. Moreover, the cumulative effect of such improprieties upon the jury in death penalty cases has been recognized in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989):

> While none of these comments standing alone may have been so egregious as to warrant a mistrial, this is not a case of merely a single improper remark. The prosecutor's closing argument was riddled with improper comments, and not once did the trial judge sustain an objection and give a curative instruction to the jury to disregard the statements. We believe the cumulative effect of the improper remarks in the absence of curative instruction was to prejudice Rhodes in the eyes of the jury and could have played a role in the jury's decision to recommend the death penalty.

547 So. 2d at 1206; Garron v. State, 528 So. 2d 353, 358-359 (Fla. 1988). The prosecutor's improper comments denied Appellant due process and a fair sentencing in violation of Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. A new sentencing hearing is required.

## POINT XVI

**APPELLANT WAS DENIED DUE PROCESS AND A FAIR, RELIABLE SENTENCING DUE TO THE INTRODUCTION OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES DURING THE PENALTY PHASE.**

During the penalty phase, the state introduced evidence of nonstatutory aggravating circumstances over Appellant's objections. The introduction of this evidence denied Appellant due process and a fair, reliable sentencing in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Untied States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

Florida's death penalty statute, Section 921.141, expressly limits the aggravating factors that may be considered in imposing the death sentence to those enumerated in the statute. Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988), cert. denied, 489 U.S. 1971 (1989); Miller v. State, 373 So. 2d 882, 885 (Fla. 1979); Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977). In Elledge, this Court stated that

> we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

346 So. 2d at 1003. A defendant is entitled to a new sentencing where the jury is presented with argument or evidence which does not properly relate to any statutory aggravating circumstances. See e.g. Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985).

The prosecutor repeatedly introduced evidence that was likely to interfere with the jury's cool and deliberate decision making through the testimony of Officer Timothy Left regarding the victim's mother crying that her baby was dead:

> "The dispatch advised me that they had a female crying that her baby was dead."

T1680. Appellant objected to this testimony, but his objection was overruled T1680. Officer Left then continued to describe how hysterical the victim's mother was:

> "And I started to approach the area of the crying. And I stopped into the apartment, I noticed a woman sitting on a chair just inside the door and she was hysterical, screaming that they killed --"

T1682. Appellant again objected to this evidence, and the trial court again overruled the objection T1682. Officer Left again continued to emphasize the victim's mother's hysteria:

> "I had to take care of the victim's mother. She was very hysterical and I felt with her health, that I needed to call an ambulance and get her calmed down because she was very hysterical."

T1682. Again, Appellant objected and the trial court finally realized the impropriety of such testimony and sustained the objection T1683. The problem is that the highly inflammatory evidence had already been placed before the jury three separate times and had totally deprived Appellant of a fair and reliable sentencing.

Clearly, this is the type of evidence which can strike an emotional cord with the jury and deprive them of the calm and cool evaluation of the proper aggravating and mitigating circumstances. Thus, it is "of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Zant v. Stephens, 462 U.S. 862, 885, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235 (1983); Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Neither evidence nor argument should "be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law."

Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). The evidence of the victim's mother crying that her baby is dead is precisely the type of evidence that inflames passions rather than produces a logical analysis of the law. Thus, it is improper.

The introduction of this evidence cannot be deemed harmless beyond a reasonable doubt. For example, in Burns v. State, 609 So. 2d 600 (Fla. 1992) this Court held that evidence of a slain police officer's "background and character as a law enforcement officer" was irrelevant toward the jury's sentencing decision. In holding that a new sentencing hearing was required because it could not be determined that such evidence was harmless, this Court stated:

> These emotional issues may have improperly influenced the jury in their recommendation. In the interest of justice we determine that fairness dictates the new sentencing hearing proceeding to be before a newly empaneled jury as well as the judge.

609 So. 2d at 600. Certainly, the unnecessary references to the mother of the victim needing an ambulance, being hysterical and screaming and crying that her baby had been killed is also the type of emotional evidence which may have improperly influenced the jury in their recommendation.

The nonstatutory aggravating evidence denied Appellant a fair, reliable sentencing. In the interest of justice, a new sentencing hearing free from this type of evidence is required.

## POINT XVII

**THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.**

"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). Its applica-

tion is reserved for "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

As explained in Point XIV, the heinous, atrocious or cruel aggravator is not legitimately applicable in this case. This leaves, at best, only one aggravating circumstance -- the commission of a felony during the capital crime which was due to the contemporaneous burglary. As noted in McKinney v. State, 579 So. 2d 80, 81 (Fla. 1991), the death sentence will be affirmed in cases supported by one aggravating circumstance only where there is either nothing or very little in mitigation:

> Having found that two aggravating circumstances are unsupported by the record, this death sentence is now supported by just one aggravating circumstance -- that the murder was committed during the course of a violent felony. As we have previously noted, "this Court has affirmed death sentences supported by one aggravating circumstance only in cases involving 'either nothing or very little in mitigation.'" *Nibert v. State*, 574 So. 2d 1059, 1063 (Fla. 1990) (quoting *Songer v. State*, 544 So. 2d 1010, 1011 (Fla. 1989)). Here, the trial court found as a statutory mitigating circumstance that McKinney had no significant history of prior criminal activity. In addition, McKinney presented substantial mitigating evidence relating to his mental deficiencies and alcohol and drug history. In light of the existence of only one valid aggravating circumstance present here, the sentence of death is disproportional when compared with other capital cases where this Court has vacated the death sentence and imposed life imprisonment. *See Lloyd*, 524 So. 2d at 403 (and cases cited therein).

See also Clark v. State, 609 So. 2d 513 (Fla. 1992); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So. 2d at 1011; Smalley v. State, 546 So. 2d 710, 723 (Fla. 1989); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Lloyd v. State, 524 So. 2d 396 (Fla. 1988).

In this case there were significant mitigating factors present. The trial court found five mitigating circumstances in this case.[13] The trial court found that Appellant has a high potential for rehabilitation:

> The unrefuted testimony from Dr. Hicks is that the defendant has a high potential for rehabilitation. She testified that while incarcerated the defendant has come to realize he has potential and that he can become a responsible and contributing citizen. This is recognized as a mitigating circumstance and the court has given it substantial weight.

R544. This Court has held -- "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988).

The trial court also found the mitigating circumstance that Appellant had suffered from a physically and emotionally abusive childhood and recognized how this negatively impacted his adult life:

> The evidence reflects that between the ages of six and fifteen (when his mother separated and divorced Gerald Sturgis) the defendant and his brothers and sisters were regularly beaten by their step father. Dr. Hicks testified that the defendant was beaten by Mr. Sturgis approximately two times per month. The defendant's step father also killed his favorite dog and several of the family's pets during this time. The defendant's mother testified that she was not aware of the physical abuse until the defendant told her at age fifteen. After hearing of the abuse the defendant's mother separated from then divorced Gerald Sturgis. The children's abuse stopped with their separation. The family (mother and children) then moved to Montana. At that time the defendant was sixteen years old, he had not done well in school, and he was not interested, so he decided to quit school. The defendant has been on his own since sixteen. Dr. Hicks testified that this abusive childhood contributed to the defendant's drifting as an adult and his difficulty in having relationships with adults. The court finds that the physical and emotional abuse suffered by the defendant at the hand of his stepfather and his upbringing is a mitigation circumstance and the court has given this some weight in the consideration of the defendant's sentence.

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[13] (1) Abuse of defendant as a child, both physical and mental; (2) Poor rural upbringing; (3) Good employment background; (4) Good conduct in jail; (5) Defendant's potential for rehabilitation R542-544.

R543. Obviously, this is significant mitigation. The trial court also considered Appellant's good conduct in jail to be mitigating R544. This has been noted as important mitigation in that it shows "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison." Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986). The circumstance attains even greater weight when, as in this case, the evidence comes from jailers who owe no particular loyalty toward the defendant:

> The testimony of more disinterested witnesses -- and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges -- would quite naturally be given much greater weight by the jury. Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations.

Skipper, 106 S.Ct. at 1673 (emphasis added). Also found as mitigation was Appellant's record as a good worker R543. In this particular case, it is the nature of the testimony supporting this mitigator which makes it significant. Since the time of the offense the only evidence regarding Appellant's character came from the people he lived with and worked for in North Carolina for three years. This character evidence is best characterized by Della Wooten's testimony that although she understands that Appellant has been convicted of murder in the first degree, if given the opportunity Wooten would rehire Appellant "in a heartbeat" T1854-55.[14] In addition, there was other mitigation such as Appellant's drug abuse (See Point XIX). It cannot

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[14] Appellant worked for the family for a three year period after the offense. Appellant worked on the family farm and was noted as the best worker the family ever had T1854,1860. Appellant also donated his time to the family. He helped rebuild their house after it burned down T1859. The family told him they would not be able to pay him T1860. Appellant replied that he was not there for the money; he was there to help friends T1860. Jean Hensley also testified that she knew Appellant was convicted of murder in the first degree, but would rehire him and give him a place to live if given the chance T1861.

be said that this was a case with either nothing or very little in mitigation. McKinney, supra. Thus, the sentence of death is disproportionate.

Assuming arguendo that the HAC aggravator is valid in this case, the death sentence would still be disproportional. Proportionality analysis is not based solely on the number of aggravating factors. See Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (although five aggravating factors, including prior violent felony existed, -- death was not proportionally warranted); Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988) (death disproportionate when proportional review of two aggravating factors, including a prior violent felony, against mitigating factors). Rather, proportionality review is also based on the quantity and quality of the mitigating evidence. There was substantial mitigation present to make death disproportional. See Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990). As explained above there was mitigation of great weight in this case. As in other cases, the substantial mitigation takes this case from the group of the most unmitigated cases for which the death penalty is reserved. Kramer v. State, 619 So. 2d 274 (Fla. 1993) (death not proportional where two aggravators [prior violent felony and HAC] where mitigators of alcoholism, mental stress, loss of emotional control, good worker, adjustment to prison, were present); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (death not proportional where two aggravators [prior violent felony and during the commission of felony] where mitigators of low intelligence, cocaine and marijuana abuse, and abusive childhood were present); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988) (death not proportional despite 5 aggravators found); Jackson v. State, 575 So. 2d 181 (Fla. 1991) (death not proportional despite two

aggravators including prior violent felony). The death sentence in this case violates Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

## POINT XVIII

**THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION TO APPELLANT'S ARGUMENT THAT THERE IS AN INITIAL PRESUMPTION OF LIFE.**

In his closing argument, Appellant pointed out to the jury that the law has a presumption for life due to the burdens involved in sentencing T2046. The state objected that this was a misstatement of the law T2046. The trial court sustained the objection T2046. This was error.

Appellant's statement as to a presumption of a life sentence was a correct statement of law. For a death sentence to be appropriate at least one aggravating circumstance must be found. Until one aggravator is found beyond a reasonable doubt, there is a presumption of a life sentence. Rembert v. State, 445 So. 2d 337 (Fla. 1989) (sentence reduced to life where no aggravators); Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288, 300 (Pa. 1983) ("presumption of life" acknowledged from burden on prosecution to prove an aggravating circumstance); State v. Young, 853 P.2d 327, 366 (Utah 1993) ("The trial court correctly informed the jury of the presumption of life in the sentencing phase"). Thus, it was improper to sustain the state's objection.

By sustaining the state's objection, the jury was incorrectly left with the notion that death, rather than life, is presumed. It is reversible error for the jury to be misinformed as to the presumption. Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1989).

The error in this case violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. This cause must be remanded for a new sentencing hearing.

## POINT XIX

**THE TRIAL COURT ERRED IN USING THE WRONG STANDARD TO REJECT APPELLANT'S DRUG ABUSE AS A MITIGATING CIRCUMSTANCE.**

The trial court recognized the evidence of Appellant's drug abuse, but rejected this evidence as mitigating because of the lack of a connection between the abuse and the act of committing murder:

> The court recognizes that drug use may be considered as a non-statutory mitigating circumstance however in this case there is no connection between the defendant's use of marijuana and his actions in committing this murder.

R544. In essence, the trial court's ruling was that drug abuse, as a matter of law, is not a mitigating circumstance unless it is directly connected to the murder. This clearly is not true. History of drug abuse does not have to be directly connected to the crime to be mitigating. See e.g. Parker v. State, 19 Fla. L. Weekly S390, S391 (Fla. Aug. 11, 1994); Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992); Caruso v. State, 19 Fla. L. Weekly S508, S511 (Fla. Oct. 6, 1994).

The trial court used the wrong standard in rejecting the drug abuse as a mitigating factor. Eddings v. Oklahoma, 102 S.Ct. 869 (1982). In Eddings, the defendant's family history, which included beatings, was rejected as being mitigating on the ground that it was not connected to the murder -- (i.e. that it did not tend to prove a legal excuse from criminal responsibility). 102 S.Ct. at 876. The Supreme Court held that the trial judge used the wrong standard in rejecting family history as a mitigating factor. Id.; see also

Lockett v. Ohio, 98 S.Ct. 2954 (1978) (aspects of defendant's background are mitigating). In other words, it is not necessary that the family history be the cause for the killing to be mitigating. Like the Supreme Court in Eddings, this Court has also recognized it is reversible error for the trial court to reject a mitigating factor on the basis of utilization of a wrong standard. See Mines v. State, 390 So. 2d 332, 337 (Fla. 1980) (trial court improperly used "sanity" standard in rejecting mental mitigator of being under extreme mental or emotional disturbance); Campbell v. State, 571 So. 2d 415, 418-19 (Fla. 1990) (trial court improperly used "sanity" standard in rejecting "impaired capacity" as a mitigator); Ferguson v. State, 417 So. 2d 639, 644-45 (Fla. 1982).

In addition, it was also improper to reject evidence of Appellant's drug abuse on the day of the offense (i.e. smoking of marijuana and blacking out) as a mitigating circumstance. See Morgan v. State, 639 So. 2d 6, 14 (Fla. 1994) (fact that defendant "sniffed gasoline on the day of the murder" found as separate mitigator from other mitigation which included longer term abuse).

The error of improperly rejecting the mitigating evidence denied Appellant due process and a fair, reliable sentencing contrary to Article I, Sections 9 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

## POINT XX

**APPELLANT WAS DENIED DUE PROCESS AND A FAIR, RELIABLE SENTENCING DUE TO THE RECEIPT OF NONSTATUTORY AGGRAVATING INFORMATION.**

The trial court received ex parte petitions and letters urging the court to sentence Appellant to death SR44-47,23-27. Also, included in this ex parte material were allegations that Appellant was

guilty of criminal conduct not presented SR32-33. Appellant was denied due process and a fair and reliable sentencing for various reasons.

First, from Gardner v. Florida, 97 S.Ct. 1197 (1977), we know that the possible reliance on ex parte material without giving the defense an opportunity to rebut the material is improper. Further, in Gardner, the court stated that where the trial court fails to state on the record whether it relied on the ex parte material, there was no opportunity to rebut the material:

> In contrast, in the case before us, the trial judge did not state on the record the substance of any information in the confidential portion of the presentence report that he might have considered material. There was, accordingly, no similar opportunity for petitioner's counsel to challenge the accuracy or materiality of any such information.

97 S.Ct. at 1204 (emphasis added) (footnote omitted).[15] In the present case the trial court never stated on the record whether the ex parte material was relied on or whether it was rejected. Thus, Appellant was denied the opportunity to rebut or confront the material. Gardner, supra (trial court states that PSI was relied on, but failed to state on the record whether the confidential portion was relied on). The error is fundamental. Id. at 1206 ("Nor do we regard this omission by counsel as an effective waiver of the constitutional error in the record").

Second, petitions for the death sentence and evidence of other nonstatutory aggravators (allegations of other crimes) is precluded as the legislature has made it clear, in Section 921.141(5) of the

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[15] See also Proffitt v. Wainwright, 685 F.2d 1227, 1225 (11th Cir. 1982) (appellate court rejects district court's conclusion that trial court did not rely on a report at sentencing as "clearly erroneous," where trial court was silent to the matter at sentencing and post-decision statements of trial court cannot be used to refute reliance).

Florida Statutes, that aggravators are limited by statute and no others can be considered in sentencing. Purdy v. State, 343 So. 2d 4 (Fla. 1977); Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988). No other statute can abrogate this requirement. Floyd v. Bentley, 496 So. 2d 862 (Fla. 2d DCA 1986) (specific statute takes precedent over general statute on subject matter). The introduction of nonstatutory aggravating evidence constitutes reversible error. Trawick v. State, 473 So. 2d 1235, 1241 (Fla. 1985). The type of information received in this case creates the unacceptable risk of arbitrary decision making. Appellant is also denied of his right of confrontation. Eutsey v. State, 383 So. 2d 219 (Fla. 1980). Appellant's rights under Article I, Sections 2, 9, 15, 16 and 17 of the Florida Constitution and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated. This cause must be remanded for a new sentencing.

## POINT XXI

**THE TRIAL COURT ERRED IN DENYING APPELLANT'S OBJECTION TO THE JURY INSTRUCTION ON SEXUAL BATTERY THAT WAS NOT APPLICABLE TO THE FACTS OF THIS CASE.**

Appellant objected to the trial court's instructing the jury on the method of proving sexual battery by anal or oral penetration on the ground that there was no evidence presented to support such theories T1969-1970. The trial court overruled Appellant's objection and instructed the jury on theories of sexual battery for which there was no evidence to support T1970. This was error.

It is undisputed in this case that there was absolutely no evidence of a sexual battery by oral or anal penetration. It was reversible error to give an instruction that was inapplicable to the facts of the case because such an instruction tends to confuse and

mislead the jury. O'Brien v. State, 206 So. 2d 217 (Fla. 2d DCA 1968) (other grounds receded from 376 So. 2d 1026). In O'Brien, supra, the defendant was charged with buying stolen property. The evidence showed that the defendant bought stolen property and sold it to someone else. There was no evidence that the defendant had possession of the stolen property. The trial court instructed the jury that unexplained possession of stolen property was a circumstance relevant toward proving guilt. The appellate court reversed for giving such an instruction because the evidence did not show defendant possessed the stolen property and thus "the instruction was completely inapplicable to the facts of the case and would certainly tend to confuse and mislead the jury." 206 So. 2d at 220 (footnotes omitted). Likewise, in this case there was no evidence to support anal or oral penetration and thus the instruction was inapplicable to the facts of the case and constitutes reversible error. The error cannot be deemed harmless where one of the aggravators argued to the jury was that the killing occurred during the commission of a sexual battery. The error denied Appellant due process and a fair and reliable sentencing contrary to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

## POINT XXII

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

This issue involves the trial judge giving virtually complete deference to the jury's death recommendation. The death sentence in this case was imposed in violation of Florida Statute 921.141, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States

Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

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

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

(Emphasis supplied) T1334.

During jury selection, the trial court advised the jury that it is "only under unusual circumstances" that he could "change the jury verdict" T1538.

In the penalty phase jury instruction the trial judge again instructed the jury that is "only under rare circumstances that this Court could impose a sentence other than what you recommend" T2069.

This case is controlled by Ross v. State, 386 So. 2d 1191 (Fla. 1980). In Ross, this Court stated:

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

386 So. 2d at 1197. This Court reversed as the trial judge's statements that he found "no compelling reason" to override the jury indicated that the trial judge did not perform the independent weighing

of aggravating and mitigating circumstances required by Fla. Stat. 921.141 the this Court's opinion in Dixon. Here, the trial judge's comments were stronger. He stated that it is only under "rare circumstances" that he could impose a different sentence. This is stronger than in Ross, supra, and indicates a lack of independent weighing of aggravating and mitigating circumstances.

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

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

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

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

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

Id. at 1243.

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

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

615 So. 2d at 690-691. The trial court violated the principles of Ross, Dixon and Fla. Stat. 921.141. Resentencing is required.

## POINT XXIII

**THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE INSTRUCTION.**

Over Appellant's objections T1979-1982[16], the trial court instructed the jury on HAC as follows:

> The second aggravating circumstance is that the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious and cruel is one accomplished by additional acts that show the crime was conscienceless or pitiless or was unnecessarily tortuous to the victim.

T2070-2071 (emphasis added). Giving this instruction was error and denied Appellant's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

States are required to narrow the class of death eligibles and to channel the discretion of the sentencers by clear, objective, and reviewable standards. Godfrey v. Georgia, 446 U.S. 420, 422, 432-433, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 1859, 100 L.Ed.2d 372 (1988). Special care must be taken to ensure this requirement in a "weighing" state such as Florida where the jury will first directly weigh the aggravating and mitigating circumstances and then the judge in turn gives "great weight" to the jury's weighing of the circumstances. See Espinosa v. Florida, 112 S.Ct. 2926 (1992). The trial court has the responsibility to instruct correctly on the law, even where the law conflicts with standard jury instructions. Yohn v. State, 476 So. 2d 123, 126-

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[16] Appellant also requested a special HAC instruction, but the trial court denied it T1979-1982;R497.

127 (Fla. 1985); Steele v. State, 561 So. 2d 638, 645 (Fla. 1st DCA 1990). It was error to give the instruction at bar.

The instruction that was given in this case is fatally flawed as it fails to properly limit the jury's discretion in deciding what offenses are HAC. First, the instruction totally fails to define "atrocious." The jury is totally left to its unbridled discretion in its evaluation whether the offense was atrocious. Further, flaws with the instruction are readily seen by breaking it down in two parts. The first part --

> Heinous means extremely wicked or shockingly evil. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.

T2070 -- has been directly held to be unconstitutional in its failure to channel discretion. Shell v. Mississippi, 111 S.Ct. 313 (1990)[17]

The only difference between the unconstitutional HAC instruction in Shell (but see footnote 17) and the one given in this case is the second part of the instruction that was given in this case:

> The kind of crime intended to be included as heinous, atrocious and cruel is one accomplished by additional acts that show the crime was consciousless or pitiless or was unnecessarily tortuous to the victim.

T2070-2071 (emphasis added). The question is whether the second part of the instruction showing an example of the type of crime included in the kinds of HAC offenses adequately limits the jury's discretion in finding HAC. Obviously, it doesn't. The second part of the instruction merely shows an example of "the kind of crime" which is "intended to be included" and not a limitation as to what constitutes HAC. Use of the terms "kind of crime" and "included" signifies there are other

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[17] Even in Shell, the unconstitutional HAC instruction defined the term "atrocious." Shell, supra, 111 S.Ct. 313 (Marshall concurring).

crimes, besides those that are consciousless or pitiless or unnecessarily tortuous, that the jury can consider as HAC.

The plurality opinion of the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) stated that limitation of HAC to consciousless, pitiless, or unnecessarily tortuous crimes as those terms have been construed by case law can provide adequate evidence to those recommending sentences in capital cases:

> As a consequence, the [Florida Supreme Court] has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim" .... [cites omitted] We cannot say that the provision as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Proffitt, 428 U.S. at 255-256 (emphasis added). However, as noted above, the instruction in this case is an example of HAC rather than a limitation of HAC. By its very nature, an example signifies that there are other kinds of offenses that qualify as HAC. In other words, by adding the second part of the HAC instruction, the jury's discretion has been broadened instead of channeled.

In addition, the "unnecessarily tortuous" and "conscienceless" language of instruction in this case acts as a catch-all to broaden discretion. As noted earlier, the "unnecessarily tortuous" or "conscienceless" provision "so as construed" by the Florida Supreme Court as a limit may provide the jury adequate guidance. Proffitt, supra.

The problem is that the instruction wholly fails to limit this provision by informing the jury as to how this provision has been construed by this Court. Without definition of the provision, the provision invites subjective responses. Without further definition,

the jury will likely determine that anyone committing a first degree murder is "conscienceless." Without further definition, how can a jury distinguish between "necessarily" and "unnecessarily" tortuous crimes.[18] While this Court may have placed limits on the meaning of these terms in its caselaw, such limits are totally irrelevant to the jury where they are not instructed on how such terms have been "so construed" by this Court.[19]

## POINT XXIV

**THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE REQUIREMENT OF "EXTREME" MENTAL OR EMOTIONAL DISTURBANCE AND "SUBSTANTIAL" IMPAIRMENT FOR MITIGATING CIRCUMSTANCES.**

Appellant objected to the characterization of the mitigating circumstances of the offense being committed while Appellant was under the influence of "extreme" mental or emotional disturbance, and that the capacity of Appellant to conform his conduct was "substantially" impaired, with the modifiers "extreme" or "substantially" R153-154. Appellant explained that if these modifiers were not eliminated the jury would discount the mitigating evidence because it did not reach the level of "extreme" or "substantial" R154. The trial court denied Appellant's objection R203. This was error.

The inclusion of the modifiers would lead to rejection of unrebutted mitigating circumstances when viewed under the strict

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[18] It has been stated that "[A]ny attempt to determine what constitutes 'necessary' torture -- to clarify the meaning of 'unnecessary' appears to be futile." People v. Engert, 31 Cal.3d 797, 802, 647 P.2d 76, 183 Cal.Rptr. 800 (Cal. 1980).

[19] For example, on numerous occasions this Court has made it clear that there must be a tortuous intent for this circumstance. See page 57, supra. Yet the instruction in this case wholly fails to inform the jury of this fact. Nor does the instruction inform the jury that this circumstance cannot be applied where events occur after the victim dies or loses consciousness. Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984).

statutory definition of "extreme" mental or emotional disturbance or "substantially" impaired. The limitation of the jury's consideration of mitigating circumstances by use of modifiers "extreme" or "substantially" violates Article I, Sections 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

In Cheshire v. State, 568 So.2d 908 (Fla. 1990) this Court held it was error to restrict consideration of mitigating circumstances by the use of the "extreme" modifier despite the language of the statute:

> Florida's capital sentencing statute does in fact require that emotional disturbance be "extreme." However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, *any* emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say. *Lockett; Rogers*. Any other rule would render Florida's death penalty statute unconstitutional. *Lockett*.

568 So.2d at 912.

The instant scenario presents the extreme of vague sentencing criteria, where the use of such modifiers can be viewed by the particular sentencer as preventing consideration of valid mitigation unless it rises to some ethereal benchmark specified by statute. As here, unless the evidence shows that the independent considerations constitute "extreme" mental or emotional influences, the sentence summarily rejects valid mitigation and affords the facts no weight in the sentencing process. The addition of the term "extreme" prevents consideration of compelling emotional or mental influences as valid mitigation unless the perpetrator is psychotic, and, perhaps, even then. See Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986) (defendant not under influence of "extreme" mental or emotional distress, even though two of five psychiatrists testified that

defendant was legally insane at the time of offense). The modifiers unduly restrict the categories that may be considered as mitigation, and their use violates the Eighth and Fourteenth Amendments by making consideration of valid mitigation inconsistent, arbitrary and capricious.

Here, the instructions with the modifiers of "extreme" and "substantially" would prevent the jury from considering such things, for example, as evidence that Appellant had smoked marijuana laced with a substance on the day of the offense T1914 and that it could have had a number of effects on Appellant T1916. Instead of considering whether Appellant was mentally or emotionally disturbed to some degree, or whether Appellant's capacity to conform his conduct was merely impaired to some degree, the instruction confined the statutory mitigating factor to an "extreme" disturbance or a "substantial" impairment. In this regard, the statutory limitations of the extent of mental or emotional disturbance, or the extent of impairment, that must be present before it can be considered to affect an aggravating factor impermissibly violates the teaching of Skipper v. South Carolina, 476 U.S. 1 (1986) and Lockett v. Ohio, 438 U.S. 586 (1978) and Article I, Sections 9 and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

## POINT XXV

**APPELLANT'S DEATH SENTENCE MUST BE VACATED AND THIS CAUSE REMANDED FOR IMPOSITION OF A LIFE SENTENCE WHERE THE TRIAL COURT FAILED TO FILE A WRITTEN SENTENCING ORDER CONTEMPORANEOUS WITH THE PRONOUNCEMENT OF THE SENTENCE.**

The trial court pronounced sentence on October 4, 1993 T95. The sentencing order was not filed contemporaneous with the pronouncement of sentence. The filing stamp reflects that the sentencing order was

filed on October 7, 1993 (R539) -- 3 days after the pronouncement of sentence. Whereas documents filed in open court duly reflect that they were filed in open court SR50.

In Grossman v. State, 525 So. 2d 833 (Fla. 1988) this Court gave fair warning that sentencing orders imposing the death sentence must be filed contemporaneous with the pronouncement of sentence:

> We consider it desirable to establish a procedural rule that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement.... [E]ffective thirty days after this decision becomes final, we so order.

525 So. 2d at 841. Subsequently, in Stewart v. State, 549 So. 2d 171, 176 (Fla. 1989) this Court held that failure to meet the Grossman requirement of contemporaneously filing the sentencing order would require a "remand for imposition of a life sentence." Due to the trial court's failure to meet the Grossman requirement in this case, a remand for imposition of a life sentence is required. Hernandez v. State, 621 So. 2d 1353 (Fla. 1993); Christopher v. State, 583 So. 2d 642 (Fla. 1991).

## POINT XXVI

**APPELLANT WAS DENIED DUE PROCESS AND A FAIR AND RELIABLE SENTENCING WHERE THE STATE WAS PERMITTED TO PRESENT ITS VERSION OF APPELLANT'S GUILT, BUT APPELLANT WAS NOT ALLOWED TO CHALLENGE SUCH A VERSION.**

After Appellant was convicted, the jury was discharged and a new jury was impaneled for the penalty phase. The trial court instructed the new jury that Appellant was guilty of murder in the first degree T1334. Over Appellant's objection T1722-29,1527, the state was permitted to present its version of the guilt phase as it had done before the prior jury. Appellant was prohibited from presenting its version of what had occurred T1319.

Allowing a one-sided version of the guilt phase of trial denied Appellant due process and a fair, reliable sentencing. See O'Connell v. State, 480 So. 2d 1284, 1287 (Fla. 1986) ("double standard" of allowing only prosecutor to question jurors denied due process). Thus this cause must be remanded for a new sentencing hearing due to the violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Untied States Constitution and Article I, Sections 2, 9 and 17 of the Florida Constitution.

## POINT XXVII

**THE TRIAL COURT ERRED IN ADMITTING HEARSAY EVIDENCE AT SENTENCING.**

The court erred in overruling a defense hearsay objection to testimony from a detective about the DNA laboratory results made by other individuals T1736,1739. The Confrontation Clause applies to capital sentencing proceedings. Moore v. Zant, 885 F.2d 1497, 1511-12 (11th Cir. 1989) (discussing history of issue). See also Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) and Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (Specht applies to capital sentencing proceedings). In Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), this Court recognized as much, but then authorized the use of hearsay testimony in violation of the Confrontation Clause.[20] Subsequent rulings of the United States Supreme Court[21] make clear that the use of hearsay testimony violates the Confrontation Clause, so that this Court should revisit Rhodes and

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[20] Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

[21] Idaho v. Wright, 110 S.Ct. 3139 (1990) and Dever v. Ohio, 111 S.Ct. 575 (1990).

recognize that the use of hearsay in capital sentencing proceedings violates the Confrontation Clause.

## POINT XXVIII

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

Florida Statute 921.141(5) violates both the Florida and United States Constitutions. The use of this aggravator renders Appellant's death sentence unconstitutional pursuant to Article I, Sections 2, 9, 12, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Appellant filed a motion to declare this aggravator unconstitutional R112-120,T17. The trial court denied the motion R198,T17. The jury was instructed on this as an aggravating circumstance and the trial court found it as an aggravator R539,T2070.

Aggravating circumstance (5)(d) states:

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

Fla. Stat. 921.141.

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

This aggravating circumstance violates both the United States and Florida Constitutions. The decisions of the United States Supreme Court have made clear that under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two requirements before it is constitutional. (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S.

863, 877, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235, 249 (1983). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Zant, supra, at 2742, 77 L.Ed.2d at 249-250.

It is clear that the felony murder aggravator fulfills neither of these functions. It performs no narrowing function whatsoever. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill. However, persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with "heightened premeditation." See Fla. Stat. 921.141(5)(i). Rogers v. State, 511 So. 2d 526 (Fla. 1987).

In this regard, the following discussion of the premeditation aggravating circumstance in Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990) (footnote omitted) is especially pertinent:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1989) (footnote omitted). Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder.

The same logic applies to the felony murder aggravating circumstance. It is completely irrational to make a person who does not kill and/or intend to kill automatically eligible for the death penalty whereas a person who kills someone with a premeditated design is not automatically eligible for the death penalty. It is clear that

this aggravating circumstance violates the Eighth and Fourteenth Amendments pursuant to Zant, supra.

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

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

It is also clear that this aggravating circumstance is essential to death eligibility in this case. The jury was only instructed on (and the jury only found) two aggravating circumstances T2070,R539-540. Florida law is clear that if there is only one aggravating circumstance, a death sentence must be reduced to life imprisonment,

unless there is little or nothing in mitigation. Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984). Here, there is substantial mitigation. Thus, felony murder was essential to make this case first degree murder and for death eligibility.

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

## POINT XXIX

**THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY DEFINE NONSTATUTORY MITIGATING CIRCUMSTANCES.**

Defense counsel moved the trial court to give a number of special jury instructions defining nonstatutory mitigating circumstances which were applicable to this case. For example, defense counsel submitted a special written instruction explaining that the jury could consider: the defendant suffered physical abuse as a child; the defendant has a record of good jail conduct while incarcerated; the defendant's prior drug use; the defendant's employment background; the defendant's potential for rehabilitation R500;T2017-2018. The trial court denied all the special instructions T2018. Failing to instruct on special nonstatutory mitigating circumstances on motion of defense violates due process and the Eighth Amendment requirement that all mitigating evidence be considered in a death sentencing proceeding.

It could be argued that an instruction on non-statutory mitigating circumstances is not necessary and that such circumstances could merely be argued to the jury by the defense. However, an attorney's argument will not substitute for a proper jury instruction. See Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA 1981). Abstract instructions relating to a defense theory are insufficient; such

instructions must be "precise and specific rather than general and abstract." United States v. Mena, 863 F.2d 1522 (11th Cir. 1989). This is true even where standard jury instructions are involved. See Harvey v. State, 448 So. 2d 578, 580-81 (Fla. 5th DCA 1984) (error to blindly adhere to standard instructions as they are "no immutable postulates from Olympus"). Jurors will only be properly able to understand what specific nonstatutory mitigating evidence is being offered if they are given instructions on such evidence.

This Court has held that it cannot be presumed that a trial judge knows what mitigating circumstances are being offered. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). Likewise, a lay jury cannot be presumed to adequately understand what is being offered as mitigation without the proper instruction to guide it.[22] An attorney's argument will not substitute for a proper jury instruction. See Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA 1981).

Parker v. Dugger, 111 S.Ct. 731 (1991), also supports the proposition that juries must be told what the nonstatutory mitigation is upon request. In Parker, the Supreme Court found the appellate review inadequate because this Court failed to consider the nonstatutory evidence in declaring error harmless and finding the jury override valid. The Court noted the difficulty in defining nonstatutory mitigation:

> Nonstatutory evidence, precisely because it does not fall into any predefined category, is considerably more difficult to organize into a coherent discussion; even though a more complete explanation is obviously helpful to a reviewing court, from the trial judge's perspective it is simpler merely to conclude, in those cases where it is true, that such evidence ... does not outweigh the aggravating circumstances.

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[22] Certainly, if a trial judge with training and experience needs guidance, a lay jury would require more guidance.

Parker, 111 S.Ct. at 738. It is error not to give the defendant's requested written instructions on possible mitigating circumstances. State v. Cummings, 389 S.E.2d 66, 80 (N.C. 1990).[23]

Given the lack of clarity in defining nonstatutory mitigation as recognized in Parker, putting this issue before the jury in lump form, with no instructions on what can mitigate, invites the jury to decide for itself what is mitigating. The refusal to instruct on the nonstatutory mitigators rendered a reasonable probability of the jury ignoring relevant mitigating evidence contrary to the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9, 16 and 17 of the Florida Constitution.

## POINT XXX

**THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTION THAT MITIGATING EVIDENCE DOES NOT HAVE TO BE FOUND UNANIMOUSLY.**

Appellant requested the following jury instruction:

> You do not have to be unanimous in your decision about mitigating circumstances. Each of you should make up your own minds about mitigation.

T2003-2004;SR13. The trial court denied the instruction T2004. This was error.

It is well-settled that the jury must be prevented from believing their decisions as to finding mitigating circumstances must be unanimous. Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988).

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[23] The Court in Cummings noted that because the non-statutory mitigating circumstances "were not presented on an equal footing" with the statutory circumstances the jury "could easily believe that the unwritten circumstances were not as worthy as those in writing." 389 S.E.2d at 81. It was also noted that "jurors, as well as all people, are apt to treat written documents more seriously than items verbally related to them. Had the circumstances been required to directly address each of them." Id.

The lack of an instruction on this matter leaves the jury without any indication that they can individually consider the mitigating factors:

> No instruction was given indicating what the jury should do if some but not all of the jurors were willing to recognize something about petitioner, his background, or the circumstances of the crime, as a mitigating factor.

Mills, supra, 108 S.Ct. at 1868. Consequently, it was error to deny Appellant's requested instruction. The error denied Appellant due process and a fair sentencing. Article I, Sections 2, 9, 16, and 17, Florida Constitution; Fifth, Eighth, and Fourteenth Amendments, United States Constitution. Appellant's sentence must be reversed and this cause remanded for a new sentencing.

## POINT XXXI

**THE AGGRAVATING CIRCUMSTANCES USED AT BAR ARE UNCONSTITUTIONAL.**

Appellant challenged the aggravators used in this case on a number of occasions.

1. Felony murder

As already argued, this circumstances does not serve the limiting function required by the Constitution and arbitrarily creates a presumption of death for the least aggravated form of first-degree murder. Further, it turns the mitigating circumstance of lack of intent to kill into an aggravating circumstance. Hence, it violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions.

2. Especially wicked, evil, atrocious, or cruel

This factor does not serve the channeling and limiting function required by the Constitution and has not been consistently strictly construed.

To be constitutional, this aggravating circumstance must, at a minimum, be limited to the conscienceless or pitiless crimes which are unnecessarily torturous to the victim. Espinosa v. Florida, 112 S.Ct. 2926 (1992); Bertolotti v. Dugger, 883 F.2d 1503, 1526-27 (11th Cir. 1989). History shows that it has been consistently applied to murders that are not "unnecessarily torturous."[24]

The heinous, atrocious, or cruel aggravating circumstance violates the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions. It does not rationally narrow the class of persons eligible for death, cannot be consistently applied, and is unconstitutionally vague.

## CONCLUSION

Based on the foregoing arguments, this Court should reverse Appellant's convictions, and vacate or reduce his sentence, and remand this cause for a new trial or grant relief as it deems appropriate.

Respectfully submitted,

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[24] Even this standard violates the Cruel and Unusual Punishment Clause and the constitutional and statutory rule of lenity. Almost any first-degree murder is conscienceless or pitiless. What a "necessarily torturous" murder is, or why it is not as bad as an "unnecessarily torturous" one, are mysteries.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 16th day of December, 1994.

Jeffrey L. Anderson

of Counsel

# A P P E N D I X

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY,
STATE OF FLORIDA



STATE OF FLORIDA,

Plaintiff,

v.

NEIL WILSON WILDING,

Defendant.

_____/

CASE NO: 91-1064-CF
JUDGE PAUL B. KANAREK

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SENTENCING ORDER

The defendant was tried before this court on July 6 through July 9, 1993 and July 12 through July 13, 1993. The jury found the defendant guilty of all three counts in the Indictment (Count I - Murder in the First Degree; Count II - Sexual Battery with physical force likely to cause serious personal injury; Count III - Burglary during which the defendant committed a battery). This jury was discharged after their verdict was returned and a second jury was selected to hear the penalty portion of this case. The penalty portion of this case was tried before this court on September 7 through September 10, 1993. On September 10, 1993, after hearing evidence in support of aggravating factors and mitigation factions the jury returned a nine to three recommendation that the defendant be sentenced to death in the electric chair. On October 1, 1993, the court held a further sentencing hearing where both sides made further legal argument. The court set final sentencing for this date, October 4, 1993.

This court, having heard the evidence presented in both the guilt phase and the penalty phase, having the benefit of legal memoranda and further argument both in favor and in opposition of the death penalty finds as follows;

A. AGGRAVATING FACTORS

1. The capital felony was committed while the defendant was engaged in the commission of, or attempt to commit a sexual battery and a burglary.

   The defendant was charged and convicted of committing a burglary of the victims home and of committing a sexual battery on the victims of the homicide. The victims home was entered by pushing in a screen of an open window located next to the front door and then reaching over and unlocking the front door. The

evidence show that the victim was found in her home, laying on a couch, clad only in her nightgown. The nightgown which opened up the front was completely open. The victim's hands were tied tightly in front of her with a telephone cord. An electrical cord which had been cut or ripped from its plug in the wall, but still attached to a lamp, was tied around the victims neck. A small seminal stain, which contained spermatozoa, was found on the bottom hem of the victim's nightgown. The medical examiner testified that he found evidence of trauma (a laceration and redness) to the inside of the victim's vagina and that this trauma occurred shortly before the victims death. He also testified that this vaginal trauma was consistent with a penis or other object being inserted in the victims vagina. On the floor, next to the couch where the victim was found, the police found a towel. This towel contained seminal stains and spermatozoa that came from the defendant. The towel also contained the victims pubic hair and blood stains from the victim. This aggravating circumstance was proved beyond a reasonable doubt.

2. The capital felony was especially heinous, atrocious, or cruel.

The victim left her parents home between 10:30 and 11:00 p.m. to go home to her apartment for the evening. Her body was found the next day laying on her couch clad only in her nightgown. Her hands were tied tightly in front of her with a telephone cord that had come from a phone in her apartment. The evidence shows that this phone cord was tied around her hands approximately five or six times and knotted. Ligature marks were found on her wrists. An electrical cord from a lamp which had been next to the couch had been cut from where it was plugged in the wall and was tied around the victims neck. This cord was tightly tied around the victims neck three or four times and knotted in two places. The medical examiner found trauma behind the victim's right ear, trauma and swelling to her eyes, and bruises to her lips. He also found ligature marks around her neck with bruises and scrapes caused by the tying of the electrical cord. He testified that the victim had died from mechanical asphyxiation (the electric cord tied around the victims neck). The evidence shows that it would take approximately five to eight minutes to kill a person in this manner. It would require a substantial and continuous pressure to be applied to the victims neck during this period of time. Such a death would be extremely agonizing and painful to the victim with the victim gasping for breath. The evidence reflects

that the victim was sexually assaulted and struggled prior to her death. She surely knew of her impending doom when the defendant wrapped the cord around her throat and began to choke the life out of her. This was a conscienceless, pitiless crime which was unnecessarily tortuous to the victim. The aggravating factor that the capital felony was especially heinous, atrocious, or cruel has been proved beyond a reasonable doubt.

None of the other aggravating factors enumerated by statute is applicable to this case and none other was considered by this court.

B. MITIGATING FACTORS

Statutory Mitigating Factors

At trial and at the sentencing hearing the defendant requested the court to consider the following statutory mitigation circumstances:

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

   The only witness to testify about the defendant's mental state was Dr. Mary Hicks who was called by the defense. Dr. Hicks testified that the defendant told her that the night of the murder he has smoked marijuana that had been laced with some other substance. He said that after smoking the marijuana his tongue got numb and he blacked out however there is no evidence that the defendant was in a blackout when he committed the murder. Dr. Hicks testified that drug use could cause some extreme emotional problems. Under cross examination she testified that she had no information about whether the defendant was under the influence of extreme mental or emotional disturbance on the date of this murder. This court allowed the defendant ot argue this circumstance to the jury, but now finds that neither the totality of the facts, nor any expert or non-expert testimony suggests the defendant was under the influence of extreme mental or emotional disturbance when he committed this murder. This mitigation circumstance does not exist.

2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

   As stated previously the only witness to testify about the defendant's mental capacity was Dr. Hicks. She

testified that the defendant told her that he had smoked marijuana regularly but that he was not addicted. He also told her that the night of the murder he had smoked marijuana which was laced with something and had a blackout. There was no evidence presented that the defendant had a blackout at the time he committed the murder. Under cross examination Dr. Hicks testified that she had no information about whether the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired on the date of the murder. The court allowed the defendant to argue this circumstance to the jury, but now finds that neither the totality of the facts, nor any expert or non-expert testimony suggests the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired when he committed this murder. This mitigating circumstance does not exist.

3. The age of the defendant at the time of the crime.

At the time the murder was committed, the defendant was twenty-seven years old. There was no evidence presented that the defendant had an abnormally low I.Q. or that his emotional age was inconsistent with his actual age. The defendant's age at the time of the crime is not a mitigating factor.

Non-Statutory Mitigating Factors

The defendant has asked the court to consider the following non-statutory mitigating factors.

1. Abuse of defendant as a child, both physical and mental
2. Poor rural upbringing
3. Good employment background
4. Defendant's drug use
5. Defendant's mental and emotional problems that don't reach the level of statutory mitigating factors.
6. Good conduct in jail.
7. Defendant's potential for rehabilitation

1 & 2. The defendant is the middle child of seven brothers and sisters. He lived and grew up in rural Idaho, just outside Pocatello. His father died when he was one year old. When he was six his mother married Gerald Strugis. His mother testified that up to that point she had stayed home with her children and she felt that they had a good childhood. The defendant's





542

mother and stepfather worked different shifts and as a result Mr. Sturgis had the responsibility of supervising the kids while their mother was at work. The evidence reflects that between the ages of six and fifteen (when his mother separated and divorced Gerald Sturgis) the defendant and his brothers and sisters were regularly beaten by their step father. Dr. Hicks testified that the defendant was beaten by Mr. Sturgis approximately two times per month. The defendant's step father also killed his favorite dog and several of the families pets during this time. The defendant's mother testified that she was not aware of the physical abuse until the defendant told her at age fifteen. After hearing of the abuse the defendant's mother separated from then divorced Gerald Sturgis. The children's abuse stopped with their separation. The family (mother and children) then moved to Montana. At that time the defendant was sixteen years old, he had not done well in school, and he was not interested, so he decided to quit school. The defendant has been on his own since age sixteen. Dr. Hicks testified that this abusive childhood contributed to the defendant's drifting an an adult and his difficulty in having relationships with adults. The court finds that the physical and emotional abuse suffered by the defendant at the hand of his stepfather and his upbringing is a mitigating circumstance and the court has given this some weight in the consideration of the defendant's sentence.

3. The record does not reflect what the defendant's employment history was prior to moving to Florida. The evidence shows that at the time of the murder the defendant had been employed for approximately one year as a mason with Treasure Coast Cement. He was a good, dependable worker and never a problem. In approximately September of 1988, the defendant left the Vero Beach area. His next known employment was from 1989 to 1992, when he did seasonal work for the Hensley's on their farm in Marshall, North Carolina. The Hensley's grew tobacco, strawberries and blackberries. The defendant worked harvesting these crops. He also helped the Hensley's lay the block for the construction of their basement. The Hensley's knew the defendant as Jack Sturgis which was the name the defendant used. The defendant was a good hard worker who was never late. They considered him to be the best worker they had. The court recognizes this as a mitigation circumstance however the defendant was employed and was a good worker at the time that he committed this murder. The court has given this little weight in the weighing process.

543

4. The only evidence of the defendant's drug use came from statements he made to Dr. Hicks. The defendant told Dr. Hicks that he smoked marijuana regularly. Dr. Hicks testified that marijuana in combination with other drugs could cause problems. There was no testimony that the defendant used other drugs or that his marijuana use affected his activities of daily living. In fact the evidence showed that whatever the level of the defendant's marijuana usage it did not interfere with his ability to work. There is no evidence that the defendant's marijuana use had any particular effect on his personality or how he acted. The court recognizes that drug use may be considered as a non-statutory mitigating circumstance however in this case there is no connection between the defendant's use of marijuana and his actions in committing this murder.

5. Dr. Hicks testified that the defendant was not a sociopath. In fact, she did not express an opinion that the defendant suffered from any any identifiable mental or emotional problem. During her interview with the defendant Dr. Hicks found that he exaggerated things as you might expect an adolescent to do. She also indicated that he had difficulty having a relationship with an adult. There was no evidence that the defendant suffered any mental or emotional disturbance when this murder was committed. The court has therefore not considered this factor as a mitigating circumstance.

6. The defendant has never caused a problem while being transported to court or while appearing in court during his numerous court appearances since his arrest. He has never been disrespectful or rude to a transporting officer. His conduct in the jail has also been good. He follows commands as given to him by the officers. On one occasion while incarcerated he was found with two or three extra aspirins which he had not taken. Although this constitutes a violation of the rules the Watch Commander over the shift on which this event occurred testified that he did not believe this to be a major violation. The defendant's good jail conduct is recognized as a mitigating factor but the court has given it little weight in the weighing process.

7. The unrefuted testimony from Dr. Hicks is that the defendant has a high potential for rehabilitation. She testified that while incarcerated the defendant has come to realize he has potential and that he can become a responsible and contributing citizen. This is recognized as a mitigating circumstance and the court has given it substantial weight.



544

The court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case. The court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances.

It is therefore;

Ordered and Adjudged that the defendant, NEIL WILSON WILDING, is hereby sentenced to death for the murder of the victim, MARSHA ROSS. The defendant is hereby remanded to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

May God have mercy on his soul.

DONE AND ORDERED in Chambers at Vero Beach, Indian River County, Florida this 4th day of October, 1993.

PAUL B. KANAREK
Circuit Judge

cc: James Harpring, Esq.
Nikki Robinson, Esq.
Neil Wilson Wilding