IN THE SUPREME COURT OF FLORIDA

JOHNNY HOSKINS,
n/k/a JAMIL ALLE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 84,737

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In this brief, the pages of the record on appeal (including the transcript of the penalty phase of the trial) will be referred to by the symbol "R". The pages of the trial transcript will be referred to by the symbol "T". The symbol "SR" will be used to refer to the pages of the supplemental records.

STATEMENT OF THE CASE

The defendant was charged with the offenses of: Count I -- First Degree Murder by strangulation of Dorothy Berger, Count II -- Burglary of a Dwelling (with a battery therein), Count III -- Sexual Battery with physical force likely to cause serious bodily injury, Count IV -- Kidnapping with intent to commit murder, sexual battery, robbery, or inflict bodily injury or to terrorize, and Count V -- Robbery (taking a motor vehicle). (R 2061-2063) Following a waiver of extradition from Cordele, Georgia, where the defendant was arrested, the defendant was arraigned and entered a plea of not guilty. (R 2069-2070, 2091-2092)

Trial by jury commenced on March 13, 1994, before the Honorable Harry Stein, Judge of the Circuit Court of the Eighteenth Judicial Circuit of Florida, in and for Brevard County. (T 1) Defense counsel moved to prevent the court clerk from excusing members of the jury venire for reasons set forth in Section 40.013, Florida **Statutes** (1993), prior to an examination by the court. Counsel contended this was an improper delegation of judicial authority. (R 2315-2317; T21-23, 367-371) The trial **court,** citing to an administrative order allowing the procedure, denied the motion and further denied the defendant's request to proffer testimony of the court clerk concerning the procedure utilized. (T 367-371) A photocopy of the jury venire list for this case with notations by the court clerk was admitted as a court exhibit. (T 371-373; Court Exhibit #2)

During the state's case, the court admitted into evidence over objection numerous photographs of the victim. Two photos, State's Exhibits #21 and #26, were specifically objected to as being cumulative. (T 966-967, 988-989)

Following the presentation of evidence, the defendant moved for judgments of acquittal on all of the charges. (T 1539-1543, 1584) The court denied the motions. (T 1541, 1543, 1584) The jury returned verdicts finding the defendant guilty as charged. (R 2389-2393; T 1868-1869)

The case proceeded to a penalty phase, wherein the defense objected to the standard jury instruction and requested a special instruction of the aggravator of cold, calculated, and premeditated, which the court denied. (R 2443-2445) Following the penalty phase, the trial court reconsidered and granted a motion for a new penalty phase before a new jury. (R 2485)

Prior to the second penalty phase, the defendant requested an order allowing the defendant to submit, at the Public Defender's expense, to a PET-Scan test at Jacksonville Hospital, to determine more accurately the extent of brain damage to the defendant's frontal lobe, and for an order to transport the defendant for the test. (R 2501-2504, 2505-2507) Following a hearing on the motion, wherein the defense neuropsychologist, Dr. Harry Krop, testified that said test would be beneficial to his diagnosis (SR 35-80), the court denied the request to transport the defendant for the neurological test, claiming that the test would be highly suggestive at best and that the defense had not

presented competent evidence to justify the test. (R 2514; SR 78, 80)

The new penalty phase before a new jury commenced on October 3, 1994. (R 522) The defendant requested special instructions on heinous, atrocious, and cruel; that the list of aggravating circumstances was exclusive; that, in order to find the aggravator of avoiding arrest, it must be the dominant motive for the killing; and concerning the penalties on the other counts. These requests were denied. (R 2409, 2420, 2423, 2425, 2529, 2531, 2533-2534)

Defense counsel moved for a mistrial and requested a new penalty phase when the prosecutor made comments in his opening statements which, the defense claimed, were comments on the defendant's silence and failure to testify (R 1155, 1158, 1165, 1383-1387, 2556-2558, 2560-2565), including the statement (while pointing at the defendant):

> MR. BEATTY [the prosecutor]: . . , Somewhere between Brevard County and Cordele, Georgia, she is beaten and strangled. We have no idea where. The only person who knows that is the man who did it to her (points).

(R 1165) The court denied the motion for mistrial, and the renewed motions for mistrial, finding that no error occurred, or if there was error, then it was harmless. (R 1170-1171, 1383-1387, 1644-1648, 2587) The defendant moved for judgments of acquittal on the aggravators of heinous, atrocious, and cruel; cold calculated, and premeditated; and witness elimination, which motions the court denied. (R 1640, 1642, 1643) The jury recom-

mended, by a vote of 12-0, that the death sentence be imposed. (R 2553)

The trial court imposed the death sentence on the defendant, finding as aggravators: (d) the killing occurred during the commission of a sexual battery or a kidnapping (to which the defense had stipulated), and (h) the murder was heinous, atrocious, and cruel. (R 2588-2592) The court found no statutory mitigating factors, noting that defense counsel had not requested any. (R 2593) The trial court did find **as** nonstatutory mitigating factors: (1) the defendant had a loving relationship with his family, but, without articulating any reasons, **gave** this factor little weight; (2) the defendant was a father figure to his siblings, but the court also without explanation gave it little weight; (3) the defendant had protected his mother from his father's violence, and received beatings for his intervention, again inexplicably giving this factor little weight; (4) the defendant has low actual and functional mental abilities, but gave this factor little or no weight because, the court claimed, there was no testimony that the defendant lacked the ability to conform his conduct to the law and no testimony that the defendant did not know that this killing was wrong; (5) the defendant has a mild brain abnormality, but once again the court gave this factor little weight, claiming that there was testimony that such damage could explain deviant behavior in some individuals, but that there was not evidence presented here which showed the defendant's brain impairment actually accounted for the crimes;

(6) Hoskins came from an impoverished and abusive background, which the court decided without explanation was of little or no weight; (7) the defendant was influenced by racial problems to drop out of school, again finding without explanation that this factor was entitled to only little weight; (8) the defendant helped support his family, giving them half of his wages and an automobile to his father, to which the trial judge also gave little weight without explanation; and (9) any other aspect of the defendant's life, to-wit: the defendant tended to his pets to which he gave affection, the defendant **was** adept at woodworking, making clocks and mantles, and that the defendant **was** not **a** behavioral problem at school, which factor the court also gave little weight without **reasons.** (R **2593-2597)** In summary the court stated that, "for the reasons stated above," the mitigating factors were of little weight which could not counterbalance the **aggravator of during** the commission of a felony or of heinous, atrocious, and cruel:

> The present case involves **a** series of rape, beatings, and a vicious murder. **No excuse or justification has been shown.** The evidence clearly shows Dorothy Berger was victimized by **a cold,** cruel and heartless killer. Since the record supports two aggravators beyond a reasonable doubt and mitigators of insignificant weight, the Court finds the sentence of death to be appropriate.

(R 2597) (emphasis added)

The court also sentenced the defendant to life imprisonment on the burglary count, life imprisonment on the sexual battery count, life imprisonment on the kidnapping count, and

fifteen years imprisonment on the robbery count, all of these sentences to run consecutive to the death sentence, but concurrent to each other. (R 2598)

A notice of appeal was timely filed. (R 2609-2610) This appeal follows.

STATEMENT OF THE FACTS

On Saturday, October 17, 1992, Pansy Young, a friend of the victim, eighty year-old Dorothy Berger, spoke to her from 6:20 p.m. to 6:45 p.m., shortly before she disappeared. (T 839-841) Police were dispatched to Ms. Berger's home Sunday night, when neighbors discovered her door open and no one home. (T 815-818) When Officer Bonocore arrived, he discovered the television set and air conditioning on, and the bed unmade. (T 819-821) He observed a small amount of blood on the bedspread and a bent pair of eyeglasses and a green hand towel on the bed. (T 821, 825) One of the statues on the headboard had been knocked over and the bed was moved partially away from the wall. (T 821-822) Ms. Berger's purse was on the chair. (R 827) A shoe impression was visible in the dust on the floor. (R 832-834) There was no sign of a forced entry. (R 832)

On Saturday about dusk, Willie Hunt had seen the defendant, who stayed with his girlfriend in the house next door to the victim, driving a car which was similar to that owned by the victim. (T 809-810) Hunt did not observe any injuries, cuts, or scratches on the defendant. (T 811)

On Sunday at approximately 5:00 a.m., the defendant arrived at his parents' home in Arabi, Georgia, driving a car which appeared to be similar to that of the victim. (T 865-866) The defendant borrowed a shovel and returned approximately twenty minutes later. (T 866)

On Monday, October 19, 1992, police in the nearby town

of Cordele, Georgia, stopped the defendant for a minor traffic violation while he was driving the victim's car. (T 880-881) A search of the car revealed vegetation and blood stains in the trunk. (T 901-903) Police went to the defendant's father's house who led them to an area where that type of vegetation grew, which was about a mile from the defendant's parents' home. (T 866, 868) There, they discovered the victim in a grave with her hands tied behind her back and a gag in her mouth. (T 911-912)

Analysis of the rope which had been used to bind the victim's hands showed that it was similar to rope discovered at the defendant's girlfriend's house next door to the victim's. (T 1185-1187, 1261-1265) A comparison of the shoe print left in the bedroom to the shoes seized from the defendant upon his arrest revealed similar general class characteristics, but no specific individual characteristics. (T 882, 1283-1295) An autopsy revealed that Ms. Berger had been raped. (T 1026) DNA analysis revealed that the semen found on the bed sheet and in the victim's vaginal vault could have been that of the defendant. (T 1444, 1448-1449)

The medical examiner testified that the victim had blunt trauma about her face, head, and neck. (T 956) She had contusions, lacerations, and abrasions on her face and head and a fracture to her cheek bone. (T 956, 974) The scalp laceration and a tear to her ear, which would have caused massive bleeding, was caused by a blow from a narrow instrument. (T 962-964, 976) These blows would likely have rendered the victim unconscious.

(T 963, 982-983) She also had a black eye and bruises where the gag was tightly tied. (T 969-971, 980-981, 985) The bruises could have been caused, the doctor opined, by fists or feet. (T 977-978) There were wounds to her hands and knees (which could have been defensive wounds or could **have** been caused by the victim falling down) and bruising and scraping on her arms (which could have been caused by her leg rubbing on something in the trunk of the car, or could have been caused by rubbing on a carpet at her house). (T 997, 1005-1006, 1010, 1025, 1039-1042, 1050; R 1327-1329)

Multiple areas of bleeding under the scalp indicated to the doctor that the injuries occurred while the victim was alive. (T 982) The doctor could not tell the sequence of the blows, but stated that the victim would have lost consciousness upon receiving the blow to the head. (T 989) The doctor also found evidence of manual strangulation, which he determined to be the **cause** of death and occurring after the sexual battery and beating. (T 991, 1046) If conscious at the time of the strangulation, she would have lost consciousness within ten or twelve seconds of being strangled, the medical examiner opined. (R 1306) The victim also had fractures to seven ribs which the doctor believed **was caused** by pressure on the chest during the strangulation, like that of someone kneeling on the chest. (T 994-995) The blow to the head which rendered Berger unconscious could have been the first blow and, while it could have resulted in the victim regaining consciousness within fifteen to twenty minutes, the medical examiner

opined, however, that she could have remained unconscious throughout being bound and gagged, raped, and strangled. (R 1280, 1285-1286, 1290, 1300, 1307, 1321) In conjunction with the other blow to the head, it could have extended the period of unconsciousness from minutes to days. (R 1319) If she was unconscious during the other injuries, she would not have felt any pain from those injuries. (R 1320-1321) Similarly, the victim could have been in a disassociative state or could have fainted, either of which would have ceased the sensation of pain. (R 1338-1339) The blood found in the trunk of the car could have been draining from the body over the course of many hours after death. (R 1330)

During the penalty phase, unrebutted testimony was presented concerning Johnny Hoskins upbringing and mental state. Johnny was the oldest brother in a family of seven children. (R 1390) His older sister is deceased, as is his youngest sister, Linda, dying of cancer in 1988. (R 1390, 1416) Her death affected Johnny quite harshly. (R 1403-1404) The father was a poor sharecropper who lived in a two-bedroom run-down shack without indoor plumbing. (R 1391-1392, 1394; Defense Exhibit #10; SR 3-19) While the children were growing up, the house had no heating other than a fireplace. (R 1392) Clothes were washed on a washboard. (R 1393)

Johnny's father had a drinking problem, which would cause him to be abusive to their mother, with each episode lasting some fifteen minutes, during which the children would be frightened to death, hoping against hope that everything would

soon stop. (R 1397-1398) Once Johnny was older, he would stand up to his father during the abuse of his mother, oftentimes getting shoved around and beaten with a fan belt. (R 1398-1400)

The family was often the object of racial slurs, causing Johnny to get into fights, which would result in him being suspended, which, in turn, would result in Johnny receiving more beatings from his father. (R 1400-1401) The children told their teachers about the racial abuse, but received no cooperation, the teachers acting like they did not care. (R 1401) This situation directly resulted in Johnny being forced to quit school. (R 1401-1402)

Once Hoskins quit school, he commenced work in farming, giving half of his pay to his family to put food on the table. (R 1401-1402) The defendant also used his pay to purchase an automobile for his father. (R 1403)

Johnny served as a father figure to his younger siblings, playing sports with them, and teaching them to drive. (R 1403, 1415, 1437-1439, 1447-1448, 1453-1454) He cared for his brothers and sisters and also cared for the family pets, and was good at woodworking, making clocks, fireplace emblems, and candle holders. (R 1416-1417, 1453-1454)

Hoskins comes from a family which includes members who suffer from nervous and emotional disorders, including manic depression and schizophrenia. (R 1439, 1444-1445, 1451) Young Johnny Hoskins did poorly in school from first grade on through. (R 1463) During second grade when he was tested he was well

below average intelligence, scoring only in the first percentile (meaning ninety-nine percent of the children were ahead of him). (R 1471-1472) He was well below the fiftieth percentile on standardized achievement tests, which caused the school to place him in remedial classes since the third grade. (R 1464) Even in remedial classes, Hoskins was not achieving. (R 1464)

As a result he was referred to a school psychologist in 1977 at age fourteen, who diagnosed the defendant as having an I.Q. of seventy-one (which is in the lower three to four percent of the population), with a visual motor integration grade level of an eight-year-old. (R 1466, 1555) Johnny showed anxiety, dependency, insecurity, and hostility, and organic brain problems. (R 1466-1467, 1558) While he should have been referred to a neurologist for further diagnosis and treatment, he was not since there were no funds available for such referrals in the school district in 1977. (R 1467-1468) Thus, Johnny was instead placed in the class for educable mentally retarded students. (R 1468) His home situation revealed a culturally and economically disadvantaged background which had a lot to do with his failures in school. (R 1469-1470)

Once placed in the retarded class, Johnny's grades improved from D's and F's to C's in 1977-1978. (R 1474) In the ninth grade, he again began to have trouble academically again, with his grades dropping to D's and an F. (R 1475-1476) He dropped out of school during the year 1979-1980. (R 1474)

Once, while Johnny was chopping wood as a youngster, he

had an accident whereby the axe blade struck him between the eyes. (R 1414) Because of their poverty, Hoskins was not taken to a doctor for stitches and other treatment as he needed, but instead was treated with a home remedy consisting of placing a spider web on the wound to stop the bleeding. (R 1414) Additionally, Hoskins had been in two motorcycle accidents which may have rendered him unconscious and he was hit in the head with a bat about four or five years previously. (R 1545) Apparently as a result of these injuries, Hoskins had experienced some type of brain trauma. (R 1545-1546) An EEG revealed some abnormality to Johnny's brain. (R 1546) Neurological testing also revealed impairment and abnormality, also indicating brain damage to his frontal lobe which would affect his behavior pattern, although the neuropsychologist could not tell from the testing the exact location and extent of the problems. (R 1547) Further testing in the form of a PET-scan was recommended by the doctor to measure the exact location and severity of damage, and, coupled with more background information about other episodes of impulse control, would "shed more light on , . . the types of problems that may be causing the brain damage." (R 1549, 1560, 1573)[1]

Frontal lobe damage where the defendant's organicity

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[1] However, the trial court denied the defendant the opportunity to utilize this testing to further establish his mitigation, even though the Public Defender's Office was going to pay for the tests and the only thing sought of the court and county was the order for the test and an order to transport the defendant to Jacksonville Memorial Hospital, where the test could be administered. See Point II, infra; R 2501-2504, 2505-2507, 2514; SR 35-80.

seemed to be centered, the doctor testified, controls the stop/start mechanism of behavior, causing the person to have difficulty stopping behaviors once they are begun, (R 1549-1551) This would indeed apply to violent behavior; the neuropsychologist describing it as a "rage reaction," causing the person to go way beyond what is necessary in terms of the violent acts, or into a frenzy. (R 1551-1552) It is an explosive kind of behavior, where the person feels as if he cannot control himself. (R 1552) This diagnosis is consistent with the type of violent behavior present in the instant case, where the individual had difficulties controlling his impulses once they got started. (R 1553) Based on the testing and data available to Doctor Krop, he was unable to specifically apply these deficits to the defendant with any certainty; the doctor could only say that individuals who have the kind of test performance that Mr. Hoskins had often show this type of impairment and this type of behavior pattern. (R 1567-1568)

Dr. Krop also opined that the rape of an eighty-year-old was generally a crime of impulse, not the type of crime that was planned. (R 1574) Similarly, the after-the-fact type of covering up the crime, such as binding and gagging and disposing of the body, do not necessarily suggest planning of the crime. (R 1575)

SUMMARY OF ARGUMENT

Point I. The trial court erred when it failed to strike the entire jury venire due to the clerk's unauthorized improper exercise of the trial judge's recusal power or, at least, by failing to allow a proffer on the issue so that the defendant could show such an improper exercise of power.

Point 11. Neurological testing in a capital case, in order to assist the defense in rebutting aggravating circumstances presented by the prosecution and to assist in presenting mitigating circumstances, is constitutionally required for an indigent defendant where the defense has made the showing that such testing would be useful in the preparation of its defense. The court's denial of this testing renders the defendant's death sentence constitutionally infirm.

Point III. The trial court erred in making its findings of fact in support of the death sentence where the findings were insufficient, where the court failed to consider and give appropriate weight to valid, substantial mitigating circumstances, and where the court erroneously found an inappropriate aggravating circumstance. This constitutional error requires a reduction of the sentence to life.

Point IV. Section 921.141, Florida Statutes (1993), is unconstitutional for a variety of reasons.

ARGUMENT

POINT I.

APPELLANT WAS DEPRIVED OF HIS RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY DRAWN FROM A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY.

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. Smith v. Texas, 311 U.S. 128, 130 (1940); Amends. VI and XIV, U.S. Const.; Art. I, §16, Fla. Const. The operation of Section 40.013, Florida Statutes (1993), and the way it was implemented in the instant case violated Appellant's right to an impartial jury.

Section 40.013, provides for various excuses for jury service. These excusals are for reasons of prior convictions, law enforcement officers, expectant mothers and parents (who do not work outside of the home) of young children, practicing attorneys and physicians, or people who are physically infirm (in the discretion of the judge), persons over seventy years of age, or those under extreme hardship. The defendant contended below, and contends on appeal that, in order for these excusals to be valid, they must be considered and granted by a judge, not the court clerk. Because of an administrative order in the instant case, it appears that the trial court clerk, and not the judge, heard these requests for excusal and granted them. (R 2315-2317) That order specifically includes subsection (5) of the statute, which specifically states that a presiding judge must consider the excusal. (R 2317)

The defendant sought by motion to have the judge, and not the clerk, exercise this power. (R 2315-2316) However, the judge denied the motion, and also refused to allow the defense to present the proffered testimony of the court clerk in order to establish how the excusals from jury service were granted. (T 21-23, 367-371) The refusal to allow the proffer violates the defendant's due process rights under the federal and Florida constitutions, and preclude appellant from effective appellate review of this issue. In Pender v. State, 432 So.2d 800 (Fla. 1st DCA 1983), the court reversed a conviction because of a refusal of the trial judge to allow the defendant to be heard on this issue and present a proffer. The Court Exhibit #2, made a part of the record, shows that certain members of the jury venire were indeed excused for reasons set forth in Section 40.013, including factors such as being a practicing attorney, which the statute specifically states must be done by the trial judge. Further argument and factual support for this point cannot be made because of the improper refusal to allow a proffer. Thus, the defendant's convictions and sentences must be reversed and the case remanded for a new trial.

POINT II.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO TRANSPORT THE DEFENDANT FOR NEUROLOGICAL TESTING (WHICH TESTING WAS TO BE PAID FOR BY THE PUBLIC DEFENDER'S OFFICE), AND WHICH TESTING WOULD HAVE PROVIDED MORE ACCURATE AND COMPLETE DATA ABOUT THE DEFENDANT'S ORGANIC BRAIN DAMAGE, ENABLING THE DEFENSE PSYCHOLOGIST TO REBUT AGGRAVATING CIRCUMSTANCES AND ESTABLISH MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE VIOLATIVE OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 2, 9, 16, 17, AND 21 OF THE FLORIDA CONSTITUTION.

The defendant was diagnosed, first in elementary school and then by the defense neuropsychologist, as exhibiting evidence of organic brain damage. (R 1545-1557) Given the need to explore this diagnosis further and it potential effect on the defendant in carrying out his crime and the method of the crime, the defense sought to have the defendant transported to Jacksonville Memorial Hospital for a half-hour test known as a PET-scan (Positron Emission Tomography), the current generation in testing for resonance imaging of the brain. (SR 39-40) This test, the neuropsychologist testified, is a more sensitive test which would provide him and the court with more precise details into the defendant's brain damage, its exact location and its extent, so that this mental defect could help rebut aggravating circumstances presented by the state to the jury and to enable the presentation of more complete and detailed testimony regarding mitigation.

However, even though the testing would not have re-

quired the expenditure of county funds (other than the minimal cost of transportation) since the Public Defender's Office had decided to pay for the cost of the testing itself, the trial court refused to sign an order authorizing the test and transportation of the defendant for the testing procedure, ruling that the PET-scan would be highly suggestive at best and that the defense had not presented competent evidence to justify the test. (R 2514; SR 78, 80) . Such a ruling clearly violates the defendant's rights under both the federal and Florida constitutions to due process (the right to fundamental fairness, the right to present a defense, and the right to disclosure of favorable evidence), equal protection (with respect to both the resources of the prosecution and/or non-indigent or non-incarcerated defendants), effective assistance of counsel, to confrontation and compulsory process, and the rights to access to courts and the prohibition against cruel and unusual punishment which require a reliable sentencing process through which the defendant can produce relevant and adequate mitigating evidence and can rebut aggravating circumstances presented by the prosecution. These rights are guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, §§2, 9, 16, 17, and 21, of the Florida Constitution.

Since a defendant's mental state is not only an element of the offense charged but also highly relevant to rebut aggravation and to establish powerful mitigation, mental health expertise and testing is uniquely important to capital litigation.

The Supreme Court has expressly acknowledged "the pivotal role that psychiatry has come to play in criminal proceedings" and the many contributions mental health professionals can make to a "defendant's ability to marshal his defense" where a defendant's mental condition is at issue. Ake v. Oklahoma, 470 U.S. 68, 79-80 (1985).

If the defendant's mental health is a legal defense to imposition of the death penalty and if defense counsel cannot consult with psychiatric experts and utilize their testing methods to aid in trial preparation, then the defendant has not had "meaningful access to justice" since he cannot adequately prepare a defense to aggravation and a compelling case for mitigation without such expert consultation. Id., 470 U.S. at 77. Similarly, if the defense is denied informed psychiatric expert consultation to prepare his mental health defense adequately, then "the defendant's counsel [is presumptively unable1 to provide effective assistance as required by the Sixth and Fourteenth Amendments." Blake v. Kemp, 758 F.2d 523, 533 (11th Cir. 1985) (citations omitted). See also Mason v. Arizona, 504 F.2d 1345, 1352 (9th Cir. 1974).

Whether or not sanity is at issue, in a capital case appointment of a mental health expert is required to assist in development of sentencing phase evidence where the defendant's history and/or behavior suggest that his mental state may be a mitigating factor. Perri v. State, 441 So. 2d 606, 609 (Fla. 1983) (new sentencing hearing ordered where judge denied appoint-

ment of defense psychiatrist and defendant demonstrated history of institutionalization and evidence of mental or emotional disturbance at time of arrest; mental health expert assistance is required to effect a proper investigation of mitigating factors, if a threshold showing is made). See also State v. Sireci, 536 so. 2d 231, 233 (Fla. 1988) (denial of opportunity to develop mental mitigation due to incompetent psychiatric exam which failed to conduct adequate neurological testing to show organic brain damage was deprivation of due process); Ake v. Oklahoma, 470 U.S. at 84. There is also an equal protection aspect: although an indigent criminal defendant is not guaranteed the resources of a millionaire, the notion that the poor as well as the rich should be able to defend their freedom (and especially their lives) is a recurring theme in the case law on this issue. See, e.g., Hall v. Haddock, 573 So. 2d 149 (Fla. 1st DCA 1991); Williams v. Martin, 618 F.2d 1021, 1025 (4th Cir. 1980); Brinkley v. United States, 498 F.2d 505, 510 (8th Cir. 1974); United States v. Meriwether, 486 F.2d 498 (5th Cir. 1973); United States v. Tate, 419 F.2d 131, 132 (6th Cir. 1969). Similarly, the defense is entitled to parity with the prosecution on litigation costs for investigation. The legislature has clearly and consistently intended to make roughly equal the access of both prosecution and defense to expert assistance and resources. Section 27.54(3), Florida Statutes (19931, provides county funding for a long list of public defender's office pre-trial litigation costs; Florida Statutes § 27.34(2) provides county funding for an

identical list of state attorney's office pre-trial litigation costs. Section 914.06, Florida Statutes (1993), provides for "reasonable compensation" for "any expert witness require[d]" by the state or **an** indigent defendant "whose opinion is relevant to the issues of the case." Section 939.07, Florida Statutes (1993), directs the county to **pay** an indigent defendant's

> legal expenses and costs, **as is prescribed for the payment of costs incurred by the county in the prosecution of such cases,** including the cost of the defendant's copy of all depositions and transcripts which are certified by the defendant's attorney as serving a useful purpose in the disposition of the case.

(Emphasis added).[2] The language in these statutes -- particularly, in the parallel provisions for state attorney and public defender found in Chapter 27 and the references to "the state or an indigent defendant" in Section 914.06 -- seems to confirm that the defense is entitled under the constitution to its own experts and resources as is the state. See also Amendments to Florida Rule of Criminal Procedure 3.220 -- Discovery (3.202 -- Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial), 654 So.2d 915, 916 (Fla. 1995), opinion on rehearing 20

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[2] The scope of litigation expenses authorized by statute has been amplified by recent amendments to the definitions in Chapter 27. The term "expert witnesses" has been defined to include "any individual, firm, or service used by the prosecution or defense to provide information and consultation on specialized **areas** of art, science, profession, business, or other calling." § 27.005(2), Fla. Stat. (1993). "Pretrial consultation fees" now expressly include "**any** costs related to the **testing, evaluation, investigation,** or other case-related services and materials necessary to prosecute, defend, or dispose of a criminal case." § 27.005(6), Fla. Stat. (1993) (emphasis added).

Fla. L. Weekly S552 (Fla. November 2, 1995) (Court indicates that discovery procedures concerning mental health issues in capital cases should be such as to "level the playing field" between the defense and the state); Dillbeck v. State, 643 So.2d 1027, 1030 (Fla. 1994).

Ake v. Oklahoma, supra, is the leading case on an indigent defendant's constitutional right to expert assistance. In Ake, a capital case, the state of Oklahoma had denied an indigent defendant's request for a confidential consultation with a psychiatrist. Justice Marshall, writing for the majority, found such denial, where the defendant has made a "preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial," to be "fundamental" error. Id. 470 U.S. at 74. The Court also found that such factors apply with equal force to the sentencing **phase** of a capital trial. Id., 470 U.S. at 83-84.

"[F]undamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system."' Ake v. Oklahoma, 470 U.S. at 77 (citation omitted). In Ake, the Court defined expert assistance as one of the "basic tools of an adequate defense."

> [W]hen a State brings its judicial power to bear on an indigent defendant in **a** criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that **justice cannot be equal**

> where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

Ake v. Oklahoma, 470 U.S. at 76 (citations omitted) (emphasis added).

The Ake Court points out that due process requires "meaningful access" to the justice system, stating:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Ake v. Oklahoma, 470 U.S. at 77, 105 S. Ct. at 1093.

Here, although the state did provide an expert witness for the defense, through the denial of relevant testing to assist that witness in making a more definitive diagnosis the defendant was denied access to the "raw materials integral to the building of an effective defense." Id. For without the tools of an adequate defense, to-wit: the neurological testing sought by the defense expert as relevant to his diagnosis and testimony, the expert assistance could not help but to prove ineffective.

To pass constitutional muster, the expert assistance provided must be competent. The Ake Court pointed out that, an indigent defendant is entitled to "have access to a competent psychiatrist" for the purposes of consulting, developing a mental health defense, and presenting the defense at trial and at

capital sentencing. Ake v. Oklahoma, 470 U.S. at 82 (emphasis added).

Competence requires performance at the level of reasonable professional standards. This includes consideration of **all** relevant information. Mason v. State, 489 So. 2d 734, 736 (Fla. 1986) (affirmance of grant of post-conviction relief, where competency examiners apparently "neglected a history indicative of organic brain damage."). See also Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985) (state withheld from court-appointed psychiatrist and defense counsel "highly significant evidence" pertinent to insanity defense; inability of lawyer to consult with psychiatrist about the information before trial was a denial of effective assistance of counsel).

Competent performance also requires that the evaluation itself comport with reasonable professional standards. Thus, the failure of a court-appointed psychiatrist to order neuropsychological testing of a defendant with clear signs of organic brain damage "deprived [that] defendant of due process by denying him the opportunity through an appropriate psychiatric examination to develop factors in mitigation of the imposition of the death penalty." State v. Sireci, 536 So. 2d 231, 233 (Fla. 1988). This is so because "under reasonable medical standards at the time [of the evaluation,]" the circumstances would have required "additional testing to determine the existence of organic brain damage." Id.

This is precisely the type of opportunity which the

defendant and his mental health expert sought to utilize in the instant case -- neurological testing to enable the expert to further evaluate Hoskins' mental health and organicity, the court's denial of which caused the expert and counsel for the defense to be ineffective. The defendant sought an order from the court to provide him the basic tools for his defense, to rebut aggravating circumstances and present adequate evidence of mitigation, and he made an adequate showing of the need for these raw materials.

In Ake v. Oklahoma, supra, the Court held that due process required the appointment of a defense psychiatrist. The Court arrived at this conclusion by performing a balancing test, analyzing three factors: the defendant's private interest in the action to be taken by the state, any state interest affected if the safeguard is to be provided, and the potential value of the safeguard and risk of an erroneous deprivation of the private interest if the safeguard is not provided. See Matthews v. Eldridge, 424 U.S. 319 (1976).

The Court concluded that the "private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling." 470 U.S. at 78. The Court acknowledged that the state has an economic interest which may be adversely affected by providing expert assistance to indigent defendants. However, the Court rejected Oklahoma's assertion that furnishing a psychiatrist to a capital defendant whose sanity was clearly in issue would be "a stagger-

ing [financial] burden." 470 U.S. at 78-79. So, here, too, the simple request for transporting of the defendant to the hospital for the PET-scan, with the actual cost of the test and evaluation to be provided by the Public Defender's Office, surely is not a "staggering [financial] burden" to warrant denial of the request.

The Ake Court further noted that the state has a countervailing and compelling interest in the accurate disposition of criminal cases. 470 U.S. at 79. Finally, the Court analyzed the "probable value of the psychiatric **assistance** sought, and the risk of error in the proceeding if such assistance is not offered." Id. The Court discussed the "pivotal role that psychiatry has come to play in criminal proceedings." Id. Further, the Court acknowledged that psychiatry is not "an exact science" and

> psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on the likelihood of future dangerousness.

Ake v. Oklahoma, 470 U.S. at 81.

The Court found that "the testimony of psychiatrists can be crucial and 'a virtual necessity if a [mental health defense] is to have any chance of success.'" 470 U.S. at 81 (footnote and citation omitted).

> The foregoing leads inexorably to the conclusion that, without the assistance of a psychiatrist to conduct **a** professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of the State's psychiatric witnesses, **the risk of an**

> **inaccurate resolution of sanity issues is extremely high.**

Id., 470 U.S. at 82 (emphasis added).

While the above-quoted language was used by the Ake Court in the context of an insanity plea, the Court went a step further and applied its holding also "in the context of **a** capital sentencing proceeding." In Ake, the state had presented at sentencing psychiatric evidence of the defendant's future dangerousness. The Court performed a similar balancing test as to the sentencing phase and found that the interest of both the defendant and the state in fair adjudication at sentencing is "compelling" and "profound" and outweighs "monetary considerations." Id., 470 U.S. at 83-84. The Court also found that the probable value of psychiatric assistance on relevant issues in the sentencing phase was "evident":

> [W]here the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, **and** to assistance in preparation at sentencing phase.

Id., 470 U.S. at 84.

The defendant in Ake demonstrated that the subject matter of the expert consultation -- i.e., the defendant's mental state -- would be **a** significant factor at either or both phases of the trial, Ake v. Oklahoma, 470 U.S. at 81-82 & nn.7-8, and also established the nature and purpose of the assistance requested and **a** factual basis for the belief that the expert's

assistance would be useful to the defense. See also Moore v. Kemp, 809 F.2d 702, 716-717 (11th Cir. 1987) (en banc); Messer v. Kemp, 831 F.2d 946 (11th Cir. 1987) (en banc). Here, too, the defendant made such a preliminary showing for the testing which he required.

The defendant proffered that the testing would assist in the diagnosis of the defendant and provide useful testimony central to the mental health issues in a capital sentencing phase, to rebut aggravating circumstances which require a mental element and to present mitigating evidence upon which the jury could rely in determining that the defendant's mental health could have contributed to the crimes. The defense also presented the testimony of the mental health expert that the PET-scan was needed by him to more accurately determine the nature and location of the brain damage for which the defendant had been diagnosed since elementary school. The following colloquy provides ample showing of the need for the test:

> Q [by defense counsel]: Doctor Krop, are there neuropsychological diagnostic tools that you rely on in your practice in determining to a degree of [psychological] or scientific certainty of the presence of organic brain damage?
>
> A [by defense neuropsychologist, Dr. Harry Krop] : Yes.
>
> * * *
>
> Q. Very good. What diagnostic tool would those be?
>
> A. Whenever I do a neuropsychological evaluation for me to render a more definitive decision as to any degree of

psychological certainty, I would also rely on either consulting or reviewing neurological findings which would include -- depending on the particular case, it would utilize neurological testing; that is, various neurological assessment procedures.

Q. Would a PET Scan be included among those?

A. In certain cases certainly the PET Scan which is one of the more sensitive neurological assessments. Whenever there is a question from other sources of possible brain damage a PET Scan would be indicated.

* * *

A PET Scan is when the neurologist injects a fluid, it's actually called FDG which stands for Fluorodeoxyglucose, . . . in the brain. And as a result of that injection a scan of the brain is done. Probably takes about twenty minutes to a half hour and various brain [images] are able to be projected onto a screen and eventually onto a paper.

Allows the neurologist to determine the metabolic activity in the brain. And it's a -- results of the metabolic activity that a neurologist is able to make the determination whether there is abnormality in the brain.

Q. Have you in the past recommended that patients or people you have evaluated be subjected to this test?

A. Yes, I have. . . , Let me clarify. Mr. Moore, what I would generally do is recommend to -- for further testing particularly as again depending on my screening or my neuropsychological evaluation.

Sometimes a particular test is not necessary because some of the less sensitive tests might -- might show the brain damage. But if there is still a suspicion of damage and the less sensi-

tive tests EEG and CAT scan could -- would not show, I would recommend a more sensitive test such as PET.

Q. How critical would the penalty input and the PET Scan in -- in this case in the organisity (sic) in Mr. Hoskins?

A. What -- one of the issues based on my findings is the possibility that there is a neurological problem which -- particularly with my findings which showed impairment in the frontal lobe which is the area which is responsible for inhibition, impulse control and so forth.

When there is a violent crime such as in this particular situation, one of the things we would want to know is is [sic] there a neurological basis for causing a person's poor impulse control.

Q. Is the PET Scan recognized in the field of neuropsychology as a valid diagnostic tool?

A. Yes, it is.

Q. Is it widely recognized as such?

A. It is widely recognized particularly in the last few years. It's a relatively new examination. I would say in the last three to five years it is has been used much more commonly than prior to that.

Q. What would be the significance of the information or data you would gather from that test as it relates to a penalty phase proceeding?

A. Well, it would certainly in my opinion give me an opportunity to render an opinion with regard to the neurological status of this -- of Mr. Hoskins to more definitive level than I was able to previously or that I can with the current data that I have available.

Q. So you believe that you could make a more definitive and more precise -- precise determination and an opinion with respect to Mr. Hoskins if you had the data from this test?

A. Yes, sir, I could.

Q. Do you recommend that test be performed upon Mr. Hoskins based upon your evaluation of him and the materials that you have outlined?

A. Yes, I do.

Q. Is it unusual for you to recommend that a PET Scan be done?

A. I have recommended it in probably five to ten cases.

(SR 56-59)

Despite this specific, factually detailed examination concerning the nature and the purpose of the assistance requested and a factual basis for the belief that the PET-scan would indeed be useful to the defense for Dr. Krop's evaluation and penalty phase testimony, to rebut aggravating circumstances and to show relevant mitigating factors (SR 45-48), the trial court denied the request for a transport order to enable the testing, stating that the PET Scan was "suggestive at best. And no competent evidence to show as to why I should allow it." (SR 78, 80) This finding, perhaps, is not surprising coming from the judge who, despite an upcoming penalty phase hearing to determine whether the defendant should live or die, whether certain aggravators and mitigators were present, astonishingly stated during this motion hearing that the state had not made the defendant's "mental

condition relevant." (SR 48)[3]

The defendant has therefore shown "that there exists a reasonable probability that [the PET-scan testing and evaluation] would be of assistance to the defense and that denial of the assistance would result in a fundamentally unfair trial. Moore v. Kemp, 809 F.2d at 712. This showing of fundamental fairness, i.e., the significance of the issue on which the expert assistance is sought, does not require a before-the-fact demonstration that the evidence generated by the test would be favorable to the defense; rather, that showing is directed at the legal relevance to the case of the issue concerning which the assistance is sought. As demonstrated at the trial level, and as recounted above, the defendant has, indeed, made the necessary showing of relevance and the reasonableness of the requested testing. See also §27.54(3), Fla. Stat. (1993), that public defender expert consultations certified as "useful and necessary" are to be

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[3] This was the same judge who, in inquiring of how long the testimony of a mental health doctor would take, appeared to indicate that he was not even listening to that testimony!

> THE COURT: Will Doctor Sperry take more time other than the morning?
>
> MR. GRIESBAUM [prosecutor]: I doubt it.
>
> MR. RHODEN [defense lawyer] : No way.
>
> MR. BEATTY [prosecutor] : No, sir. You've already heard it, Judge.
>
> THE COURT: ***Well, I'm not listening to it, it's the Jury.***

(R 1247) (emphasis added)

provided for the defendant and paid for by the county. Under Florida law, if it is necessary to ensure a competent consultation and assistance of expert witnesses, further testing is expressly required as a matter of due process. State v. Sireci, 536 So.2d 231, 233 (Fla. 1988). See also Westbrook v. Zant, 704 F.2d 1487, 1496 (11th Cir. 1983) (state has "an affirmative duty" to "provide the funds necessary for production of [mitigation] evidence"); and United States v. Schultz, 431 F.2d 907, 911 (8th Cir. 1970) (applying a "reasonableness" standard, court held trial judge should not withhold authorization of defense expert consultation "when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge"),

The refusal of the trial court to authorize the PET-scan test (even at the Public Defender's own expense) and to order the transport of the defendant for the purpose of that test resulted in a denial of due process, equal protection, access to courts and compulsory process, and the effective assistance of counsel and experts, and resulted in cruel and unusual punishment. The death sentence must be vacated and the case remanded for a new penalty phase trial with the defendant entitled to the neurological testing and evaluation he sought.

POINT III.

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED AN IMPROPER AGGRAVATING CIRCUMSTANCE, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL.

The sentence of death imposed upon Johnny Hoskins must be vacated. The trial court found an improper aggravating circumstance and gave the aggravators excessive weight, failed to consider (or unfittingly gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors. These errors render Hoskins' death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments, and Article I, Sections 9, 16, and 17, of the Florida Constitution.

A. The Trial Court's Sentencing Order Is Insufficient In Its Factual Basis And Rationale To Support The Death Sentences.

The trial court's sentencing order is sparse, to say the least, with its factual support, especially in rejecting or in assigning little weight to unrebutted significant mitigating factors. The aggravating factor of HAC is supported by incomplete and inaccurate facts only, not giving any detail as to rejection of some facts and blind acceptance of others; the weighing of mitigating circumstances is conclusory only, offering

absolutely no basis for giving only little weight to significant mitigation. The death sentence cannot be affirmed on the basis of such insufficient written findings. To uphold such sentences on the basis of this order would deny the defendant his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

This Court has stressed the importance of issuing specific written findings of fact in support of aggravation and mitigation in capital cases. Van Royal v. State, 497 So.2d 625 (Fla. 1986); State v. Dixon, susra. The sentencing order must reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, supra at 10. Florida law requires the judge to lay out the written reasons for finding aggravating and mitigating factors, then to personally weigh each one in order to arrive at a reasoned judgment as to the appropriate sentence to impose. Lucas v. State, 417 So.2d 250, 251 (Fla. 1982). The record must be clear that the trial judge "fulfilled that responsibility." Id.

Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to memorialize the trial court's decision. Van Royal v. State, supra at 628. Specific findings of fact are crucial to this Court's meaningful review of

death sentences, without which adequate, reasoned review is impossible. Unless the written findings are supported by specific facts, the Supreme Court cannot be assured that the trial court imposed the death sentence on a "well-reasoned application" of the aggravating and mitigating circumstances. Id.; Rhodes v. State, 547 So.2d 1201 (Fla. 1989). Although the Court considered the sentencing order sufficient (but barely) in Rhodes, the Court cautioned that henceforth trial judges must use greater care in preparing their sentencing orders so that it is clear to the reviewing court just how the trial judge arrived at the decision to impose death over life. As the Court held in Mann v. State, 420 So.2d 578, 581 (Fla. 1982), the "trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found." See also Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985).

Here, the judge's analysis is not of "unmistakable clarity" and it cannot be said that he "fulfilled that responsibility" of weighing the aggravating circumstances against the mitigating factors calling for life. The findings provide no clue as to what standard the court used in weighing the factors, why it found one aggravating factor despite evidence to the contrary (see subsection C, infra), why it summarily rejected or gave only little weight to mitigators which had been unrefuted when the evidence of those factors was substantial and where similar factors have been used to justify a reduction of a death

sentence to life (see subsection B, infra). The death sentence must be reversed on this basis alone. Santos v. State, 591 So.2d 160 (Fla. 1991) [death sentence reversed for new sentencing where record not clear that trial court adhered to the procedure required by Rosers v. State, 511 So.2d 526, 534 (Fla. 1987), and Campbell v. State, 571 So.2d 415, 419-420 (Fla. 1990), and reaffirmed in Parker v. Dugger, 498 U.S. 308 (1991)]; Lamb v. State, 532 So.2d 1051 (Fla. 1988) (death sentence reversed and remanded where unclear whether court had properly considered all mitigating evidence); Mann v. State, supra; Lucas v. State, supra.

In a line of cases commencing with Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court held that a trial court may not refuse to consider, or be precluded from considering, any relevant mitigating evidence offered by a defendant in a capital case. The Lockett holding is based on the distinct peculiarity of the death penalty. An individualized decision is essential in every capital case. Lockett, 438 U.S. at 604-605. The Supreme Court has consistently reiterated the Lockett holding. See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986).

In Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990), and Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990), this Court held that, where uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. This Court will not

tolerate a trial court's unexplained rejection of substantial and/or uncontroverted evidence. See, e.g., Santos v. State, 591 So.2d 160 (Fla. 1991) and Hall v. State, 614 So.2d 473, 478-9 (Fla. 1993). While the relative weight to be given each mitigating factor is within the province of the sentencing court, a valid mitigating circumstance cannot be dismissed as having no weight. Dailey v. State, 594 So.2d 254 (Fla. 1991). See also Eddinss v. Oklahoma, 455 U.S. 104, 114-15 (1982).

Since the clarification by this Court concerning the proper treatment of mitigating evidence, counsel has noticed a disturbing trend in trial courts' sentencing orders. In dealing with mitigating factors, trial courts (as did the sentencing judge in Appellant's case) frequently find that a mitigating circumstance exists, but unilaterally give the factor very little weight. Hoskins' trial judge concluded without any analysis that nine mitigating circumstances applied to the murder. (R 2593-2597) However, the trial court attributed virtually no weight to the plethora of mitigating factors. The court decided that the nonstatutory mitigating factors deserved only "very little weight" or "no weight." (R 2594-2597) In light of the minuscule weight which the trial court incorrectly and unconstitutionally allotted to the numerous uncontroverted mitigating circumstances, it erroneously concluded that the aggravating circumstances outweighed the mitigating circumstances, thus warranting the ultimate sanction. (R 2597)

While the Lockett doctrine is clearly violated by the

explicit refusal to consider mitigating evidence, it is no less subverted when the same result is achieved tacitly, as in this case. By refusing to give Appellant's uncontroverted, mitigating evidence any substantial weight, the trial court has vaulted this state's capital jurisprudence back to the unconstitutional days prior to Hitchcock v. Dugger, 481 U.S. 393 (1987).

Prior to Hitchcock, this Court adopted a "mere presentation" standard wherein a defendant's death sentence would be upheld where the trial court permitted the defendant to present and argue a variety of nonstatutory mitigating evidence. Hitchcock v. State, 432 So.2d 42, 44 (Fla. 1983). The United States Supreme Court rejected this "mere presentation" standard, and held that the sentencer not only must hear, but also must not refuse to weigh or be precluded from weighing the mitigating evidence presented. Hitchcock v. Dugger, supra. Since Hitchcock, this Court has repeatedly reversed death sentences imposed under the "mere presentation" standard where there was explicit evidence that consideration of mitigating factors was restricted. E.g., Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Thompson v. Dusser, 515 So.2d 173 (Fla. 1987).

The recent trend of trial courts attaching no real weight to uncontested mitigating evidence, results in a de facto return to the "mere presentation" practice condemned in Hitchcock v. Dugger. Appellant's trial court's refusal to give any significant weight to Appellant's uncontroverted mitigating evidence violates the dictates of Lockett and its progeny. By allowing

trial courts unfettered discretion in determining what weight to give mitigating evidence, trial judges can effectively accomplish an "end run" around the constitutional requirement that capital sentencings should be individualized. Appellant's trial judge has effectively failed to consider mitigating evidence within the statutory and constitutional framework.

By giving only "little or no weight" to valid, substantial mitigation, trial judges can effectively ignore Lockett, supra, and the constitutional requirement that capital sentencings must be individualized. The trial court's refusal to give any significant weight to valid mitigating evidence, calls into question the constitutionality of Florida's death penalty scheme. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17 Fla. Const.

C. Mitisatins Factors Are Present Which Outweigh Any Appropriate Aggravating Factors.

In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court set out the proper formula for addressing the weighing of mitigating and aggravating circumstances. In Campbell, the Florida Supreme Court held that a trial court "must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence." Id., citing Lockett v. Ohio, 438 U.S. 586, 604 (1978); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Where there is uncontroverted evidence of a mitigating circum-

stance, the trial court must find that the mitigating circumstance has been proven. See Nibert v. State, 574 So.2d 1059 (Fla. 1990); Kisht v. State, 512 So.2d 522 (Fla. 1987); Cook v. State, 542 So.2d 954 (Fla. 1989); Pardo v. State, 563 So.2d 77 (Fla. 1990). In Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), this Court enunciated a three-part test for weighing evidence:

> [T]he trial court's first task . . . is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

The record here shows clearly that the trial court below failed to adhere to the procedure required by Rogers and Campbell, supra, and reaffirmed by the United States Supreme Court in Parker v. Dugger, 498 U.S. 308 (1991). The trial court inexplicably failed to find as mitigation unrebutted evidence of mitigating factors and, also without explanation, gave merely little or very little weight to extremely significant and unrebutted factors that, "in fairness or in the totality of the defendant's life or character, may be considered as extenuating or reducing the degree of moral culpability for the crime committed." Rogers v. State, supra. See also Santos v. State, 591 So.2d

at 163-164.

Initially, it must be noted that the trial court utilized the wrong standard for determining what is mitigation and what weight it should have in the capital sentencing decision. The court, in its sentencing order concluded that "no excuse or justification [for the murder] has been shown." (R 2597) Thus, the trial court limited mitigation to matters directly connected to the killing and a legal excuse or justification for the killing (matters which, if they existed, would exonerate a defendant of first-degree murder), instead of considering "the totality of the defendant's life or character." Rogers, supra. This Court and the United States Supreme Court have repeatedly held that "[m]itigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant." Brown v. State, 526 So.2d 903, 908 (Fla. 1988). See also Maxwell v. State, 603 So.2d 490, 491 & n.2 (Fla. 1992); Hitchcock v. Dusser, 481 U.S. 393 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982). A mitigating circumstance should be defined broadly as "**any aspect of a defendant's character** or record **and** any of the circumstances of the offense" that reasonably may serve as a basis for imposing **a** sentence less than death. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis added). By limiting the mitigation **as** the court expressly did here to "excuse or justification" for the killing and thereby excluding that which related to "anything in the life

of a defendant," is to unconstitutionally exclude relevant and crucial mitigation from the sentencing decision. In Brown v. State, supra, this Court expressly disapproved of a sentencing order, similar to the one here, which concluded that appellant's family and educational background were not "mitigation in the eyes of this court or in the eyes of the law." 526 So.2d at 908. This Court reversed, holding that such aspects of the defendant's personal life and background must be considered as mitigation, and can be particularly significant in a given case. Id.

Because of the failure on the trial court's part to apply the correct standard, the sentences must be reversed and the case remanded for resentencing. Brown v. State, supra; Rogers v. State, supra; Santos, supra; Hitchcock v. Dugger, supra; Eddinss v. Oklahoma, supra; Lockett v. Ohio, supra. In this case, it is clear that the evidence of mitigating factors, which is entirely unrebutted, far outweighs any aggravating circumstance that could be proposed by the state. Clearly, under the formula set out in Campbell v. State, the trial court was mandated to find in favor of the defendant. There is significant evidence of the following mitigating factors, which have been considered and utilized in other cases to reduce the sentence to life imprisonment:

The trial court found several mitigating factors relating to the defendant's heartening, family relationship, to-wit: the defendant had a loving relationship with his family, he was a father figure to his siblings, and, when he quit school, he

got a job and gave half his pay to his family to help feed them. These factors, however, the court, without any explanation, gave only little weight in its consideration. (See Point III, subsection A, supra.) Instead they were constitutionally entitled to great weight; they have been utilized to support life sentences. See, e.g., Bedford v. State, 589 So.2d 245 (Fla. 1988); Perry v. State, 522 So.2d 817 (Fla. 1988); Carothers v. State, 465 So.2d 496 (Fla. 1985); Jacobs v. State, 396 So.2d 713 (Fla. 1981).

The evidence of the good relationship defendant had with his family and of the love, care, and money he gave them, is not inconsequential, but rather it was substantial and cannot be discounted without any justification. The facts concerning these factors has been recounted in the Statement of Facts portion of this brief. These factors are entitled to great weight.

Additionally, the court found the factor of the defendant's protection of his mother from his abusive father, and the resultant abuse Johnny received as a result to also have little weight. However, this factor has also been utilized to justify the reduction of a death sentence to life. See, Campbell v. State, 571 So.2d 415 (Fla. 1990); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Livingston v. State, 565 So.2d 1288 (Fla. 1990); Shue v. State, 366 So.2d 387 (Fla. 1978). This factor has been shown in these cases and in the instant case to have affected the defendants' mental and emotional development in their formative years, and thus is a serious factor in mitigation which cannot be dismissed as having only little weight.

The trial court rejected (giving no weight) or gave only little weight to the factors concerning the defendant low mental abilities and his brain abnormalities, finding that they were not entitled to greater weight simply because they did not rise to the level of statutory mitigating circumstances (did not lack the ability to conform his conduct to the essential requirements of the law) or that they did not rise to the level of insanity (knew that killing the victim was wrong). (R 2595) However, this is not the test for mitigation. In Fersuson v. State, 417 So.2d 631 (Fla. 1982), this Court remanded the case for resentencing because the trial judge had applied the wrong standard in determining the applicability of the mental mitigating factors. This Court noted:

> The sentencing judge here, just as in Mines [v. State, 390 So.2d 332 (Fla. 1980)], misconceived the standard to be applied in assessing the existence of mitigating factors (b) and (f). From reading his sentencing order we can draw no other conclusion but that the judge applied the test for insanity. He then referred to the M'Naughten Rule which is the traditional rule in this state for determination of sanity at the time of the offense. It is clear from Mines that the classic insanity test is not the appropriate standard for judging the applicability of mitigating circumstances under section 921.141 (6), Florida Statutes.

Ferquson, supra at 638. Similarly, it has been held that simply because mental problems do not rise to the level of statutory mitigating is not a reason to reject such factors and afford them substantial weight. See State v. Sireci, 502 So.2d 1221 (Fla. 1987) ; Amazon v. State, 487 So.2d 8 (Fla. 1986); Penrv v.

Lvnaush, 492 U.S. 302 (1989).

There was substantial unrebutted testimony that the defendant, who had had several incidents in his childhood and youth wherein he had received blows to the head, had brain damage to his frontal lobe which controls the start/stop mechanism of behavior, causing the person to have difficulty stopping behaviors once they are begun. (R 1546-1551) This would indeed apply to violent behavior; it was described as a "rage reaction," causing the person to go way beyond what is necessary in terms of the violent acts, or into a frenzy. (R 1551-1552) It is an explosive kind of behavior, where the person feels as if he cannot control himself. (R 1552) This diagnosis is consistent with the type of violent behavior present in the instant case, where the individual had difficulties controlling his impulses once they got started. (R 1553) Doctor Krop indicated that individuals who have the kind of test performance that Mr. Hoskins had often show this type of impairment and this type of behavior pattern. (R 1567-1568) Further development of these mitigating factors could not be adequately developed since the trial court rejected the defendant's request for further neurological testing as required by the neuropsychologist. See Point II, supra.

A defendant's brain organic abnormality has been found to be mitigating and justification for a life imposition. See **Carter v. State,** 560 So.2d 166 (Fla. 1990); Hall **v. State,** 541 So.2d 1125 (Fla. 1989); State v. Sireci, 502 So.2d 1221 (Fla.

1987). The testimony here was unrefuted that the defendant suffered from some type of organicity. No justification exists for diminishing this mitigation, which could have been a major factor in the crime here (especially the violence involved), It should be given substantial weight.

Similarly, low mental abilities, such as those which were documented in the instant case (the defendant's low I.Q. of 71, and his poor performance on standardized tests and in school, even in a class for the educable mentally retarded), have been afforded weight sufficient to reduce a death sentence to life. See Hall v. State, 541 So.2d 1125 (Fla. 1989); Morris v. State, 557 So.2d 27 (Fla. 1990); Down v. State, 574 So.2d 1095 (Fla. 1991); Nearv v. State, 384 So.2d 881 (Fla. 1980); Meeks v. State, 336 So.2d 1142 (Fla. 1976).

Hoskins' impoverished background and the rough environment in which he grew up in rural Georgia with its race problems should be given great weight to reduce his punishment. In case after case, this factor has been shown to have substantial effect on a child which should decrease his sentence. See, e.g., Nibert v. State, supra; Livinsstone v. State, supra; Hall v. State, supra; Thompson v. State, 456 So.2d 444 (Fla. 1984); Shue v. State, supra.

Additionally, specific good deeds, such as that recounted in the judge's findings (caring for pets, woodworking, saving his mother from abuse, teaching his siblings) have also had substantial utilization in determining the appropriate

sentence in a capital case. See, e.g., Bedford v. State, supra; McCrae v. State, 582 So.2d 613 (Fla. 1991); Campbell v. State, supra; Hooper v. State, 476 So.2d 1253 (Fla. 1985) (served in Salvation Army -- religious convert); Lockett v. Ohio, 438 U.S. 586 (1978).

All of these totally unrebutted factors, when considered in light of the extensive evidence presented in mitigation, are entitled to more than the short shrift given them by the trial court. They militate against the death sentence, especially in light of the small number of aggravating circumstances present here. See subsection C, infra. The death sentence should be vacated and a life sentence imposed.

C. The Trial Judge Considered An Inappropriate Aggravating Circumstance.

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. Martin v. State, 420 So.2d 583 (Fla. 1982); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The state has failed in this burden with regard to one of the aggravating circumstances found by the trial court. The court's findings of fact, based in part on matters not proven by substantial, competent evidence beyond a reasonable doubt, do not support this circumstance and cannot provide the basis for the sentence of death.

The trial court found this factor based solely upon the method of the killing. However, this factor must fall for two

reasons -- there was no showing that the victim was conscious during any of the attack except prior to the blow on the head (which the medical examiner could not say when it occurred in the sequence of events); and the defendant's mental impairment, affecting his impulse control, contributed to the violence and should, thus, diminish Hoskins' blame for the alleged heinousness. Because of the defendant's uncontroverted and extreme mental impairment and state of rage, there can be no showing that the defendant intended for the victim to suffer or even intended the method for the killing.

This Court has defined the aggravating circumstance of heinous, atrocious, or cruel in State v. Dixon, supra at 9:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further defined its interpretation of the legislature's intent that the aggravating circumstance only apply to crimes which are **especially** heinous, atrocious, or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

State v. Dixon, supra at 9.

Quoting from Sochor v. Florida, 504 U.S. , 119 L.Ed.2d 326, 339 (1992), this Court has held that, for this factor to apply, the crime must not only be unnecessarily torturous to the victim, but it **also** must be conscienceless or pitiless on the defendant's part. Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992). Thus, as this Court has stated in Santos v. State, 591 So.2d 160, 163 (Fla. 1991), and Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990), this factor is appropriate only in torturous murders which exhibit a **desire** to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. See, e.g., Douglas v. State, 575 So.2d 165, 166 (Fla. 1991).

In Clark v. State, 609 So.2d 513 (Fla. 1992), the victim was shot in the chest from a distance of ten feet with a single-shot, sawed-off shotgun. Clark reloaded the weapon, walked to the victim and killed him with a shot to the head. This Court rejected the trial court's improper application of the HAC factor, explaining that simply because the victim was aware of his impending death and remained conscious for some period of time before being killed does not make the murder unnecessarily torturous to the victim. Clark, supra.

While it is true in the instant case that death was not instantaneous, the medical examiner testified that upon receiving the lacerations to the top and side of the head, the victim would have lost consciousness. He had no way of telling beyond a reasonable doubt whether these blows came early in the attack,

and whether the victim regained consciousness, testifying that either of the two blows could have caused her to remain unconscious throughout the rape, beating, and strangulation, and, in conjunction with each, other could have caused a victim to lose consciousness for days. (T 963, 982-983, 989; R 1280, 1285-1286, **1290, 1300, 1307,** 1319, 1321, 1338-1339) With the unconsciousness would have come **a** cessation of pain. (R 1320-1321) Thus, there is no showing beyond a reasonable doubt of prolonged suffering or anticipation of death. Under the holding in Elam v. State, 636 So.2d 1312, 1314 (Fla. 1994), therefore, this factor must fall.

Additionally, though this factor has been approved in diverse factual situations, a consistent thread has been that the victim was intentionally made to suffer prior to being killed. See Omelus v. State, 584 So.2d 563, 566 (Fla. 1991) ("we find that the heinous, atrocious or cruel aggravating factor cannot be applied vicariously."); Teffeteller v. State, 439 So.2d 843 (Fla. 1983) ("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."). See also, Amoros v. State, 531 So.2d 1256, 1260-61 (Fla. 1988).

In Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990), this Court rejected the trial court's application of the HAC factor where the evidence **was** "consistent with the hypothesis that Porter's **was a crime of passion,** not a **crime that** was **meant**

to be deliberately and extraordinarily painful." (Emphasis in original). The facts here are quite comparable. To fail to apply this rationale of Porter to the instant case would be to invite arbitrariness and capriciousness back into the death penalty scheme.

"It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). There is no logical reason to apply a statutory aggravating factor in "strict liability" fashion simply because the way it occurred was an unintended consequence. If it can be shown that a particular person intended that **a** victim suffer, a rational basis exists for application of the HAC factor. See Cochran v. State, 547 So.2d 928, 931 (Fla. 1989); Porter v. State, supra.

There is no proof that Johnny Hoskins intended that the victim suffer unnecessarily, especially where the evidence conclusively shows that Johnny's actions were not intentionally brutal, but that he was merely reacting to his mental impairment, the brain damage to the frontal lobe of his brain, that he was unable to control his impulse, and lacked a start/stop mechanism. (R 1546-1551) Doctor Krop testified that this type of damage applies to violent behavior; it was described as a "rage reaction," causing the person to go way beyond what is necessary in terms of the violent acts, or into a frenzy. (R 1551-1552) It is an explosive kind of behavior, where the person feels as if he

cannot control himself. (R 1552) This diagnosis is consistent with the type of violent behavior present in the instant case, where the individual had difficulties controlling his impulses once they got started. (R 1553) Doctor Krop indicated that individuals who have the kind of test performance that Mr. Hoskins had often show this type of impairment and this type of behavior pattern. (R 1567-1568) Further development of this evidence to rebut the aggravator of HAC could not be adequately developed since the trial court rejected the defendant's request for further neurological testing. See Point II, supra. This uncontroverted testimony shows the relationship between the aggravating factor of heinousness and the mental mitigation presented here: the defendant's organicity specifically negates any showing of the aggravator since he was incapable of consciously controlling his "rage reaction;" he simply could not stop because of his frontal lobe damage.

The facts here are thus short of establishing beyond a reasonable doubt that the murder was **intended** to be unnecessarily torturous, that is, that it was especially heinous, atrocious or cruel as that statutory aggravating factor has been consistently applied by this Court. Because the judge based the death penalty on this improper consideration, and because the jury was permitted to consider it, that sentence must be vacated.

When this court follows the formula set out in Campbell v. State, supra, the only possible conclusion is that the state cannot support sentence of death. The proper mitigating factors

(when given their due weight) clearly outweigh the appropriate aggravating factor(s) . The punishment must be reduced to life imprisonment.

POINT VII

SECTION 921,141, FLORIDA STATUTES IS UNCONSTITUTIONAL.

1. The Jury

a. Standard Jury Instructions

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

i. Heinous, Atrocious, or Cruel

The instruction does not limit and define the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application in violation of the dictates of Maynard v. Cartwright, 486 U.S. 356 (1988); Shell v. Mississippi, 498 U.S. 1 (1990); and Espinosa v. Florida, 112 S.Ct. 2926 (1992). The "new" instruction in the present case (T882) violates the Eighth Amendment and Due Process. The HAC circumstance is constitutional where limited to only the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Espinosa, supra. Instructions defining "heinous," "atrocious," or "cruel" in terms of the instruction given in this case are unconstitutionally vague. Shell, supra. While the instruction given in this case states that the "conscienceless or pitiless crime which is unnecessarily torturous" is "intended to be included," it does not limit the circumstance only to such crimes. Thus, there is the likelihood that juries, given little discretion by the

instruction, will apply this factor arbitrarily and freakishly.

The instruction also violates Due Process, The instruction relieves the state of its burden of proving the elements of the circumstances as developed in the case law.[4]

b. Majority Verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates the Due Process and the Cruel and Unusual Punishment Clauses. A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate Due Process. See Johnson v. Louisiana, 406 U.S. 356 (1972), and Burch v. Louisiana, 441 U.S. 130 (1979). It stands to reason that the same principle applies to capital sentencing. Our statute is unconstitutional, because it authorizes a death verdict on the basis of a bare majority vote.

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an anomalous practice violates Due Process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. Only Florida allows a death penalty verdict by a bare majority.

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[4] For example, the instruction fails to inform the jury that torturous intent is required. See McKinney v. State, 579 So.2d 80, 84 (Fla. 1991) ("The evidence in the record does not show that the defendant intended to torture the victim").

c. **Florida Allows an Element of the Crime to be Found by a Majority of the Jury.**

Our law makes the aggravating circumstances into elements of the crime so **as** to make the defendant death-eligible. See State v. Dixon, 283 So.2d 1 (Fla. 1973) . The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution. See Adamson v. Rickets, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 490 U.S. 638 (1989).

d. **Advisory Role**

The standard instructions do not inform the jury of the great importance of its penalty verdict. The jury is told that their recommendation is given "great weight." But in violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320 (1985) the jury is told that its "recommendation" is just "advisory."

2. **Counsel**

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's -- the defendant has no say in the matter. The defendant becomes the victim of the ever-defaulting capital defense attorney.

Ignorance of the **law** and ineffectiveness have been the hallmarks of counsel in Florida capital **cases** from the 1970's through the present. See, e.g., Elledse v. State, 346 So.2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance).

Failure of the courts to supply adequate counsel in

capital cases, and use of judge-created inadequacy of counsel as a procedural bar to review the merits of capital claims, cause freakish and uneven application of the death penalty.

Notwithstanding this history, our law makes no provision assuring adequate counsel in capital cases, The failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution.

3. **The Trial Judge**

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975) . On the other, it has at times been considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored. This ambiguity and like problems prevent evenhanded application of the death penalty.

4. **Appellate review**

a. **Proffitt**

In Proffitt v. Florida, 428 U.S. 242 (1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259.

Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. Aggravating Circumstances

Great care is needed in construing capital aggravating factors. See Mavnard v. Cartwrisht, 486 U.S. 356 (1988) (Eighth Amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112 (1979). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious or cruel" (WAC) circumstances making them unconstitutional because they do not rationally narrow the class of death-eligible persons, or channel discretion as required by Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rosers v. State, 511 So.2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Her-

ring).

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts).[5]

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So.2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[6] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

c. Appellate Reweighing

Florida does not have the independent appellate re-weighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the

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[5] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L.Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L.Rev. 523 (1984).

[6] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L.Rev. 907, 926 (1989).

judge and jury") and Atkins v. State, 497 So.2d 1200 (Fla. 1986).

d. Procedural Technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[7] See, Rutherford v. State, 545 So.2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of Eighth Amendment); and Smalley v. State, 546 So.2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated Eighth Amendment). Capricious use of retroactivity principles works similar mischief. In this regard, compare Gilliam v. State, 582 So.2d 610 (Fla. 1991) (Campbell not retroactive) with Nibert v. State, 574 So.2d 1059 (Fla. 1990) (applying Campbell retroactively), Maxwell v. State, 603 So.2d 490 (Fla. 1992) (applying Campbell principles retroactively to post-conviction case, and Dailey v. State, 594 So.2d 254 (Fla. 1991) (requirement of considering all the mitigation in the record arises from much earlier decisions of the United States Supreme Court).

e. Tedder

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[7] In Elledse v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Appellant contends that a retreat from the special scope of review violates the Eighth Amendment under Proffitt.

The failure of the Florida appellate review process is highlighted by the Tedder[8] cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

6. **Other Problems With the Statute**

a. Lack of Special Verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found, because the law does not provide for special verdicts. Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the Eighth Amendment.

In effect, our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-

[8] Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 490 U.S. 638 (1989) (rejecting a similar Sixth Amendment argument).

b. No Power to Mitigate

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because Rule 3.800(b), Florida Rules of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, Sections 9, 16, 17 and 21 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It also violates Equal Protection of the laws as an irrational distinction trenching on the fundamental right to live.

c. Florida Creates a Presumption of Death

Florida law creates a presumption of death where, but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation

aggravating circumstance is applied to the case) .[9] In addition, HAC applies to any murder. By finding an aggravating circumstance **always** occurs in first-degree murders, Florida imposes a presumption of **death** which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[10] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the United States Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary sentencing result contrary to Due Process and the heightened Due Process requirements in a death-sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

d. Florida Unconstitutionally Instructs Juries Not To Consider Sympathy.

In Parks v. Brown, **860** F.2d 1545 (10th Cir. 1988), reversed on procedural grounds sub nom. Saffle v. Parks, 494 U.S. 484 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violate the Lockett principle. The Tenth Circuit distinguished California v.

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[9] See Justice Ehrlich's dissent in Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984).

[10] The presumption for death appears in §§ 921.141(2)(b) and (3)(b) which require the mitigating circumstances outweish the aggravating.

Brown, 479 U.S. 538 (1987) (upholding constitutional instruction prohibiting consideration of mere sympathy), writing that **sympa-**thy unconnected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Parks, 860 F.2d at 1553. The instruction given in this case also states that sympathy should play no role in the process. The defense specifically requested that the jury be instructed that they could consider mercy in making their sentencing recommendation, which requested instruction was denied. A jury thus could have believed in reasonable likelihood that much of the weight of the early life experiences of Appellant should be ignored. The standard instructions then **violated** the Lockett principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

e. **Electrocution is Cruel and Unusual.**

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel, but equally effective methods of execution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eishth Amendment Assessment of Methods of Inflictins **Capital** Punishment, 39 Ohio State L.J. 96, 125 n.217 (1978) (hereinafter cited, "Gardner"). Malfunctions in the electric chair cause unspeakable

torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So.2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

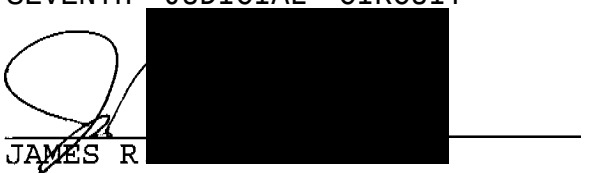
This unnecessary pain and anguish shows that electrocution violates the Eighth Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977).

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the appellant requests that this Honorable Court reverse the convictions and sentence of death and, as to Point I, remand for a new trial; as to Point II, remand with directions to hold a new penalty phase before a new jury; as to Points III and IV, remand for imposition of a life sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Johnny Hoskins, n/k/a Jamil Alle, #962032 (43-1191-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 13th day of November, 1995.

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER