IN THE SUPREME COURT OF FLORIDA

NO. 85,693

TIMOTHY CURTIS HUDSON,,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

KENNETH DAVID DRIGGS
Florida Bar No. 0304700
229 Chapel Drive
Tallahassee, Florida 32304
(904) 575-2988

M. ELIZABETH WELLS
Florida Bar No. 0866067
376 Milledge Avenue
Atlanta, Georgia 30312
(404) 614-2014

Counsel for Appellant

PRELIMINARY STATEMENT

This proceeding involves the direct appeal of the Circuit Court's imposition of a death sentence in the 1995 retrial of Mr. Hudson's capital punishment phase. The State cross appealed some rulings of the trial court. Mr. Hudson will only address the issues raised in his appeal as to the legality of the proceedings below and appropriateness of his death sentence. Mr. Hudson will address the State's cross appeal issues as necessary in his Answer Brief.

Citations in this brief to designate record references are to the page number and the volume of the Record of the Circuit Court proceedings below, for instance "R. VI 260-261." All other citations will be self explanatory or will otherwise be explained.

REQUEST FOR ORAL ARGUMENT

Mr. Hudson has been sentenced to death. This Court has consistently allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be an aid to the Court and the parties. Given the seriousness of the claims and the stakes at issue, Mr. Hudson respectfully requests that the Court permit oral argument in this case.

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STATEMENT OF THE CASE

This case involves the appeal of a resentencing to death in a capital case. Tim Hudson was convicted and sentenced to death in Hillsborough County on February 6, 1987. On the first direct appeal this court affirmed Mr. Hudson's conviction and death sentence, with three justices dissenting as to the death sentence Hudson v. State, 538 So.2d 829 (Fla. 1989)(hereinafter Hudson I)[1]. In a separate opinion, Justices Barkett and Kogan found death to be a disproportionate sentence on the record as it stood. Hudson I, 538 So.2d at 832-33 (emphasis added). The Supreme Court denied certiorari later in the year. Hudson v. Florida, 493 U.S. 875 (1989).

In post-conviction the circuit court found that Mr. Hudson's punishment phase trial counsel had provided ineffective representation in that he had failed to adequately investigate and present extensive mitigation in Mr. Hudson's background. On appeal this court affirmed. Hudson v. State, 614 So.2d 482 (Fla. 1993)(hereinafter Hudson II).

Mr. Hudson's punishment phase was retried before a new jury on March 20-25, 1995. The jury recommended death by a vote of nine to three, and a second death sentence was imposed by the

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[1] At the first trial "[Mr.] Hudson [did] not contest the state's finding two aggravating factors, previous conviction of a violent felony and committed during an armed burglary. ... The trial court found, but gave little weight to, the statutory mitigating factors of being under extreme mental or emotional disturbance, impaired capacity to conform conduct to requirements of law, and Hudson's age (22 years)." Hudson I, 538 So.2d at 831 n 5.

circuit court. This appeal follows.

STATEMENT OF THE FACTS

In the early morning hours of June 17, 1986, Mollie Ewing was stabbed to death in her Tampa home.

Ms. Ewings' roommate, Becky Collins, had recently been living with and was engaged to marry the defendant, Mr. Tim Hudson. Their relationship broke down over Mr. Hudson's addiction to crack cocaine. Ms. Collins observed that cocaine made Mr. Hudson, normally a courteous man towards her, hostile and quick to anger. The victim knew Mr. Hudson through Ms. Collins, and he had often been a guest in her house. There were no indications of animosity between them, but the victim apparently knew of threats which resulted in Ms. Collins spending the night elsewhere.

On the evening of the murder, Mr. Hudson used cocaine with his cousins, Anthony and Gerald Bembow, who were heavy drug users. Their house was a short walk from the home of Ms. Collins and the victim. After leaving their residence, he went to the victim's home. Upon his entering the house, the victim recognized and confronted Mr. Hudson. She apparently began screaming at him to leave, and Mr. Hudson stabbed her four times in an attempt to quiet her screams.

In Mr. Hudson's first direct appeal, this Court divided 4-3 on a proportionality review. The majority opinion suggested Mr. Hudson's situation was "arguably a close call," Hudson I, 538 So. 2d at 832. A dissent distinguished Mr. Hudson's situation from

that of the worst offenders deemed worthy of the death penalty.

> BARKETT, Justice, concurring in part and dissenting in part.
>
> I concur as to guilt and dissent as to sentencing. In his sentencing order, the trial judge made the following findings:
>
> > The facts of the case, as produced by the evidence, indicate that the defendant, TIMOTHY CURTIS HUDSON, was apparently surprised by the victim during the defendant's burglarizing of the home owned by the victim and shared with the defendant's ex-girlfriend....
> > ...
> > The extensive testing done by Dr. Berland on the defendant together with the circumstances of the surprise of the defendant during the burglary when confronted by the victim, convinces the Court that at the time of the killing and for at least a short period thereafter, the defendant was unable, to a certain extent, to conform his conduct ot the requirements of the law...
>
> In light of our prior case law, I cannot conclude that the death penalty is proportionate under these facts. As was stated in the seminal case of State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), the death penalty is reserved "to only the most aggravated and unmitigated of most serious crimes." In light of the trial judge's explicit findings, I conclude that the murder in this case is not within the category of crimes described in Dixon.
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> KOGAN, J., concurs.

Hudson I, 538 So. 2d at 832-33.

Additional mitigating evidence, presented in Mr. Hudson's resentencing, supports the dissent's conclusion that "the murder in this case is not within the category of crimes described in Dixon.

Becky Collins first met Tim Hudson in 1984 and a romance quickly developed. They became engaged to marry and lived

together. But Mr. Hudson got involved with drugs which his girlfriend strongly opposed. "He wouldn't seem to leave it alone," she testified. They argued over this and the fact that Mr. Hudson was staying out all night and hanging out with his drug buddies. R. V 185-87.

Finally, Ms. Collins decided she could not deal with the drug addiction any longer and told Mr. Hudson she wanted to break up in March or April 1986. She then moved back in with the victim. Mr. Hudson began calling Ms. Collins on the phone daily, suspicious that she was seeing other men. Ms. Collins testified that Mr. Hudson "would ask me if I was seeing anybody...", and would get incensed when she denied that she was seeing other men. R. V 187-89, 199-200.

Shortly bfore this homicide, Mr. Hudson was jailed for a violation of probation. When Mr. Hudson was about to be released from jail Ms. Collins was frightened. Mr. Hudson had relayed messages through a co-worker, Jasmine Robertson, which scared her. Mr. Hudson called Ms. Collins at work the day of the murder, but she hung up on him. When he called back, someone else took the call and also hung up on him. That night, Ms. Collins did not stay at the victim's home but was with another friend. Early the next morning she went by the house. Seeing the condition of the victim's bedroom and the presence of the victim's glasses and cigarettes, Ms. Collins knew something was wrong. R. V 192-95.

On cross examination Ms. Collins said when she first met Mr.

Hudson he was polite and well mannered. They had a good relationship. By summer 1985 she was happy enough to move in with him, an arrangement which lasted about six months. Mr. Hudson was considerate both to her and to their neighbors. During this time, Mr. Hudson worked at Bennigans and Kentucky Fried Chicken. R. V 195-96, 200-1.

Then Mr. Hudson began hanging around another apartment complex resident whom she knew used cocaine. His moods changed. He quit working. He borrowed money from her and insisted that she drive him to where drugs were sold. Finally he confessed that he was doing crack cocaine. They talked about this and he promised to seek treatment. "He said he would go if I got him an appointment." They contacted Tampa area treatment facilities, but were told the waiting list for available treatment was months long. Things just continued to spiral downward. Mr. Hudson began to anger easily. He began living on the streets. He began telling Ms. Collins strange things such as claiming he worked for the mafia. It was during this period that Mr. Hudson first became abusive. R. V 196-99.

Ms. Collins testified that Hudson's threats, abusiveness, and jealousy were never a part of their relationship before he became involved with cocaine. To her, Mr. Hudson became a completely different person when involved with cocaine. He no longer sounded like the man she had become engaged to. But even with her bad experiences she could not believe that Mr. Hudson had anything to do with the victim's disappearance when she first

heard of it. R. V 200-1.

Jasmin Robertson, a co-worker of Ms. Collins and the victim, testified to taking calls during this period from Mr. Hudson in which he left messages for Ms. Collins. The night of the murder she chanced on Mr. Hudson out front of her apartment where they talked briefly in the dark. This was three or four blocks from the victim's home. After the conversation she observed Mr. Hudson heading toward Gerald Bimbo's apartment. She knew Mr. Bimbow to be a drug dealer. R. V 202-7.

Detecive Rick Childers testified that as part of the investigation of the disappearance of Mollie Ewings, he and Detective Fletcher went to Mr. Hudson's mother's residence at 3312 McBerry at 4:20 p.m. on June 18, 1986. His mother answered the door and let them in where they found Mr. Hudson asleep on the couch. They woke him and he jumped up, appearing startled. He was then cooperative and agreed to accompany them to the police department for questioning. R. V 215, 253-55.

Mr. Hudson was first interviewed at the police department beginning at 5:55 p.m. on June 18, 1986. R. V 215, 256. In the next 24 hours Mr. Hudson quickly told the police Ms. Ewing was dead but gave three different stories which inched closer to and finally became a full and complete confession. R. V 227, 230. At first Mr. Hudson told of being with a man named Greg, R. V 215-18 and 256, then about being with a man named Warren Peabody, R. V 223-36. The Peabody account had Peabody killing Ms. Ewing and Mr. Hudson with him when the body was left in the country. Mr.

Hudson led police to the body where he then admitted "there is no Peabody," that he was Peabody.' R. V 239-40, 260-61.

Det. Noblitt testified to Mr. Hudson's becoming physically ill when he showed police Ms. Ewing's body. "He was somewhat nauseated. He said that he was feeling sick to his stomach." R. V 239-40. Det. Childers also testified that Mr. Hudson was upset and cried as he showed police the body. R. V 260-61.

Back at the police department Mr. Hudson made a full confession which Det. Noblett described for the jury:

> [Mr. Hudson] said that he went to the house, he had taken this knife, that he knew that the back door would be open. He went in and he went down the hallway. He walked into Molly's room. She immediately saw him. He saw her. She screamed at him to get out of there. She continued to scream. He said while she was screaming he began to stab her. He didn't know how many times but it was more than once.[3]
>
> He said that after he stabbed her he then carried her out the back door through the wooden gate, put her in her vehicle. He said that he drove to Wimauma, that he got rid of her body.
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> He said that he went to Baum first and he was going to put her where the green blanket was but he heard noise and thought somebody was coming so he put her back in the vehicle. Then he went to Wimauma and placed her where we found her.
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> He said that he then went back to 34th and Osborne where he left her vehicle and he obtained some cocaine. He went back home. He changed clothes. He then went out to discard the car out by Sligh and 301 and he said that he walked back to his residence where he got back around 11:00

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[2] The Peabody account has both Mr. Hudson and Mr. Peabody buying and smoking cocaine before the murder. R. V 223-224. The body was located near tomato fields in an agricultural area 35 miles from the murder scene. R. V 242.

[3] The trial court in Hudson I concluded that the victim had surprised Mr. Hudson by being at the home. 538 So.2d at 832.

[a.m.] or 12:00 [noon] that day.

R. V 241-42; 261-62. During this confession, Mr. Hudson told police his going to the house had nothing to do with Ms. Ewing, that to the extent he had a plan it was to confront Ms. Collins, and that the murder came when the victim screamed. R. V 247.

Tampa Police Detective Robert H. Price recalled Mr. Hudson's initial story about "Warren Peabody" which none of the officers believed. It was Det. Price who took Mr. Hudson aside at Robinson High School and gave him the "good Christian burial" talk[4] which ultimately resulted in the confession and location of the body. R. VI 380-83. He testified to Mr. Hudson's reaction to this: "... he was emotional. He was upset. He was afraid . .." R. VI 385. As the group neared the location of the body Mr. Hudson's emotions churned further:

> The closer we got, the more emotional he became. It was my opinion he was having to face the situation that he was involved in. I think his biggest fear to me personally, I feel he just did not want to see the body.

R. VI 385. Before Mr. Hudson would agree to take the officers to Ms. Ewing's body he extracted a promise:

> One of the things he requested was if I take you there, please don't make me stay long. I mean let me get out of there just as soon as possible. Promise me you don't make me stay long, and, again, that was no problem.

R. VI 386. As they traveled in a police van to the body's location Mr. Hudson's emotions remained high. Det. Price noticed him hiding his face in the curtains in the van. He went on to

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[4] See Hudson I, 538 So.2d at 830.

testify:

> I think he was ashamed of himself at the time. I think he was embarrassed of the fact that he wanted to cry very hard. In fact, I told him, there's no shame in crying very hard.

R. VI 386.

Mr. Hudson did direct them to Ms. Ewing's body. She was in such a remote rural location Det. Price felt police never would have found her without Mr. Hudson's assistance. "She was further out than I had ever been before." R. VI 387-88.

Dr. Charles Diggs performed the autopsy on the victim on June 21, 1986, a bit less than three days after the murder. Dr. Diggs testified that the victim died from four downward angle stab wounds to her upper chest, apparently coming in quick succession. The wounds were each two to three inches deep and they appeared to have come from the same 5/8th inch wide knife. The resulting internal bleeding would have produced shock and relatively quick death. The victim could have been conscious about two minutes and possibly as little as 20 seconds. Dr. Diggs testified that he could only speculate as to how long she was conscious. Death would come about the same time the victim lost consciousness and each wound was fatal by itself. R. VI 297-310.

The doctor could not find "anything which would say that a struggle took place." The only indication of a defensive wound was a laceration on the victim's fifth finger indicating that she "might have come in contact with the knife blade at one point in time . . ." The placement of the wounds did indicate that "she's moving while the person is stabbing" or that "you could have

movement of both." R. VI 305-7.

To develop its mitigation the defense presented testimony from Mr. Hudson's father Daniel, R. VI 311-24; his younger sister Deborah Hudson, R. VI. 334-43; his Little League baseball coach Charles Bedford, R. VI 324-34; a prison counselor named Littleton Long, R. VI 343-50; two drug friends who often observed Mr. Hudson under the influence of cocaine including the night of the murder, Anthony Jerome Bembow, R. VI 351-56, and Gerald Bembow, R. VI 371-79; another drug friend named Kelly Doster, R. VI 356-70; a Tampa police detective who took Mr. Hudson's confession, Robert H. Price, R. VI 380-88; and a defense mental health expert, psychiatrist Dr. Michael Maher, R. VI 389-482. In addition Mr. Hudson introduced for the judge's consideration the prior cross-examined testimony of mental health experts Dr. Robert Berland[5], Dr. Peter Macaluso[6], and Dr. Charles Wheaten[7]. Finally, Mr. Hudson offered the entire defense punishment phase

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[5] Dr. Berland, a psychologist, had been a defense witness in Mr. Hudson's first trial, then testified again in the 1990 post conviction evidentiary hearing. Mr. Hudson offered the transcripts of his December 13, 1990, 3.850 testimony, Defense Exhibit 2, R. X 106-200, filed on April 10, 1995, after the jury's recommendation and before sentencing.

[6] Dr. Macaluso, a psychiatrist, evaluated Mr. Hudson during post conviction. He testified in the 1990 circuit court evidentiary hearing which resulted in the reversal of Mr. Hudson's initial death sentence. His December 14, 1990, hearing testimony was introduced as Defense Exhibit 3 on April 10, 1995. R. XI 201-272.

[7] Dr. Wheaton, a psychologist, evaluated Mr. Hudson in preparation for the resentencing. He was deposed by the State on March 15, 1995. Mr. Hudson introduced the transcript of that deposition as Defense Exhibit 1 on April 10, 1995. R. X 42-105.

from the first trial which included the initial testimony of Dr. Berland.[8]

Timothy Curtis Hudson was born on December 1, 1964, the child of Daniel Marion Hudson and his wife Maggie. The parents were migrant citrus pickers. In 1968 Daniel got a job in Tampa at Westinghouse making $3 an hour. The family then settled in Port Tampa at 7412 Gardner Street. Tim was about four-years-old. At that point there were four children, including some by one of the parents' previous marriages.[9] R. VI 312-13, 323.

The Hudsons divorced in 1973 or 1974 when Tim was around ten years old. His sister recalled that the divorce "tore up" the family. R. VI 313, 335. At the time of the divorce Tim was the only son left in the home with their mother. R. VI 316. After the divorce the mother worked full time. R. VI 341.

While the marriage was intact it was the father who was the disciplinarian. When the family broke up the mother never was able to exercise any control over the kids. From the father's vantage point "it looked like the children just done what they wanted to . . ." R. VI 314-15.

Tim stayed angry with both his parents about the divorce.

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[8] Defense Exhibit 4, R. XI 273-394. This included testimony from his mother Maggie Hudson, at 278-279; his father Daniel Hudson, at 279-282; from prison counselor Littleton Long, at 282-288; from Dr. Robert Berland, at 288-321; from Mr. Hudson's supervisor at Bennigan's Restaurant Mitchell Walker, at 322-323; from Little League Coach Charles Bedford, at 324-333; and from city recreation department coach Freddie Williams, at 334-336.

[9] Ultimately there were a total of nine children in the family. Five were half brothers or half sisters. R. V 313.

His sister observed that he "really didn't care too much for [their father] after [the divorce]." Tim was particularly devastated by the divorce. R. VI 336, V 397-98.

Substance abuse problems ran all through the Hudson family. The father testified that his wife drank through most of their marriage and that her drinking escalated when they moved to Tampa in 1968. At first she drank beer, but in Tampa she moved to "heavier stuff," in particular vodka. R. VI 314. One of her children, Mr. Hudson's younger sister Deborah Hudson, recalls their mother drinking "[m]aybe a fifth a day" of vodka. Mr. Hudson did not want to be around the mother when she drank. R. VI 336-37. A friend of Mr. Hudson's sister, Kelly Doster, was also in the home to observe "his mother, she drank a lot and she would be . . . cursing, and . . . she would holler and fuss at the kids and stuff like that." R. VI 360. Closer to the time of this murder, Mr. Hudson's girlfriend Becky Collins had also observed the vodka bottles his mother routinely kept under her bed. R. V 201.

Two other older sons in addition to Mr. Hudson developed substance abuse problems. One was an alcoholic who also used crack cocaine, while the other was a heroin addict who, in the words of their father, "was shooting up." R. VI 315, 336.

The father first became aware that Mr. Hudson had a drug problem when Mr. Hudson's girlfriend, Becky Collins, came to him for help with it. R. VI 317. Later his mother found a beer can altered as a crack pipe which she brought to the father. R. VI

317-18.

The one escape Mr. Hudson developed from his miserable childhood was baseball. He wanted to play baseball early but his mother was opposed to it. His father intervened and Tim began to play Little League by about age 8 or 9. R. VI 316, 326. A retired military man, Charles Bedford, was a coach and the first black vice president of the South Palomino League. He recruited for the league in poor black neighborhoods which is how he met Timmy Hudson. Bedford either coached or was in a position to watch Tim throughout his Little League experience. Coach Bedford observed that baseball became very important to Tim "because that was where he had a feeling of belonging, a feeling he had something to look forward to." R. VI 324-28.

The father testified that his work schedule didn't allow him to attend many of Tim's games, but that he got to "[s]ome of them." R. VI 316. Coach Bedford does not recall ever seeing either of the Hudsons at Tim's games. Bedford observed that while other children had lots of family support, "[f]or Timmy there was nobody" which "was very devastating to Timmy to have no one there for him." As a consequence Coach Bedford "tried to be a surrogate type of support for him." Bedford made sure his own son and Tim were on the same team, and tried to involve him with his own family. R. VI 327-29.

Coach Bedford went to Tim's home and tried to get his mother to come out to some of the baseball games. He testified that the mother "got very belligerent with me, and I mean some of the

things she said I can't repeat [...] And it hurt Timmy very much because I'm sure he was standing there observing this exchange.*@ R. VI 328-29.

Sometimes Coach Bedford would observe or be told that Tim was going through another low point with his family and would talk with him. "He said [...] you don't know what it is to go home to have to live with what I have to live with and to go through all these things they put on me." Once Tim even asked Coach Bedford to open the Little League concession stand at night so Tim would have a place to stay, which the coach was willing to do. Coach Bedford was genuinely touched by how difficult Tim's childhood had become:

> This is where we talked a lot of times about his home life and I felt a little bad when I went back to my house. And I knew what it must have been for a kid that age to have to go home to that, to live under those pressures. I'm sure it must have been devastating for a kid of any age.

R. VI 332-33.

Coach Bedford stayed in touch with Mr. Hudson after Little League baseball and observed that very low self esteem was "hurting him." R. VI 330-31. Once he encountered Mr. Hudson working in a restaurant after his release from prison. "He came by and talked to me, and I think he felt very apologetic and he felt like he let me down." R. VI 331.

Littleton Long was an educational instructor who taught Hillsborough Correctional Institution inmates how to prepare for the GED and in that role met Tim Hudson. He found Mr. Hudson to be hard working and anxious to achieve his GED. R. VI 343-47.

Mr. Long testified that Mr. Hudson seemed to be searching for a father figure and a kind of father-son relationship developed between them. Mr. Hudson came early to class and stayed late so they could talk. When Mr. Hudson was released Long felt he was optimistic and wanted to make a success of himself. Long gave Mr. Hudson his home phone number and Hudson called several times and visited "at least a couple times I know I'm sure of" to give progress reports. R. VI 346-48.

Then Mr. Hudson fell back into the drug world again. "He called me and he said he was having some problems [...] doing drugs again, but that he intended not to continue." Mr. Long "gave him my long lecture about the evils of drugs and he promised me that he was going to stop." R. VI 348-49.

Several defense witnesses substantiated prosecution witness Becky Collins' testimony of the dramatic change in Mr. Hudson's personality with his addiction to crack cocaine. His sister recalled him before drugs as someone who "would take time and play with me and my brother and do things with us. He was a nicer person then." But with the drugs:

> He just changed. He turned into a monster. [...] He was like paranoid. He would think people were after him. His eyes would just go like crazy and just look all around him as if someone was after him or something.

R. VI 339. She went an to say "[h]e wouldn't bathe for a couple days sometimes. He wore the same clothes, holey shoes, he didn't care" what he looked like or that he was dirty. R. VI 342. The day of the murder Mr. Hudson asked his sister for $10 to buy more crack cocaine. R. VI 338.

That night after the murder his sister saw Mr. Hudson come home about three or four in the morning, change clothes, and lay down on the sofa where he went to sleep. The sister observed that he had been acting "strange, real nervous and fidgety." R. VI 338.

Kelly Doster had known Mr. Hudson 18 years and testified she smoked crack with him "A lot." Like others, she told the jury Mr. Hudson was "a different person" on crack. She said this made some people fearful because "his personality just changed [...] I really had never been around a person that smoked in that state." She described his paranoid state and unusual reaction to noise when on crack. Among other reactions, Mr. Hudson "feels like somebody is in [other rooms] or somebody's trying to hurt him or something like that." He carried a pocket knife and this drug-induced paranoia often had him bringing it out while smoking crack. She told the jury that when straight Mr. Hudson "was a nice guy, a nice, intelligent guy." R. V 356-70. Ms. Doster saw Mr. Hudson a couple days before the murder and told the jury "[h]e looked like he had been smoking crack all night long." She knew his drug consumption rate remained high over the next couple days. R. V 359.

Two of Mr. Hudson's close friends were also drug buddies, Anthony Jerome Bembow, R. V 351-56, and Gerald Bembow, R. V 371-79. Both were with him in the hours leading up to Ms. Ewing's murder.

Anthony Bembow was an experienced crack user and smoked with

Mr. Hudson the night of the murder, smoking about $20 or $30 worth at 5 or 6 p.m. He described Mr. Hudson as having a very different response to crack from others he had seen. Anthony told the jury Hudson was "a very nice guy when he was straight" but on crack he was unusually paranoid and "especially wanted you to be quiet when he was high." R. V 352-53. They did crack together "several times a week," whenever they were together. R. V 356.

During the two years before the murder Gerald Bembow met Mr. Hudson three or four times a week and "every time we got together we usually smoked [crack cocaine].@@ Mr. Hudson began using crack in Gerald's presence in 1984 or 1985. Gerald said crack made Mr. Hudson "very paranoid," observing that "little noises or movements would make him jump and get scared like somebody is after him ..." When Mr. Hudson was with a group smoking crack he would want everyone to sit very still and be quiet. If there was a noise "[h]e would jump. It would scare him like somebody was after him or something, just get very nervous." R. V 371-73, 376. Gerald testified that when Mr. Hudson was not on drugs "[h]e was very generous; he's a nice guy. He's really a good guy." R. V 375.

During the evening hours and minutes leading up to the murders Gerald observed Mr. Hudson to be "high" and "higher." At the time Mr. Hudson was preoccuppied with his former girlfriend Becky Collins. Mr. Hudson was in Gerald's Rembrandt Drive apartment where he was acting upset and asked Gerald to come with

him on some business, but Gerald refused. In fact, Gerald "noticed he was higher than the first time I saw him [earlier that day]. I asked him to stay over, sleep on the sofa, and he didn't." Gerald had never asked Mr. Hudson to do this before but was so struck by Mr. Hudson's high that he felt it necessary. R. v 373-78.

Psychiatrist Dr. Michael Maher of Tampa evaulated Mr. Hudson prior to the resentencing. R. VI 389-482.[10] Based upon his evaulation, Dr. Maher concluded that Mr. Hudson was "under the influence of extreme mental and emotional disturbance at the time that he killed Mollie Ewing." When asked to explain this finding Dr. Maher said the most significant factor was his cocaine intoxication at the time of the murder, compounded by Mr. Hudson's long term use of drugs and alcohol. Other contributing factors were Mr. Hudson's mental illness which Dr. Maher identified as a "Mixed Personality Disorder," and his dysfunctional family background. R. VI 397-99.

Mr. Hudson's addiction and acute cocaine intoxication left him paranoid, irritable, unable to concentrate, and desperate to secure more cocaine. Dr. Maher described crack as "an incredibly powerful substance which has a direct effect on brain chemistry.

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[10]Dr. Maher's evaluation consisted of two interviews with Mr. Hudson, a review of a substantial body of Mr. Hudson's records, and the testing, evaluations and the testimony of the other mental health experts. R. VI 393-96. He was supplied the police reports in this crime which were an important part of his evaluation. R. VI 407. He also had the transcripts of prior testimony by the other experts and statements by his sister and father. R. VI 482.

It gets to the brain extremely quickly because it goes right from the lungs to the blood and from the blood into the brain... It directly affects a variety of neurologic systems in the brain" which control mood, alertness and response to stimuli. At first a cocaine user feels "good . . . positive . . . euphoric," but this is quickly replaced by negative feelings of pessimism and fear. "The cocaine tends to intensify almost any feeling that comes from within a person," particularly worry or fear. R. VI 401-4. The reports of Mr. Hudson's particular reaction to noise when on crack were consistent with Dr. Maher's findings. R. VI 404.

Dr. Maher went on to tell the jury that cocaine addiction made a person "selfish, self-centered, indifferent to the feelings and reactions of the people around them, and unaware of what's important to other people. [. . .] It tends to dehumanize an individual." He also noted that crack brought "sleep disturbance, depression, irritability, fearfulness, [and] poor judgment." R. VI 410-11.

The witness went on to explain the personality traits which developed out of Mr. Hudson's life experience as "[i]t's like [. . .] you're on thin ice all the time; you're always worried about crashing through the ice, and you're always ready to grab hold of something to make sure that you stay up." R. VI 414.

Dr. Maher found that Mr. Hudson came from a background filled with the risk factors that predicted drug involvement. He has an extremely poor educational background -- "[h]e was able to learn to read and do basic mathematics but that's about all that

school provided to him...." There was no active intervention when Mr. Hudson quit going to school. The extreme family poverty was another "major risk factor." These were the greatest risk factors for future drug involvement. "He's got a huge load of risk factors." R. VI 417-19, 429-430".

He further concluded that Mr. Hudson's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the murder. "[H]is capacity to consider what he was doing, to stop and think, to ask himself in plain words or even just in thoughts, what should I be doing now, what's right, what's wrong, what kind of trouble can I get in for doing this was essentially absent at the time that [Mollie Ewing] screamed and he attacked her with a knife." This was the result of "the immediate cocaine intoxication, the long term cocaine use, and the underlying personality disorder." R. VI 419-20, 423-24.

One aspect of Mr. Hudson's Mixed Personality Disorder was that he was extremely dependent on his relationship with Becky Collins for his self esteem and security. "When that relationship is threatened, a person with a dependent personality

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[11] Dr. Maher later testified to some of his own research into social risk factors which predict likely future drug abuse. He acknowledged not all people who experience these risk factors become drug involved. "Why one individual goes one direction and one goes another direction, I don't know that. We will never know, but it is clear that as you add more and more and more risk factors, there's a higher and higher percentage of people who fall apart in some way or another, and Mr. Hudson is all too typical of that. He's got a huge load of risk factors." R. VI 429-30.

disorder gets extremely upset, more upset than a normal person might get under those circumstances," Dr. Maher testified. Mr. Hudson became "frantic and desperate" as well as hostile where Ms. Collins was concerned. R. VI 415-16. He later characterized Mr. Hudson as being "excessively pathologically dependent upon her." R. VI 470-71. It wasn't that this bond with Ms. Collins was real any longer. Mr. Hudson "was not very realistic about this relationship," in fact, he only "imagined" he still had it. R. VI 416-17.

Dr. Maher described a "Mixed Personality Disorder" for the jury as "a set of personality traits which when you look at them compared with the general population has some clearly negative, unadvantageous characteristics to it." These personality disorders made Mr. Hudson "even less able to cope with his drug problems." The psychatrist regarded this as "a sign that [Mr. Hudson] did not have very healthy relationships in [his] family life." R. VI 411-12, 414-15.

Dr. Maher also testified to Mr. Hudson's various tested IQ scores and the fact he seemed to have improved between 1987 and 1990. He regarded this as evidence that Mr. Hudson's overall environment had actually improved in prison as compared to the free world. R. VI 431-32.

Near the end of his testimony, Dr. Maher observed that Mr. Hudson's ability to accurately recall these events was greatly reduced by his cocaine intoxication at the time. "In effect, he [is] trying to figure out exactly what happened himself, and

where it happened..." and has been obsessing about it for several years. R. VI 479-81.

On cross examination Dr. Maher testified that at junior high school age Mr. Hudson was much more open to intervention and support, but by the time he was 17 those opportunities had largely passed. R. VI 442-43.

After closing argument, the jury recommended a death sentence by a vote of 9-3. R. III 355, VII 553.

SUMMARY OF THE ARGUMENTS

I. The death penalty is not appropriate in Mr. Hudson's case. Due to the wealth of mitigation evidence and the lack of aggravating factors, the death penalty in this case is disproportionate.

II. Significant unrebutted mitigating evidence was improperly not considered by the trial court. Failure to consider this evidence was error.

III. Mr. Hudson was denied his right to cross examine the victim of an alleged prior conviction when the trial court allowed an officer to testify to the facts of that case.

IV. The prosecutor interjected improper argument and comments into the resentencing.

V. Evidence concerning the worth of the victim was erroneously admitted in the resentencing. This admission of evidence was an ex post facto application of the law and was contrary to the legislative intent behind the rule change.

VI. The state improperly struck jurors from Mr. Hudson's jury

panel based solely on their race.

VII. The trial court improperly excluded jurors from the jury panel based upon their alleged feelings about the death penalty, and failed to make the proper inquiry concerning their ability to follow the law.

VIII. Mr. Hudson was sentenced to death solely because he is a black male and his victim was a white female.

IX. The trial court improperly refused to instruct the jury that Mr. Hudson would never be eligible for parole.

X. The aggravating factor of in the course of a felony was improperly applied in this case and is unconstitutional.

XI. Mr. Hudson was absent from critical stages of his trial when he was not permitted to be present at several bench conferences.

XII. The trial court's improper rulings denied Mr. Hudson his right to a fair resentencing.

XIII. The aggravating factor of "prior violent felony" is unconstitutionally vague and overbroad in that the instruction fails to inform the jury what is necessary for a death sentence. This aggravator was improperly applied in Mr. Hudson's case.

XIV. The jury was impermissibly led to believe that their verdict was only a recommendation that carried no weight.

xv. The death penalty in Florida constitutes cruel and unusual punishment.

XVI. Mr. Hudson's resentencing was fraught with procedural and substantive errors.

ARGUMENT I

MR. HUDSON'S DEATH SENTENCE IS DISPROPORTIONATE.

A. Introduction

This is a case about a 22-year-old man addicted to crack cocaine. It is clear from the Record below that his addiction completely changed his personality, that his addiction broke up a promising romantic relationship, and that he became obsessed with regaining that relationship. Among other things, cocaine left him with an extreme, paranoid reaction to loud noise, including yelling. This murder took place when he was intoxicated on cocaine and went to the current residence of his former romantic partner to confront her, but instead found only the roommate. When the roommate shouted at him to leave, he fatally stabbed her four times. The record indicates the victim died quickly and that Mr. Hudson did not attempt to inflict any additional insult or suffering on her.

It is also uncontested that Mr. Hudson's childhood was greatly disadvantaged, that he confessed to the crime within hours, and that the police would not have found the victim's body without his confession and cooperation. His great remorse over the murder is readily evident even from the testimony of State witnesses below.

Mr. Hudson did have a prior felony record but it was not for the kind of violence which would give it great weight. Additionally, the trial court found as an aggravating factor that the murder came in the course of a burglary.

B. The Standard of Review for Proportionality

This court has taken capital proportionality review more seriously than any other state Supreme Court in the country. It has undertaken detailed factual and comparative analysis in a number of published opinions which set out clear guideposts for the present review. This Court has addressed proportionality at least 39 times between Hudson I in 1989, and Spencer v. State, 21 Fla.L.Weekly 5366 (Fla., Sept. 12, 1996), further refining the law.

In the seminal decision of State v. Dixon, 283 So.2d 1 (Fla. 1973) this court pointed out that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitisated of most serious crimes." 283 So.2d at 7 (emphasis added). The Dixon court went on to describe the death sentence as being properly reserved for "only the most aggravated, the most indefensible of crimes." Id. at 8. The Supreme Court relied on this proportionality review in approving the new Florida death penalty statute. Proffitt v. Florida:

> [I]t is apparent that the Florida court has undertaken responsibility to perform its function of death sentence review with a maximum of rationality and consistency. For example, it has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences. See, e.g., Alford v. State, 307 So.2d, at 445; Alvord v. State, 322 So.2d, at 540-41. By following this procedure the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute.

428 U.S. 242, 258-59 (1976).

More recently this Court has written that "our law reserves the death penalty only for the most aggravated and least mitigated murders," Kramer v. State, 619 So.2d 274, 278 (Fla. 1993).

Proportionality review is essentially a factual one:

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

Tilman v. State, 591 So.2d 167, 169 (Fla. 1991), quoting with approval Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). See also Sonser v. State, 544 So.2d 1010, 1011 (Fla. 1989). It is the intention of proportionality review to prevent the imposition of death in an "unusual" manner, in violation of Art. I, sec. 17, of the Florida Constitution. "[P]roportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties." Tilman, 591 So.2d at 169.

Mr. Hudson's case is clearly not one of "the most aggravated and least mitigated murders," Kramer, 619 So.2d at 278, presented to this Court.

C. Proportionality Review in Hudson I

Mr. Hudson was before this Court on proportionality review in 1989. Hudson I, 538 So.2d at 831-32. At that time this Court affirmed the death sentence 4-3 with the acknowledgement

that his comparison with other cases given proportionality relief was "arguably a close call."[12] Three members of this Court would have reduced the sentence to life on the first record. Id. at 832-33.[13]

In post conviction Mr. Hudson's death sentence was reversed because of punishment phase ineffective assistance of counsel. The ineffectiveness was for trial counsel's failure to investigate and present a substantial body of mitigation which was not included in the Hudson I record. This Court unanimously affirmed that circuit court decision. Hudson v. State, 614 So.2d 482 (Fla. 1993) (Hudson II).

The record presently before the Court contains substantially more mitigation than that in Hudson I and the same or less in aggravation. See Fitzpatrick v. State, 527 So.2d 809, 812 (Fla. 1988), where this Court reduced death to life on a second review, writing "[w]e note that the record on resentencing is substantially different from that on the original sentencing."

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[12] In deciding this issue the majority compared Mr. Hudson's situation with that in: Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), which the majority observed was "arguably a close call"; Proffitt v. State, 510 So.2d 896 (Fla. 1987); Wilson v. State, 493 So.2d 1019 (Fla. 1986); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Thompson v. State, 456 So.2d 444 (Fla. 1984); Peaw v. State, 442 So.2d 200 (Fla. 1983); and Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984).

[13] Justices Barkett and Kogan dissented as to the death sentence with an opinion relying on Dixon. Justice Shaw dissented as to the sentence without an opinion.

D. Substantial Mitigation Presented Below Was Unrecognized[14]

The trial court below found some mitigation but ignored a great deal of the Record. It found both mental mitigators[15] to be present to different degrees and as a result of his cocaine intoxication, in combination with other factors existing in his make-up. However, the court erroneously failed to recognize considerable non-statutory mitigation presented on Mr. Hudson's behalf. The trial court's Sentencing Order in part reads:

> II. STATUTORY MITIGATING FACTORS
>
> A. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Dr. Michael Maher, a psychiatrist, testified, without contradiction, that the defendant, at the time of the murder, was suffering from an extreme mental or emotional disturbance because of cocaine addiction and ingestion, a personality disorder and a deprived background.[16] The court was not

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[14] See also Argument II.

[15] Subsections 921.141(6)(b and f).

[16] When first asked to summarize this finding, Dr. Maher testified:

> To just sort of name it, the various factors which were most significant at the time would be first and foremost his immediate intoxication on crack cocaine, which was present at the time of the murder.
>
> The second most significant factor would be the long term effect that using various drugs, especially crack cocaine, but all of the other drugs and alcohol also had had on him over the years.
>
> I want to be clear. I'm separating there the immediate effect of the drugs that he's put in his system that day from the long term effect that those drugs have had over a period of years that he's been taking them. They have different kinds of effects on an individual and they were both present in his situation.
>
> Other factors that are relevant to his state of

convinced by this testimony that the defendant's condition in this regard was either substantial or extraordinary and the court assigns little weight to this mitigating circumstance.

B. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements was substantially impaired. Dr. Maher's testimony supports a finding by the court that this mitigating circumstance indeed existed at the time of the murder.

III. NON-STATUTORY MITIGATING FACTORS

There was testimony concerning defendant's earlier years and family background and, though unfortunate, the court finds that this testimony did not establish anything substantial or extraordinary. It was established by the evidence, however, that the defendant cooperated with the police in locating the body of the victim and the court finds this to be a single non-statutory mitigating circumstance.

R. III 398-99 (emphasis added).

Dr. Maher testified at length for Mr. Hudson and was the

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mind at the time would be presence of a personality disorder, a set of personality traits and characteristics which was present in him at the time and continues to be the present.

His background with regard to various specific issues is also a part of his state of mind. It's a part of the mental and emotional disorder at the time he suffered from.

The family instability he suffered as a child, having two families, basically, the poverty experience, the poor educational background, the lack of strong positive role models in his life, his brothers used drugs. His brothers were involved in drug use. His brothers didn't provide the kind of solid family atmosphere in the absence of a father that might have been there. And the school was not equipped to make up for it.

All of those factors, the cocaine problem being most significant, all of those factors were a part of his state of mind and the disorder that he suffered from at the time of the offense.

R. VI 397-98.

only mental health expert to take the stand. The Sentencing Order indicates the trial court found the substance of his testimony to be credible and "without contradiction." The trial court apparently did not find it to be a neat fit for the statutory language of section 921.141(6)(b), but this does not diminish the weight of the facts in a determination of the appropriateness of the death sentence.

It is not the existence of these facts which are at issue here, merely their name. A close reading of what took place below shows the trial court was confused as to how to apply mitigation, apparently believing that unless it fit neatly under a statutory mitigation label it should not be given much weight.

E. Precedent In Cases Involvins Domestic Disputes, Druas and Alcohol, and other Situations Similar to Mr. Hudson's

1. There was Substantial Testimony on Drug Intoxication Below

One cannot read the Record below without appreciating that Mr. Hudson had a drug addiction of long standing and that he was extremely intoxicated on crack cocaine at the time of the murder. Testimony to this effect was never seriously challenged by the prosecutor.

Prosecution witness Becky Collins testified that while she and Mr. Hudson lived together he went from a polite and courteous young man to one who could not leave drugs alone. She described for the jury his complete change of personality under crack's influence, his angry outbursts, his paranoid suspicions and strange claims, his borrowing money from her to buy drugs and his

insisting that she drive him to where cocaine could be bought, and his new friendships with other crack users and dealers. R. V 185-87, 189-91, 195-96, 200-01.

Defense witnesses Mr. Hudson's father Daniel Hudson, R. VI 317-19, 322-23; his sister Deborah Hudson, R. VI 336-39, 342; prison counselor Littleton Long, R. VI 348-49; and drug buddy Kelly Doster, R. VI 357-59, 360-63, 366-70, all testified to different aspects of Mr. Hudson's drug dependency and responses to cocaine. The father and sister pointed out that in addition to Mr. Hudson two of his brothers were chronic substance abusers, strongly suggesting factors over which he had limited control. R. VI 315, 336. Defense witnesses and drug buddies Anthony Jerome Bembow, R. VI 351-56, and Gerald Bembow, R. VI 371-79, also testified at length about Mr. Hudson's conduct under the influence of crack cocaine as well as his extreme level of cocaine intoxication just minutes before the murder. Both witnesses testifed that Mr. Hudson has a unique, intense reaction to crack, and was particularly sensitive to noise. Id. at 352-53, 373.

The only mental health expert to testify in person was Dr. Michael Maher, R. VI 389-482. Much of his testimony explained Mr. Hudson's addiction and how it compromised his ability to think clearly and conform his conduct. Id. at 390-483. The trial court also was given a substantial body of earlier cross-examined testimony about Mr. Hudson's drug problems from three other mental health experts who evaluated him in relation to this

murder. Dr. Robert Berland, R. X 106-200 and R. XI 288-321; Dr. Peter Macaluso, R. XI 201-72; and Dr. Charles Wheaten, R. X 42-105. None of the four experts disagreed as to Mr. Hudson's having a drug addiction of long standing and to his being intoxicated at the time of the murder.

No expert was presented by the prosecution to counter this evidence.

2. Precedent Requires Life in Mr. Hudson's Case

This Court has consistently recognized drug addiction, alcoholism, or other substance abuse which diminishes a defendant's ability to make rational decisions as powerful mitigation dictating a life sentence on proportionality review.

Addictions rob defendants of "substantial control over [their] behavior when" abusing substances. Nibert v. State, 574 So.2d 1059, 1063 (Fla. 1991)[17]. That certainly was the uncontroverted testimony about Mr. Hudson's condition in the trial below.

This Court has repeatedly recognized this unfortunate reality of substance abuse in reducing death sentences to life on proportionality grounds. Morsan v. State, 639 So.2d 6 (Fla. 1994)(where death was found to be disproportionate even with a finding of heinous, atrocious, or cruel, when the perpetrator had been drinking and huffing gasoline, along with his "marginal

[17] Nibert was described by this Court as a "chronic alcoholic who lacked substantial control over his behavior when he drank, and (who had] had been drinking heavily on the day of Snavely's murder." Nibert, 574 So.2d at 1063.

intelligence"); Kramer v. State, 619 So.2d 274 (Fla. 1993)(where the victim is beaten to death with a rock but the death sentence is reduced to life on proportionality grounds even with a finding of heinous, atrocious, or cruel, and a prior violent felony that resulted in the death of an earlier victim); White v. State, 616 So.2d 21 (Fla. 1993)(where death is found to be disproportionate for a drug addicted defendant who murders his former girlfriend and there is a valid finding of a prior violent felony, a burglary and assault directed at the victim)[18]; Penn v. State, 574 So.2d 1079 (Fla. 1991) (reduced to life by this Court where Penn gets drunk and kills his mother-in-law by beating her to death with a claw hammer, resulting in a valid finding of heinous, atrocious, or cruel); Nibert, (death reduced to life where an intoxicated alcoholic man stabs the victim 17 times in the course of a robbery with a valid finding of heinous, atrocious, or cruel); Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987), (a stabbing murder during the course of a burglary where Proffitt had be&drinking, a fact which was not expressly set out as mitigation by the trial court but was recognized by this Court); Ross v. State, 474 So.2d 1170 (Fla. 1985)(an alcoholic"

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[18] Mr. Hudson might well have had the kind of quality, substantiated drug intoxication testimony that was so important in White except for the deficient performance by counsel that was the basis for relief in Hudson II. Preservation of such evidentiary material will only happen when trial counsel is alert to his/her responsibility very early in the defense.

[19] This Court observed that the record showed Ross to be "an alcoholic [who] becomes intoxicated easily" and that at the time of the murder he was "having difficulty controlling his emotions." Ross, 474 So.2d at 1172 and 1174.

who beat his wife to death with a blunt instrument under circumstances that gave rise to a valid finding of heinous, atrocious, or cruel, has his death sentence reduced to life); and Rembert v. State, 445 So.2d 337 (Fla. 1984)(death sentence reduced to life where the victim was clubbed to death by a drunken[20] Rembert during a robbery).

In some instances intoxicants may not lead to a life sentence on proportionality review. Unlike the present record, such cases involve some combination of multiple victims, one of the most substantial aggravating factors such as heinous, atrocious, or cruel, or an absence of mitigation. Pope v. State, 21 Fla. L. Weekly S257, 259 (Fla. June 13, 1996)(where an alcoholic kills his alcoholic domestic partner but where this Court found "competent substantial evidence to support the court's finding that this was a premeditated murder for pecuniary gain..."; Orme v. State, 21 Fla.L.Weekly S195 (Fla. May 2, 1995)(cocaine use where the aggravating factors were (1) in the course of a sexual battery, (2) heinous, atrocious, or cruel on a murder by beating and strangulation, and (3) for pecuniary gain); Windom v. State, 654 So.2d 432 (Fla. 1995)(a triple homicide and the attempted homicide of a fourth victim during a robbery with a finding of cold, calculated and premeditated, and three 12-0 jury death recommendations). Mr. Hudson's case involves none of these defining factors -- there was only one victim, the circuit court

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[20] This Court wrote that Rembert murdered "[a]fter drinking for part of the day and worrying about how to make his car payment," Rembert, 445 So.2d at 338.

rejected the finding of heinous, atrocious or cruel, and there is a wealth of mitigation.

3. Murder in a Domestic Context"

In this record the testimony of prosecution witnesses Becky Collins, Mr. Hudson's fiance, R. V 184-201, and her friend Jasmin Robertson, R. V 202-07, leave no doubt as to the domestic setting of this tragic situation. Ms. Collins testified that she had lived with, planned to marry, or dated Mr. Hudson nearly until the time of this murder. It was Ms. Collins who broke off the relationship over Mr. Hudson's cocaine addiction, a decision which he apparently refused to accept. Her testimony was bolstered by that of Dr. Maher who testified that Mr. Hudson was "excessively pathologically dependent upon her." R. VI 470-71.

"[T]his Court has never approved a 'domestic dispute' exception to imposition of the death penalty," Spencer v. State, 21 Fla.L.Weekly S366, S367 (Fla., Sept. 12, 1996). However, it has repeatedly found that homicide in a domestic context is generally not appropriate for a death sentence. The victim need not be the domestic partner for this consideration to apply so long as a domestic conflict is the engine driving the unfortunate violence. See Penn where the victim was a mother-in-law with whom the estranged wife was living.

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[21] Mr. Hudson recognizes that the majority expressed skepticism that this murder had a domestic context in Hudson I but argues that the record presently before the Court is considerably more complete on that issue. In Hudson II this Court acknowledged that the case involved his "breaking into his former girlfriend's home and killing her roommate," 614 So.2d at 482.

There are ample decisions from this Court reviewing the proportionality of death sentences in a domestic context. These include at least 18 decisions since Hudson I.[22]

Relief has been extended in circumstances similar to, and even more serious, than those in this record. Chaky v. State, 651 So.2d 362 (Fla. 1994)(the clubbing murder of a wife where Chaky had a prior attempted murder conviction and was alleged to receive insurance proceeds); White; Penn, (where Penn killed his mother-in-law, with whom his estranged wife and son were living, by hitting her with a hammer 31 times, mostly to the head, leading to a finding of heinous, atrocious, or cruel); Farinas v. State, 569 So.2d 425 (Fla. 1990)(where Farinas kidnapped then killed the women whom he'd formerly lived with, and where there was a valid finding of heinous, atrocious, or cruel); Blakelv v. State, 561 So.2d 560, 561 (Fla. 1990)("this court [has] stated that when the murder is a result of a heated domestic confrontation, the death penalty is not proportionally warranted"); and Justice Barkett's informative dissent in Porter,

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[22] Spencer; Pope v. State, 21 Fla.L.Weekly S257 (Fla., June 13, 1996); Orem which rejects the characterization; Larzelere v. State, 676 So.2d 394 (Fla. 1996); Chakv v. State, 651 So.2d 1169 (Fla. 1995); Lindsey v. State, 636 So.2d 1327 (Fla. 1994); Duncan v. State, 619 So.2d 279 (Fla. 1993); White; Richardson v. State, 604 So.2d 1107 (Fla. 1992); Santos v. State, 591 So.2d 160 (Fla. 1991); Penn; Farinas v. State, 569 So.2d 425 (Fla. 1990); Lucas v. State, 568 So.2d 18 (Fla. 1990); Buenoano v. State, 565 So.2d 304 (Fla. 1990), where the victim was a domestic partner; Porter; Blakelv v. State, 561 So.2d 560 (Fla. 1990); and Smalley v. State, 546 So.2d 720 (Fla. 1989), a babysitter who killed an infant. Note also Dousan v. State, 595 So.2d 1 , 6-8 (Fla. 1992), which Justice McDonald in a dissent calls a quasi-domestic murder.

564 So.2d at 1065-66, noting "this Court consistently has accepted as substantial mitigation the inflamed passions and intense emotions of such situations."

A life sentence is appropriate even in the face of what appears to be calculated planning directed toward the murder. Douglas v. State, 575 So.2d 165 (Fla. 1991) and Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986)(where two people are killed in a domestic context and this court observed "that the killing, although premeditated, was most likely upon reflection of short duration"). See also domestic situations where this Court reversed an aggravating factor and remanded to the trial court: Santos v. State, 591 So.2d 160 (Fla. 1991)(Santos kills his girlfriend and 22-month-old daughter) and Lucas v. State, 568 So.2d 18 (Fla. 1990)(Lucas murders his girlfriend and shoots two others).

This Court has rejected the domestic characterization where there was nothing to indicate a past relationship was still a factor in the murder. See Orme where this Court wrote that "we decline to find that the instant homicide was a lover's quarrel. ... There is no evidence the murder was sparked by an emotional reaction to this breakup." 21 Fla.L.Weekly at S196-97. The evidence presented in Mr. Hudson's resentencing was just the opposite -- every indication is that Mr. Hudson's relationship with Becky Collins, the roommate of the victim, was the precipitating factor in this crime. Proportionality relief was also rejected where the perpetrator had a prior homicide or

attempted homicide which presumably was a very substantial aggravating factor. Lindsey v. State, 636 So.2d 1327 (Fla. 1994)(prior second degree murder conviction and two murder victims in the case reviewed); Duncan v. State, 619 So.2d 279 (Fla. 1993)(prior murder conviction while in prison); Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230 (1985)(murder in a domestic context where Lemon had a prior attempted homicide of another woman).

This Court's most recent discussion of a proportionality claim in a domestic context were Spencer and Pope, but they have little application to Mr. Hudson's case. Unlike Mr. Hudson, defendant Spencer had a valid finding of heinous, atrocious, or cruel, the victim was first beaten in the head with a brick then stabbed four or five times in the chest and face, the victim required ten or fifteen minutes to die, there was an earlier plan to kill the victim, and there was evidence of a financial motive.[23] The Spencer victim was not only a domestic companion,

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[23] The facts of this case are set out at Spencer v. State, 645 So.2d 377, 379-80 (Fla. 1994):

> Spencer returned to [his estranged wife and business partner] Karen's house on the morning of January 18, 1992. [Spencer's teenaged stepson] Timothy was again awakened by a commotion, grabbed a rifle from his mother's bedroom, and found Karen and Spencer in the backyard. Timothy testified that Spencer was hitting Karen in the head with a brick, and that he observed a lot of blood on Karen's face. Timothy tried to shoot Spencer, but the rifle misfired and he instead struck Spencer in the head with the butt of the rifle, which was shattered by this impact. Spencer pulled up Karen's nightgown and told her to "show your boy your pussy." He then slapped Karen's head into the concrete wall of the house. Karen told Spencer to "stop." When Timothy attempted to carry his mother away, Spencer threatened him

but a business partner whose **death would have benefitted** the perpetrator. The Spencer record includes significantly more aggravating evidence than Mr. Hudson's record. Pope is similar **in that** respect. This Court denied Pope's proportionality claim with the observation that there was substantial evidence that the murder was premeditated and committed for pecuniary gain. No such evidence exists in Mr. Hudson's case.

F. Analysis of a Prior Violent Felony.

The trial court below found as an aggravating factor Mr. Hudson's 1982 conviction for sexual battery of Linda **Benjamin.**[24]

> **with a knife.** Timothy ran to a neighbor's house to summon aid.
>
> When the police arrived at the scene, they found Karen **dead.** She had been stabbed four or five times in the chest, **cut on the face and arms,** and had suffered **blunt force** trauma to the back of the head. The medical examiner testified that cuts on Karen's right hand and arm were defensive wounds and that death was caused by blood loss from two penetrating wounds to the heart and lung. The medical examiner also testified that all of the wounds occurred while Karen was alive and that she probably lived for ten or fifteen minutes after receiving the stab wounds to the chest. According to the medical examiner, Karen **suffered three** impacts to the back of the head that were consistent with her head being hit against a concrete wall. Because this impact would have caused Karen to lose consciousness, the medical examiner testified that the defensive wounds **had to have occurred before the head** trauma.

Spencer also had earlier assaulted his wife with an iron requiring treatment at a hospital, had earlier threatened to kill her and her teenaged son, and had told friends the details of his plan to kill her while on a boat. There was also evidence of a financial motive on Spencer's part for the murder.

[24] The State also presented Mr. Hudson's robbery conviction as a prior violent felony, but the trial court obviously took note of the fact it was really a purse snatching and rejected it as an aggravating factor. R. III 397, the

He was charged and convicted of the sexual battery of an adult without physical force and violence likely to cause serious personal injury, a second degree felony, with the accompanying burglary.[25] R. IX 12, 16.

Not all prior violent felonies are treated the same for weighing purposes. Proportionality review requires this Court to "weigh the nature and quality" of the aggravating and mitigating factors found. Kramer, 619 So.2d at 277. This Court may look at "the circumstances surrounding that conviction" to determine its weight. This Court has determined that some prior violent felonies are entitled to little weight. Chakv, 651 So.2d at 1173 (where a prior attempted murder conviction came during Vietnam War service some twenty years earlier).

This Court has properly given very great weight to prior violent felonies of homicide or an attempted homicide and declined proportionality relief. Munsin v. State, 21 Fla.L.Weekly S66 (Fla. Feb. 8, 1996)(Motion for Rehearing pending)(shooting another store clerk in the head as part of the same crime spree that included the murder); Lindsey (prior second degree murder conviction and a lack of mitigation); Duncan (prior second degree murder conviction for the killing of another prison

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Sentencing Order below. This was after the prosecutor argued that this was a prior violent felony. R. VII 508. See also R. II 323-25, Mr. Hudson's Request for Judicial Notice as to Mr. Hudson's felonies involving no physical force. The documents introduced by the State on these two incidents are at R. IX 3-20. Note also R. II 275-80.

[25] Florida Statute 794.011(5).

inmate); Hall v. State, 614 So.2d 473 (Fla. 1993)(prior second degree murder conviction with seven approved aggravating factors); Harvard v. State, 375 So.2d 833 (Fla. 1977), cert. denied, 441 U.S. 956 (1979)(where the prior violent felony was an attempted murder of another wife).

Likewise, depending on the level of mitigation, this Court has been willing to reduce a death sentence to life on proportionality grounds even with a very serious prior violent felony. See Kramer, 619 So.2d at 278, dissent by Justice Grimes, which points out the victim was beaten to death and the alcoholic defendant had previously beaten **another** man so badly his death resulted as well; White, where the prior violent felony by a drug addicted defendant was a burglary and aggravated battery on the same victim who was his former girlfriend.

Mr. Hudson's aggravating factor of a prior violent felony is at the bottom end of violent felonies and should receive little weight in proportionality review. In addition, there are serious problems with the way this claim was presented by the prosecution. See Argument III.

G. The Trial Court **Neglected** to Evaluate Non-Statutory Mitisation in Violation of **Campbell** v. State

The Trial Court below said little about non-statutory mitigation in it's Sentencing Order of April 24, 1995. The total comment was:

> There was testimony concerning defendant's earlier years and family background and, though unfortunate, the court finds that this testimony did not establish anything substantial or extraordinary. It was established by the evidence, however, that the defendant cooperated with the police in

locating the body of the victim and the court finds this to be a single non-statutory mitigating circumstance.

R. III 399.

Mr. Hudson argues error under both Lockett v. Ohio, 438 U.S. 586 (1978) and Campbell v. State, 571 So.2d 415 (Fla. 1990) elsewhere but would here point out that this non-statutory mitigation must be considered as part of his proportionality claim. See Argument II.

H. This Court Should Conduct the **Proportionality** Review

Proportionality review can be accomplished on this record. The record is sufficient to consider the legal significance of aggravating and mitigating factors. This record is similar to those where this Court has conducted a proportionality review and resentenced the defendant to life.

Only this Court undertakes proportionality review. Trial courts are not in a position to undertake the kind of statewide and factually detailed examination such review requires. Dixon.[26] Thus, this Court is the appropriate Court for a proportionality review of Mr. Hudson's case. See Kramer (aggravating and mitigating factors left as found below in the case of an alcoholic's death sentence being reduced to life); White (one aggravating factor struck by this Court before it

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[26] Dixon describes this Court's review on death sentences as "the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes." 283 So.2d at 8.

reduces a drug addict's death sentence to life); Penn (a domestic murder reduced from death to life without a remand after this Court struck one of the aggravating factors); Nibert (where an alcoholic's death sentence is reduced to life on proportionality review with the statement that "[w]here uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established," 574 So.2d at 1061); Farinas (a death sentence reduced to life for a murder in a domestic setting with a 9-3 jury death recommendation and a valid finding of heinous, atrocious, or cruel); Livingston (death sentence reduced to life on proportionality grounds where this Court struck one of three aggravating factors on a 17-year-old defendant); Blakely (a death sentence reduced to life on a murder in a domestic setting); Smalley v. State, 546 So.2d 720 (Fla. 1989) (a death sentence reduced to life in an infant murder by a babysitter with a valid finding of heinous, atrocious, or cruel); and Songer, 544 So.2d at 1011 (death for the murder of a state trooper reduced to life on proportionality grounds.)

Additionally, upon a finding that the trial court has failed to recognize mitigation established below this Court has reduced a death sentence to one of life on proportionality grounds without a remand to the trial court. Morgan, 639 So.2d at 14 (a unanimous opinion where life is found to be appropriate even with a valid finding of heinous, atrocious, or cruel, and noting that the unrecognized mitigation was established by "a reasonable

quantum of competent evidence".)[27]

I. **Conclusion**

This Record does not support a sentence of death. There is abundant proportionality law from this Court, especially those decisions issued since Hudson I, which **clearly establishes** this crime as one warranting a life sentence. It is not one of "the most aggravated and least mitigated murders," Kramer, 619 So.2d, 278.

Mr. Hudson deserves a life sentence for this murder, nothing more and nothing less.

ARGUMENT II

THE TRIAL COURT NEGLECTED TO EVALUATE NON-STATUTORY MITIGATION IN VIOLATION OF LOCKETT V. OHIO, CAMPBELL V. STATE AND **THE** EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Substantial mitigation was introduced in the penalty phase that was not considered nor weighed by the trial court, contrary to well-established law. The law is clear that the trial court must both examine and weigh mitigation presented by the defense -- it may not simply ignore it.

> [T]he trial court's first task in reaching its conclusions 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

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[27] When this Court does remand there is a particular characteristic of the case which requires it. See Santos (a double homicide in a domestic setting remanded for reweighing where the trial court has neglected this Court's recent decision in Campbell); Campbell (remand after announcing a new rule on consideration of mitigation in the record); and Lucas (remanded where the trial court's sentencing order was not sufficiently clear for review). No such characteristic exists in Mr. Hudson's case.

> 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.

Rogers v. State, 511 So.2d 526, 534 (Fla. 1987); see also Campbell v. State, 571 So.2d 415 (Fla. 1990).

The state did not offer any evidence in rebuttal of the extensive mitigation evidence presented by Mr. Hudson, either in the form of lay witnesses or expert witnesses, nor did it seek to refute the evidence.[28] "Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence," Santos, 591 So.2d 160, 164 (Fla. 1991). Since the evidence offered by Mr. Hudson was not contested by the state, this Court is not bound by an erroneous trial court finding that ignored the bulk of the non-statutory mitigation. See Santos, 591 So.2d at 164, relying on Parker v. Dugger, 498 U.S. 308 (1991).

The trial court below said little about non-statutory mitigation in it's Sentencing Order of April 24, 1995. The total

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[28]The state presented eight witnesses at the resentencing -- four police officers, one medical examiner and three lay witnesses. These witnesses testified about the worth of the victim (see Argument V), the investigation of the crime, Mr. Hudson's assistance with the discovery of the body and his confession, the autopsy of the victim and Mr. Hudson's prior problems with the victim's roommate.

comment was:

> There was testimony concerning defendant's earlier years and family background and, though unfortunate, the court finds that this testimony did not establish anything substantial or extraordinary. It was established by the evidence, however, that the defendant cooperated with the police in locating the body of the victim and the court finds this to be a single non-statutory mitigating circumstance.

R. III 399.

The trial court, in this order, made no mention of significant unrefuted non-statutory mitigation in the record, and failed to properly consider uncontroverted mitigation concerning Mr. Hudson's family background. The following mitigating factors, each of which has been separately found by Florida courts to be mitigating evidence in a capital case, were presented in unrebutted testimony to the court below: 1) history of drug and alcohol addiction - R. VI 317, 318, 337, 342, 348-49, 352-53, 355-56, 357, 359, 360-61, 372, 373, 389-482, X 74, XI 212, 219; 2) family history of chemical dependency - R. VI 314, 315, 328-29, 336-37, 360, XI 212; 3) under the influence of cocaine on the night of the crime - R. VI 354, 359, 373-75, X 127; 4) broken and unstable home environment - R. VI 327-28, 332-33, 335, 397-98, X 91, 96; 5) raised by an alcoholic mother - R. VI 314, 328-29, 336-37, 360; 6) extreme paranoia as a result of drug addiction and use - R. VI 337-38, 339, 357-58, 362, 366, 372, 373, 401, 447, X 74, 98-99, 123, 124, 141; 7) good potential for rehabilitation - R. VI 345; 8) courteous and helpful to others when not under the influence of drugs/ good person - R. VI 195, 196, 339, 345, 353, 358; 9) confessed to the crime - R.

VI 227, 236-37, 239-40, 259, 261-62 10) good employer - R. VI 196, 331, 348, XI 322-23; 11) has matured since crime - R. VI 319-20; 12) relatively young age at time of crime - R. VII 516-17, 531-33, III 369;[29] 13) functions well in prison - R. VI 431-32, VII 517-18;[30] 14) symptoms supporting diagnosis of paranoid schizophrenia - R. X 126; and 15) shame and remorse for the crime, R. V 239-40, 260-61, VI 385-86, 481.[31] This list is in no way exhaustive. A wealth of other mitigating evidence was introduced at Mr. Hudson's resentencing which would support the finding of other non-statutory mitigators.

Several witnesses testified that Mr. Hudson had an idiosyncratic response to cocaine and that he responded more severely to the drug than most people did. For example, Gerald Bembow noted that cocaine "would make [Mr. Hudson] very paranoid, sort of like defensive, jump and he would -- little noises or movements would make him jump and get scared like somebody is after him or something." R. VI 372, see also R. VI 352-53, 362, 373, X 123. The uncontested testimony was that Mr. Hudson was acutely paranoid when under the influence of cocaine and thought people were out to get him. His overreaction to slight, and

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[29]The first trial court recognized Mr. Hudson's age as mitigating as did this court in Hudson I, 538 So.2d at 831.

[30]See Skipper v. South Carolina, 476 U.S. 1 (1986).

[31]Compare: Nibert, 574 So.2d at 1062, where the defendant "felt 'a great deal' of remorse"; Richardson v. State, 604 So.2d 1107 (Fla. 1992), which also has a domestic context; and Smalley v. State, 546 So.2d 720 (Fla. 1989), the murder of an infant by a babysitter who later shows great remorse.

sometimes non-existent, noises was repeatedly mentioned by witnesses. Id. This non-statutory mitigation is particularly relevant in this case, where the testimony was that Mr. Hudson reacted to the victim's screams when he stabbed her. This mitigation was of the sort that has been recognized by this the Court as proper mitigation in a capital case.

The testimony concerning Mr. Hudson's impoverished and difficult childhood was extensive and unrebutted, and supports the finding of several non-statutory mitigators. Witnesses testified that Mr. Hudson was raised in poverty, that his parents' divorced when he was very young -- an event which devastated him more than the other children, that Mr. Hudson's mother was an alcoholic who was impulsive and provided no guidance or emotional support for her son, that there was a dearth of structure in his early life, and that this chaotic and deprived childhood affected his ability to become a productive adult and to appropriately deal with situations such as his breakup with Ms. Collins. The trial court's characterization of this evidence as "though unfortunate, the court finds that this testimony did not establish anything substantial or extraordinary" indicates a failure to understand that it can be considered mitigating.[32] The trail court's refusal to recognize

[32] In the seminal case of consideration of non-statutory mitigation, Lockett v. Ohio, 438 U.S. 586 (1978), the Supreme Court found that a sentencer in a capital case must not be precluded from considering "any aspect of a defendant's character or record" as a mitigator in support of a sentence less than death.

this non-statutory mitigation also ignores the unrebutted testimony of Dr. Maher recognizing these experiences as significant risk factors which predisposed the defendant toward problems in later life. R. VI, 397-98, 413-15, 429-30.

Perhaps the most significant omission in the trial court's order is the impact of Mr. Hudson's cocaine addiction on his behavior on the night of the crime, and the failure to find Mr. Hudson's cocaine intoxication on the night of the crime as a mitigating factor. As noted above, substantial, uncontroverted evidence concerning Mr. Hudson's use of cocaine and the affect this drug had on his behavior on the night of the crime was introduced in the resentencing. Gerald Bembow testified that Mr. Hudson was so high on the night of the crime that he asked him to stay over and sleep on the sofa, something he had never asked Mr. Hudson to do before. R. VI 374, see also Id. at 355. This evidence of Mr. Hudson's drug use was consistent with the facts of the crime, and should have been found by the trial judge as a non-statutory mitigating factor.

The trial court erred when it failed to credit the substantial non-statutory mitigation presented by Mr. Hudson in the resentencing. Lockett; Campbell. As this Court has repeatedly stated, the trial court must find as a mitigator each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of evidence. Campbell, 571 So. 2d at 419. The state has offered no evidence to counter this mitigation. Mr. Hudson has presented a

"reasonable quantum of competent, uncontroverted evidence" of these mitigating circumstances. Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993), quoting Nibert v. State, So. 2d 1059, 1062 (Fla. 1990); Morsan v. State, 639 So. 2d 6, 13 (Fla. 1994). The trial court should have found that the mitigating circumstances discussed above existed.

Mr. Hudson submits that the death sentence in his case is disproportionate on the record as it now stands (see Argument I). With these additional non-statutory mitigators that were in the record, uncontroverted and supported by the evidence, the death sentence cannot stand. See Morcran, 639 So. 2d at **14.**

ARGUMENT III

MR. HUDSON'S DUE PROCESS RIGHTS WERE VIOLATED BY THE DENIAL OF HIS OPPORTUNITY TO CROSS EXAMINE THE VICTIM OF THE PRIOR VIOLENT FELONY.

It is uncontested that Mr. Hudson plead guilty to a 1982 felony charge of sexual assault without injury or threat of violence. Fla. Stat. § 794.011(5). The victim in that matter was a woman named Linda Benjamin.

The State offered court documents of the conviction as proof. However, the prosecutor went beyond that documentation and presented the Tampa Police Officer Keith Bush who took the complaint of the victim.[33] Over Mr. Hudson's objection, Officer Bush was allowed to testify to the details of the incident as related by Benjamin and recorded in his report. Bush had no

[33] R. v 276-85.

independent recollection of the incident.[34] Benjamin never testified in this proceeding. The record reflects the following:

[Ms. Cox] Q.: Did you interview Ms. Benjamin?

A.: [illegible]

Q.: And what did she tell you happened?

MR. DONERLY: Objection. May we approach the bench?

THE COURT: Okay.

(Whereupon, the following bench conference was had:)[35]

MR. DONERLY: I realize that hearsay is not itself admissible but it is inadmissible if it deprives the defendant the opportunity to confront witnesses.

Linda Benjamin is still around and could have been called. This is simply to get the facts of the case in.

He is insulating it from attack and, therefore, I would object to Ms. Benjamin's recitation through Officer Bush.

THE COURT: Well, did he plead to it or was he convicted of it?

MR. DONERLY: He plead to it. I am not saying there is anything wrong with the conviction.

Well, I do say there was something wrong with the conviction but that is another motion that has been ruled on but what I am saying is that the state's enhancing by getting in the facts in this matter is depriving him of his confrontation rights under the 6th amendment and, therefore, violating the 8th and 14th amendment of the United States Constitution.

THE COURT: Well, I think that it would be much more enhancing to Ms. Benjamin [sic]. Did you depose her?

MR. DONERLY: That is what I was to do and I tried to depose her several times and I was put off and I guess this

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[34] R. V 279.

[35] Mr. Hudson's absence from this bench conference violated the Fifth, Sixth, Eighth and Fourteenth Amendments (see Argument XI).

is the result of it.

THE COURT: Let it in. Overruled. Let it in.

R. V 280-82.

At this point the officer was allowed to testify to specific statements made by Benjamin:

> A. She said she was in her bedroom in her bed and was awakened and sat up in bed and saw a man at the end of her bed wearing a red T-shirt and brown nylon underwear. He was standing at the front of his bed -- her bed.
>
> Q. And then what else did she tell you?
>
> A. She said she told the male to get the hell out of her house.
>
> Q. And then what happened if you can tell us, everything that she told you?
>
> A. At that time the subject pushed back on the bed, inserted his finger into her vagina and then attempted to insert his penis. Subject stated person by the name of B.J. hired him to kill her.
>
> Q. The complainant fought with the black male and screamed and the children also screamed and the suspect ran out of the house through the back door.
>
> And then she gathered up the children, exited her house, went to a neighbor's house located at 704 Cheryl Street and called the police. While she was on the way to --
>
> MR. DONERLY: Judge, I have a further objection that I would like to make at this point.

R. V 282-83. At this point the State sensed it had pushed the matter too far and was willing to withdraw this line of questioning. id.

The State could have been content to establish the fact of Mr. Hudson's having been convicted of the prior violent felony through the introduction of the relevant court documents. R. XI

12, 16. Instead they attempted to establish details of the incident which were only known to the participants, Ms. Benjamin and Mr. Hudson.

This is not a matter to be considered in isolation. Throughout the trial, and without any evidence, the prosecution tried to suggest that Mr. Hudson was attempting to sexually assault the murder victim.[36] In her closing argument the prosecutor came as close to saying rape as you can without using the word:

> [Ms. Cox]: The evidence will show you that she's at home alone, a small woman sleeping in her bedroom when he comes in, sneaking in the back door. And she's essentially unclothed.
>
> There's a sinister aspect of this evidence that can't be explained to you, and that's because Mollie Ewings is gone and she can't tell us what happened,[37] but amongst her bed clothes, her underwear is found, and amongst those bed clothes, there's a great deal of blood and there's splatter from the cast off of that night on the pillow where she rested her head.
>
> She screamed, she struggled and he stabbed her four times, insuring her death. She didn't stand a chance, and now it's up to you to decide what should be done about that.

R. VII 506-07.

In the Florida capital punishment system this Court is required to consider not only the fact of a prior violent felony,

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[36] In the absence of any evidence to this the prosecutor and state witnesses implied it by emphasizing the condition of the bedroom, the location of the bed covering, and the presence of women's undergarments, R. V 212-14, 243-44, 266-74, and the absence of underwear on the victim when she was found, R. V 237.

[37] This line is clearly a comment by the prosecutor on Mr. Hudson's decision not to take the witness stand during his punishment phase, further denying him his constitutional rights.

but also the quality or substance of them. See Argument I(F). While nothing would require the State to introduce the details of the incident, once they elect to do so they may not insulate it from cross examination by Mr. Hudson. Just as the defendant in Gardner v. Florida, 430 U.S. 349 (1977) had a right to know of and respond to sealed materials in a Presentence Investigation Report which would have bearing on whether he would live or die, so must Mr. Nudson be afforded the opportunity to inform this jury and trial court through cross examination.

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. Mempa v Rhay, 389 US 128, 19 L Ed 2d 336, 88 S Ct 254; Specht v Patterson, 386 US 605, 18 L Ed 2d 326, 87 S Ct 1209. The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. See Witherspoon v Illinois, 391 US 510, 521-523, 20 L Ed 2d 776, 88 S Ct 1770, 46 Ohio Ops 2d 368.

Gardner, 430 U.S. at 357-58 (footnotes omitted).

By denying Mr. Hudson the right to confront the sourse of the details here presented to the sentencing court he was denied an ability to assure their reliability. The Confrontation Clause assures not only a personal examination of the witness, but also:

> "(1) insures that the witness will give his statements under oath -- thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendants fate to observe the demeanor of

> the witness in making his statement, thus aiding the jury in assessing his credibility." (California v.] Green, [399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970)] supra, 399 U.S., at 158, 90 S.Ct., at 1935 (footnote omitted).

Marvland v. Craig, 497 U.S. 836, 845-46 (1990).

Mr. Hudson's punishment phase is fatally flawed by this denial of his opportunity to probe the specifics of a statutory aggravating circumstance which would determine whether he lived or died. He was denied basic constitutional Due Process. This Court must reverse his death sentence and impose a sentence of life, or in the alternative remand to the trial court for a new punishment phase.

ARGUMENT IV

TEE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS, ARGUMENTS, AND CONDUCT RENDERED MR. HUDSON'S DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Throughout Mr. Hudson's resentencing the prosecutor injected all manner of impermissible, improper, and inflammatory matters into the proceedings. Through questions of witnesses, comments and arguments, the prosecutor attempted to discredit Mr. Hudson's defense because of Mr. Hudson's exercise of his constitutional rights, improperly exhorted the jury not to consider mitigating evidence, urged consideration of matters not in evidence, misstated the evidence and injected emotion into the proceedings. The prosecutors' arguments were fundamentally unfair and deprived Mr. Hudson of due process.

The prosecutor began the trial by describing the victim as "decomposing face down in the dirt, essentially nude, being

infested by bugs." R. V 160. This inflammatory description of the victim's body was offered soley to incite the jury and to encourage them to base their sentence on emotion rather than on the law. This theme was continued in the closing argument when the proseuctor argued that "her decomposed, maggot-ridden body." R. VII 516. Both of these statements were contrary to the evidence and should not have been considered by the jury.

Again in closing the prosecutor argued "facts" not in the record when she commented that the defendant reported to his probation officer on the day before the crime and appeared normal. R. VII 508. There simply was nothing in the record to support this contention. Similarly the Prosecutor stated in closing that Mr. Hudson was not on crack during his prior crime because crack was not around in 1982. R. VII 515. Again, there was nothing in the record to support this claim, and in fact, it is not true.

The prosecutor also impermissibly argued that the jury should base their sentence on the suffering of the victim's families (see Argument V). This argument encouraged the jury to base the penalty on impermissible victim impact evidence -- an improper appeal to the jurors' emotions.

The prosecutor also commented on Mr. Hudson's perceived failure to offer evidence in his defense, urging the jury to question why he had not called all "four mental health professionals that were retained by the defense." R VII 520-21. This argument impermissibly shifted the burden of proof to Mr.

Hudson and misled the jury about the state's burden to prove its case beyond a reasonable doubt. A defense motion for objection and motion for mistrial were denied. Id.

Throughout the resentencing, the prosecutor impermissibly submitted argument and questions to the jury misstating the role of mitigation in a capital sentencing, and the sentencer's ability to consider mitigation. For example, during closing argument the prosecutor asked "[h]ow is [the ingestion of cocaine) something that in anyway takes away from the pain that this woman felt?" R. VII 510. This is an improper characterization of the law and misled the jury into believing that mitigation had to lessen the pain of the victim. The prosecutor continued in this vein -- misleading the jury about the the consideration of mitigation -- beginning in the voir dire and concluding with improper statements in the closing argument. R. IV 67, 72, 107, VII 510, 524.

The prosecutor's most egregiously improper argument came during closing argument. Immediately before the jury heard its instructions, the prosecutor urged the jury to convict Mr. Hudson because he, unlike the victim, had been afforded his constitutional rights. The prosecutor explained to the jury that the testimony concerning the victim was offered "to remind you that just as justice is due to Timothy Hudson, it's due to Mollie too, " R. VII 522-23.

"A prosector's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While

a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones.'" Berger v. United States, 295 U.S. 78, 88 (1935). A prosecutor may not misrepresent the facts in the case, United States v. Evster, 948 F.2d 1196 (11th Cir. 1991), and likewise, may not comment upon matters not in evidence because such comments

> . . . convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the government's judgment rather than its own view of the evidence. See Berger v. United States, 295 U. S. at 88-89.

United States v. Young, 470 U.S. 1, 18-19 (1985). "The consistent and repeated misrepresentation of dramatic . . . evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations." Donnellv v. DeChristoforo, 416 U.S. 637, 646-47 (1974).

The prosecutor distorted Mr. Hudson's trial and sentencing with frequent improper commentary and actions, thus destroying any chance of a fair sentencing phase. These arguments and actions were intended only to inflame the jury.

The remarks in this case are similar to the improper comments the state used in Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991). The court described as "outrageous" the state's closing argument that implied Cunningham had abused our legal system in some way by exercising his sixth amendment right to a jury trial. The prosecutor in Cunninsham argued:

> He's had a trial of people in Lincoln County, some of whom, I believe, knew him before this, he's had the right to have witnesses face. He's had the right to cross-examination. He's had the right to have His Honor charge the jury correctly. He's had every right afforded to a human being, although sometimes I wonder if they're really entitled to it.

Cunninsham, 928 F.2d at 1019, n. 23.

The Eleventh Circuit held that the prosecutor sought to inflame the jurors and to misinform them as to the role that certain fundamental rights play in our legal system and suggested that the defendant was somehow not entitled to those rights. Cunninsham, 928 F.2d at 1020.

The prosecutor's conduct in the instant case is far more egregious. As noted above, the prosecutor repeatedly argued "facts" not in evidence, impermissibly urged the jurors to sentence to death based on emotion, impermissibly shifted the burden to Mr. Hudson, improperly commented on Mr. Hudson's assertions of his constitutionally guaranteed rights, and misstated the law to the jury.

Each of these instances of prosecutorial misconduct standing alone is sufficient to warrant reversal of Mr. Hudson's convictions and sentences. Taken together, these numerous instances of misconduct clearly render the trial unconstitutional and require reversal. See Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994). The prosecutor's inflammatory, emotional and thoroughly improper comment and argument to the jury rendered Mr. Hudson's death sentence fundamentally unfair and unreliable in violation of the Sixth, Eighth and Fourteenth Amendments. These comments

by the prosecutor went beyond the bounds of proper argument and clearly prejudiced Mr. Hudson's right to a fair sentencing. See United States v. Young, 470 U.S. 1 (1985). As a result Mr. Hudson's death sentence is neither fair, reliable nor individualized.

ARGUMENT V

THE TRIAL COURT ERRED IN ADMITTING VICTIM **IMPACT EVIDENCE** UNDER SECTION **941.141(7) OVER** MR. HUDSON'S OBJECTION, CONTRARY TO EXPRESS LEGISLATIVE **INTENT, AND IN VIOLATION OF THE** EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND **ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.**

A. **Factual Basis of the Claim**

It should again be pointed out that the proceeding below was a retrial of the punishment phase only. The jury was instructed that Mr. Hudson had already been found guilty of capital murder and that they need not be concerned with issues relating to guilt. R. v 155.

Prior to the resentencing, Mr. Hudson filed a battery of motions to prohibit testimony from members of the victim's family designed to create sympathy and to prohibit victim impact testimony under Fla. Stat. § 921.141(7) as both unconstitutional and ex post facto. R. II 281-325. These motions were denied. Mr. Hudson renewed those objections before the testimony was actually presented. R. V 177.

Most of the victim impact testimony came in through the State's first witness, the victim's daughter Mandy Kio, R. V 177-84, before any other matter was presented to the jury. Kio testified that Ms. Mollie Ewing **was** her mother and that she had

one other sister, a second daughter of the victim. Kio testified she had a three-year-old son and the other daughter had two children, ages 12 and 7. She described the victim as a "very good" mother and grandmother -- "She was great to the one [grandchild] that was here before she died" -- who provided for her children even after her own divorce. Kio further testified that the victim worked two jobs to provide for her children but always found time to talk to them about problems and that the victim also had a close relationship with Kio's husband. She described the victim as "always giving. She was warm hearted. She was a very loving person. She never found fault in anybody. She was trusting." R. V. 179-82. Kio was asked to describe the funeral and testified that "You couldn't count [the people there]. The chapel was standing room only. There were people standing outside." She then identified State's Exhibit 1 as a recent large color portrait photograph of her mother. The witness cried at this point in her testimony. The color portrait was introduced into evidence over a defense objection on victim impact grounds. A defense motion for mistrial was denied. R. V 182-83; IX 1-2.

The only questions asked of Kio that related to the murder concerned Becky Collins' first contacting her when Collins sensed something was amiss at the victim's home. R. V 181.

Other prosecution witnesses testified about personal qualities of the victim which did not relate to the crime. The second witness was Collins who was immediately asked by the

prosecutor to describe the victim's personal qualities and replied:

> She liked going out. She was very friendly, very personable. Of course, she had to be to be a bartender. She was very good with people. She loved animals.

R. V 185. See also prosecution witness Jasmin Robertson. R. V 203.

During closing argument the prosecutor emphasized the victim impact testimony to the jury:

> Mandy Kio testified briefly to you regarding Mollie Ewings, her mother, and this isn't to be considered as an aggravating circumstances. You heard from her to remind you that as Mr. Donerly wants you to view Timothy Hudson as an individual, Mollie Ewings was an individual.
>
> She was a mother, a mother of two. She was a grandmother, a grandmother who will never get to meet some of her grandchildren. Mandy Kio came in to give you a brief glimpse of the life that Timothy Hudson chose to extinguish, chose to destroy, to show you that his actions deprived her daughters of a mother and her love and support, the knowledge that there's somebody in this world who will always be there for you whenever you need them, deprived her grandchildren and her future grandchildren of a loving, warm and caring grandmother who would be able to bring joy into their lives and to contribute something to them. You heard from Mandy Kio to remind you that just as justice is due to Timothy Hudson, it's due to Mollie Ewings, too.

R. V 522-23.

The prosecutor's admonition to the jury not to consider this personal information about the victim as an aggravating circumstance is straight out of Alice in Wonderland. Why argue it? Why stress it to the jury if she didn't expect twelve non-lawyers to understand it as detrimental to Mr. Hudson? The prosecutor said "You heard from [Mandy Kio] to remind you that as Mr. Donerly wants you to view Timothy Hudson as an individual,

Mollie Ewings was an individual." How else is that statement to be considered except to diminish or contrast with Mr. Hudson's evidence? Just saying the words "this is not an aggravating circumstance and you shouldn't consider it as such" does not change the character of the evidence or how it is used.[38]

The prosecutor's comment "just as justice is due to Timothy Hudson, it's due to Mollie Ewings, too" is nothing more than a effort to use the victim impact testimony as a "Characterization[ ] and opinion [ ] about the crime, the defendant, and the appropriate sentence[ ]" contrary to the express language of the statute. See Fla. Stat. § 921.141(7).

B. Legislative History of 921.141(7)

The trial court allowed this testimony under § 921.141(7) Fla. Stat. (1992) which provides:

> (7) VICTIM IMPACT EVIDENCE. - Once the prosecutor has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentences shall not be permitted as part of victim impact evidence.

This subsection was enacted by the 1992 Florida Legislature. Chapter 92-81, Session Laws. Senate Bill 362 by Sen. Dick Langley (R-Clermont) was enacted as introduced, no amendments

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[38] "Furthermore, the cleansing effect of the cautionary instructions in this case is dubious for, as the trial judge himself observed during the trial, '[y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good.'" O'Rear v. Fruehauf Corp., 554 F.2d 1304, 1309 (5th 1977).

were offered in the Senate and a House amendment was unrelated to this issue.[39] The Senate Bill was referred to the Committee on Criminal Justice and the Judiciary where a Senate Staff Analysis and Economic Impact Statement dated January 27, 1992, reads:

> B. Effect of Proposed Changes:
>
> SB 362 would amend s. 921.141, F.S., to specify that victim impact evidence would be admissible in the sentencing phase of a capital felony trial. The bill provides that once the prosecution has shown the existence of aggravating circumstances and the defendant has shown mitisating evidence of his uniqueness as a human being, the state could then introduce and argue victim impact evidence. This evidence would be designed to show the victim's uniqueness as a person and the loss to the community as a result of his death. Characterizations and opinions about the crime, defendant, and appropriate sentence would be impermissible under the bill.

Senate Staff Analysis and Economic Impact Statement, January 27, 1992, at 2 (emphasis added)(Attached as Exhibit C). Thus, the

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[39] Few Legislative records can be located in the Florida State Archives. The only existing committee records are from a January 21, 1992, meeting of the Senate Committee on Criminal Justice which passed SB 362 out 5-1. A very poor tape recording of the meeting reveals less than two minutes discussion on the bill. Senate sponsor Dick Langley appeared on behalf of Bill 362 but his comments are completely unintelligible. Senator Helen Gordon Davis asks a single question about this Court's reconsideration of Burns v. State. 16 Fla.L.Weekly S389 (Fla. May 16, 1991). The committee chairman is heard to comment on the Bill: "This is so simple." Records of the Senate Committee on Criminal Justice, Series 625, Box 599, tape 1 of 1 dated January 21, 1992, Florida State Archives. The Bill was approved by the full Senate on the consent calendar 37-1 on February 6, 1992. It did not receive any committee hearings in the House which passed it 114-2 on March 11, 1992. Journals of the Florida House of Representatives, Volume II, Continuation of Regular Session, 1992 March 10 - March 13, 1992. pgs. 1412 and 1477. (Attached as Exhibit A). The Senate then passed the amended bill on March 12, 1992. Journal of the Senate, State of Florida, Continuation of Twenty-Fourth Regular Session Under the Constitution as Revised in 1968 January 14 Through March 13, 1992. vol. II, pg. 1486. (Attached as Exhibit B).

bill as understood by the Florida Senate was obviously limited to rebuttal testimony, to be heard only if and after "the defendant has shown mitigating evidence of his uniqueness as a human being."

After the Senate passed SB 362 it arrived in the Florida House of Representatives where it was referred to the Committee on Criminal Justice. That committee approved the bill and filed a Final Bill Analysis & Economic Impact Statement dated April 22, 1992. The Analysis discusses this Court's holdings on Art. 1, Sec. 16(b) of the Florida Constitution, victim impact testimony, and Supreme Court law under Booth v. Maryland, 482 U.S. 496 (1987) and Payne v. Tennessee, 501 U.S. 808 (1991), at 3-4.[40] It goes on to set out changes the law was intended to accomplish:

> B. Effect of Proposed Changes:
>
> This bill amends ss. 921.141 and 921.142, Fla. Stat., to provide that the prosecution may introduce, and subsequently argue, victim impact evidence during the separate sentencing proceeding in a capital felony or a capital drug trafficking felony case. Victim impact evidence may be introduced once the prosecution has provided evidence of the existence of one or more statutory aggravating circumstances. The victim impact evidence must be designed to demonstrate the victim's uniqueness as a human being and the resultant loss to the members of the community by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence cannot be part of the victim impact evidence.

House Final Bill Analysis & Economic Impact Statement, April 22, 1992, at 4 (emphasis added)(Attached as Exhibit D). Although the

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[40] Both staff reports make reference to this Court's reconsideration of Burns v. State, in light of Payne but were prepared before this Court's revised opinion published at Burns v. State, 609 So.2d 600, 605 (Fla. 1992).

House version is less clear as to whether victim impact testimony was intended as rebuttal testimony only, the language of the bill approved by the House was identical to that approved earlier by the Senate where the intent is clear.

C. As Used in This Record, the Victim Impact Evidence Violates the Statute, Windom v. State and Archer v. State

Mr. Hudson is aware this Court rejected this claim at Windom v. State, 656 So.2d 432, 438-39 (Fla.), cert. denied, 133 L.Ed.2d 495 (1995)[41] and Archer v. State, 21 Fla.L.Weekly S119, S120 (Fla., March 14, 1996). In deciding Windom this Court endorsed the Fourth District Court of Appeals opinion at Maxwell v. State, 647 So.2d 871 (Fla. 4th DCA 1994), which in turn relied upon Glendenins v. State, 536 So.2d 212 (Fla. 1988), cert. denied, 492 U.S. 907 (1989), calling victim impact evidence a procedural rather than substantive matter.

Yet here the prosecutor presented and argued the victim impact testimony as a non-statutory aggravating factor,[42] presenting it as the lead aspect of her case and seeking to persuade the jury that Mr. Hudson deserved a death sentence because of uniqueness and individual qualities of this victim.

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[41] When deciding this issue in Windom this Court was confronted with a Record where no express objection was made at the trial level to the victim impact evidence: "...defendant did not object to this testimony specifically, and thus his objection on appeal is procedurally barred." 656 So.2d at 438. In contrast, Mr. Hudson made express and explicit objections to this kind of evidence and to the constitutionality of the new statute as applied to him. R. II 281-325.

[42] See Argument XV (reliance upon non-statutory aggravators fails to narrow the class of persons eligible for death and renders the death penalty in Florida unconstitutional).

On this record the presentation and use of victim impact testimony violates the express terms of the statute, violates the procedural safeguards the Legislature thought it had built into the statute when it was enacted, and violates the guidelines set forth by this Court in Windom.

Mr. Hudson has also argued that this is an ex post facto application of the law to him and nothing written here should be read as a waiver of that argument. He maintains that application of the victim impact statute to him is a violation of Miller v. Florida, 482 U.S. 423 (1987).

Mr. Hudson's death sentence should be reversed and a life sentence imposed. In the alternative, his death sentence should be vacated and the matter remanded for another punishment phase.

ARGUMENT VI

MR. HUDSON'S RIGHTS WERE VIOLATED WREN THE STATE EXERCISED ITS PEREMPTORY STRIKES IN A RACIALLY DISCRIMINATORY **MANNER IN VIOLATION OF THE FIFTH,** SIXTH, **EIGHTH AND FOURTEENTH AMENDMENTS.**

During jury selection at Mr. Hudson's resentencing, prosecutors improperly struck a potential black juror, using a peremptory strike.[43]

During voir dire Mr. Siplin was asked about his ability to vote for a death verdict:

> MS. COX: And is your position that under any circumstances you would not be able to recommend the death penalty if the -- if you heard from family members, the defendant, and they were in the courtroom?

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[43] Mr. Hudson is black. The victim in this cause is white (R. IX 1-2).

MR. SIPLIN: Well, it would be a lot of doubt in my mind because I'm a strong family man and I don't know if seeing his family in the courtroom would affect me somehow make my decision [sic].

R. IV 27. Mr. Hudson's defense attorney returned to Mr. Siplin on this matter and rehabilitated him:

MR. DONERLY: And, Mr. Siplin, I understood you also to say that there would be at least difficulty seeing Mr. Hudson's family sitting in the courtroom, listening to them testify about what had been argued are mitigating factors; however, despite that difficulty, do you still believe that you can listen to the instructions from the Court and can weigh the aggravating and mitigating circumstances and consider both penalties and make a recommendation to the Court?

MR. SIPLIN: Yes.

R. IV 36.

The State then used a peremptory challenge on black juror Siplin. The defense made a timely objection under Batson v. Kentucky, 476 U.S. 79 (1986) and State v. Slappy, 522 So. 2d 18 (Fla. 1988), to the prosecution's discriminatory exercise of peremptory challenges at his trial:

MS. COX: And, your Honor, he -- Mr. Siplin, although he was equivocal about whether or not he would be able to render a death recommendation with the defendant's family in the courtroom, he said he was a strong family man and it would be very difficult for him. So I don't think he raised a level of cause, on the other hand, his answer gave me concern.

MR. DONERLY: I thought he was reasonably well rehabilitated.

THE COURT: On the other hand, that is a race neutral reason. If he weren't a black man and you wanted to peremptory challenge him, I think we would all understand why. So that being the standard, I'm going to find that is a sufficient reason.

MR. DONERLY: I just wish that our objection be clear on that, your honor."

R. IV 58-59.

The explanation given for the peremtory challenge of Mr. Siplin was pretextual, not race nuetral and not supported by the answers given by this potential juror during voir dire.[44]

In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court held that the equal protection clause of the Fourteenth Amendment prohibited the prosecutor from exercising his peremptory challenges solely on the basis of race. If the defendant makes a prima facie case for purposeful discrimination of a cognizable race group, the burden shifts to the prosecutor to rebut the inference with racially neutral explanations for the challenges. The prosecution's answers at Mr. Hudson's trial concerning the strikes of these black jurors were not race neutral and were not supported by the record. The judge recognized that on at least one of the occassions, the prosecutor was attempting to strike a juror for entirely pretextural reasons. The prosecution's exercise of peremptory challenges was for the sole purpose of excluding blacks from the jury in order to deny Petitioner his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Florida Constitution.

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[44]Later in voir dire the prosecutor used a peremptory challenge on another black potential juror, Mrs. Rhonda Williams, in spite of her strong feelings against cocaine use (R. IV 62, 63). Mr. Hudson again made a Neil/Batson objection to the peremptory challenge. The prosecutor again offered her reasons, but this time the trial court sustained Mr. Hudson's objection, implicitly recognizing that the State's proffered reasons were pretextual (R. IV 80-81).

ARGUMENT VII

MR. HUDSON WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AND HIS RIGHT TO BE TRIED BY A JURY OF HIS PEERS BY THE TRIAL COURT'S EXCLUSION OF POTENTIAL JURORS ON THE BASIS OF THEIR VIEWS OF THE DEATH PENALTY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Mr. Hudson's resentencing, six jurors were improperly excused for cause from the jury panel based upon their response to questions about their ability to give the death penalty.

During voir dire, the Prosecutor stated the following to the first twelve jurors:

> And a murder with aggravating circumstances, if there are no mitigating circumstances or the mitigating circumstances are outweighed by the aggravating circumstances, is a murder that should get the death penalty.[45]
>
> Is there anybody here who **cannot** follow that law?

R. IV 16. Three potential jurors responded to this inquiry -- Motes, Downs and Hearsum. Id. at 16, 17. Ms. Hearsum stated only that she did not "think" she could pass judgment (Id. at 17), but was never asked whether she would follow the instructions of the court. None of these three jurors were asked proper follow up questions by the court to determine their ability to listen to the instructions and the three were all struck for cause. Id. at 20-21.

In response to another question from the Prosecutor --

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[45] This was an incorrect statement of the law and should have been stricken by the Court. A life sentence can be recommended by the jury even if no mitigating circumstances exist and for any reason at all. The Prosecutor's statement that certain circumstances mandate a death penalty is mistatement of law, in violation of Gregg v. Georgia, 428 U.S. 153 (1976) and Proffitt v. Florida, 428 U.S. 242 (1976).

"Anybody here that you're not going to be able to do it knowing the tremendous consequences that your opinions will have in this case?" -- potential juror Menendez indicated yes. Id. at 23. The prosecutor then went on to make the following improper statement:

> It's possible that in the course of these proceedings not only will you see Mr. Hudson here, but you will hear from members of his family. People who will -- who obviously care for him and you'll realize that your decision is going to have an effect on them.
>
> Now, know that, is there anybody here who thinks that they would be incapable of recommending the death penalty when Mr. Hudson's mother is sitting in the courtroom, or his sister, or his brother or his father?
>
> Anybody here who that would just be so much pressure that even though you know the law requires it, you don't want to be in any way a part of saying that in front of his family members who didn't do anything?

Id. 25-26. Not only is this statement not based on any evidence in the record (see Argument IV), it is also irrelevant to the voir dire of the potential jurors. It is nothing more than a veiled attempt to exclude jurors who may be unsure of their ability to vote for death. The proper inquiry is whether the potential jurors can follow the law, not whether the fact that the defendant has family might be something they consider during their deliberations. The law is clear that jurors may consider any mitigation in the penalty phase deliberations, including the fact that the defendant has family members who care for him. See Lockett v. Ohio, 438 U.S. 586 (1978).

Juror Menendez was struck for cause without any further questions concerning her ability to follow the law. R. IV 58.

Two other jurors were struck for cause with limited questioning about their ability to follow the law. Specifically,

the prosecutor asked if there was "[a]nything that would affect [your] ability to follow law? Id. at 120. Potential juror Grattan responded that she could not recommend the death penalty for anyone under any circumstances and was immediately excused without any further questioning. The court failed to inquire about her ability to follow the instructions on the law.

The second potential juror, Ms. Vasquez, was equivocal in her response to the question. The following colloquy took place between her and the Prosecutor:

> VASQUEZ: Yes, I do. I'm a nurse in a psychiatric unit, and I'm a nurse, and, you know, I've taken a pledge to preserve life. So I think that might alter my, you know, my decision, and because I do work in a psychiatric unit, maybe things that the psychiatrist or psychologist or, you know, say might alter my decision, too, so.
>
> COX: Do you think that by your profession that that is going to make it very difficlut or impossible for you to recommend someone be sentenced to death because it is inconsistent?
>
> VASQUEZ: It might be.

Id. at 120-121. The judge immediately excused Ms. Vasquez without allowing defense counsel to question her, although she never stated that she certainly could not vote for death, and although she was never questioned about her ability to follow the judge's instructions on the law. Defense counsel was not given an opportunity to ask follow up questions of Jurors Vasquez or Grattan to determine whether they genuinely could consider voting for a penalty of life imprisonment if they found Mr. Hudson guilty of murder.

In Wainwrisht v. Witt, 469 U.S. 412 (1985), the United

States Supreme Court held that a prospective juror may only be excused for cause whenever his or her attitude about capital punishment would prevent or substantially impair his or her ability to follow the charge of the court on punishment. The circuit court's exclusion of these jurors without proper and adequate inquiry concerning juror attitudes with respect to imposition of capital punishment prevented Mr. Hudson from establishing cause under Wainwrisht v. Witt for excusal of potential jurors on this basis.

The proper inquiry is whether the potential juror is "willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. Witherspoon, 391 U.S. 510, 521 n. 21 (1968). As the United States Supreme Court has noted:

> Unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequent imposed death penalty cannot stand.

Davis v. Georgia, 429 U.S. 122, 123 (1976).

These six jurors never came close to expressing the "unweilding conviction and rigidity of opinion regarding the death penalty which would allow their excusal for cause." Chandler v. State, 442 So. 2d 171, 172-174 (Fla. 1983). It is not enough that the juror is more predisposed to a life sentence

than to death. Id. Excusal for cause under Withersnoon can only be proper when the potential juror makes unmistakeably clear that they would automatically vote for life regardless of the evidence presented in the penalty phase or of the information offered by the prosecutor. Relief is proper.

ARGUMENT VIII

MR. HUDSON'S SENTENCE OF DEATH IS BEING EXACTED PURSUANT TO A PATTERN AND PRACTICE OF FLORIDA PROSECUTING AUTHORITIES, COURTS AND JURIES TO DISCRIMINATE ON GROUNDS OF RACE, SEX, AND POVERTY IN THE ADMINISTRATION OF RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The death penalty in the United States, and particularly in the State of Florida, has been discriminately imposed against blacks, males and poor persons. The probability of execution is overwhelmingly greater in cases where, as in this case, the accused is black, poor and male and the victim is white and female. Mr. Hudson's death sentence was imposed pursuant to this pattern of racial, economic and sexual discrimination.

The discriminatory imposition of the death penalty is demonstrated both by statistical evidence and by independent indicia that show that Mr. Hudson was specifically discriminated against because he is a black, poor male, and because his victim was a white female.

In the early 1980s, researchers conducted a study whereby they traced cases that had gone through the court system in one southern state to see if there was any statistical evidence demonstrating that factors of race, sex or economic status of the

accused had a predictable outcome on the imposition of the death penalty in capital cases. In the now famous **"Baldus"** study, researchers concluded that, indeed, there were such connections. A similar study was conducted in Florida by sociologist Michael Radelet. See Choosing Those Who Will Die: Race and the Death Penalty in Florida, 43 Fla. L. Rev. 1 (1991). This study traced cases in the Florida court system to determine what role factors such as race and sex of the victim and defendant played in the imposition of death sentences.

The study found that (1) cases with white victims are almost six times more likely to involve a death sentence, (2) black defendants are almost twice as likely to be sentenced to death as white defendants, (3) a black defendant suspected of killing a white defendant is fifteen times more likely to be sentenced to death than a black defendant killing a black defendant, (4) suspects with female victims are more likely to receive a death sentence than those with male victims, (5) defendants suspected of killing a white female are five times more likely than those suspected of killing a black female, and (6) a black defendant suspected of killing a white woman is fifteen times more likely to be condemned than a black defendant who has killed a black woman. Id. The study also took other predictors of a death sentence into account such as contemporaneous felonies, location, familiarity with the victim, number of victims and use of a weapon. The study found that of all of these, the second strongest predictor of a death sentence was the race of the

victim. Id. at 28. The study concluded that the "odds of a death sentence are 3.42 times higher for defendants who are suspected of killing whites than for defendants suspected of killing blacks." Id.; see also Where the Iniured Fly for Justice," Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission (Dec. 11, 1991)("The Commission find that racial factors affect the administration of the death penalty in Florida.")

These connections are clearly apparent in the prosecution and conviction of Mr. Hudson. Mr. Hudson, a black male, was convicted of killing a white female. According to both studies, Mr. Hudson is in the highest risk category of any combination of sex and race of both victim and defendant for receiving a death sentence.

Mr. Hudson notes that at this time general statistical information, even demonstrating the strong connections that have been shown between race, sex, and economic characteristics of the accused and the victim as bearing upon the likelihood that a death sentence would be imposed, is not enough, and that to succeed with a Fourteenth Amendment claim a petitioner must demonstrate either that the decisionmakers in his case acted with discriminatory purpose, or that the decisionmakers possessed racial biases that created "an 'unacceptable risk' that affected the sentencing decision.," Dobbs v. Zant, 720 F. Supp. 1566, 1572 (N.D. Ga. 1989). See also McClesky v. Kemp, 481 U.S. 279, 282 (1987). Florida rules prohibiting Mr. Hudson from

interviewing jurors preclude him from making this showing. See Florida Rule of Professional Responsibility 4-3.5(d)(4) (a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial in which that juror participated). This prohibition restricts Mr. Hudson's ability to allege and litigate constitutional claims which may very well ensure he is not executed based on an unconstitutional verdict of guilt and/or sentence of death.

The record is clear that the decisionmakers in Mr. Hudson's case acted with a discriminatory purpose. The decision to seek the death penalty in Mr. Hudson's case and the sentence of death was a direct result of the inherent discrimination in Florida's death penalty statute.

ARGUMENT IX

MR. HUDSON'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT REFUSED TO INSTRUCT HIS JURY THAT HIS LIFE SENTENCE WOULD BE WITHOUT ELIGIBILITY OF PAROLE.

Mr. Hudson was subject to a life sentence as a result of his accompanying burglary conviction. Hudson v. State, 538 So. 2d 829, 829 n.1 (Fla.), cert. denied 493 U.S. 875 (1989). He also was subject to a fifteen year sentence for the sexual battery of Linda Benjamin. R IX 18. At his first capital trial a life sentence would have meant he could not be considered for parole for at least twenty-five years, but the law had changed by the time of his resentencing and life now meant no possibility of parole. Fla. Stat. § 775.082(1). Mr. Hudson asked the trial court to sentence him under the new law and to so instruct the

jury. Counsel pointed out that "life 25 was always life without parole anyway." R VII 493-95.

The Supreme Court has often recognized that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." Jurek v. Texas, 428 U.S. 262, 275 (1976)(plurality opinion). A state death penalty statute need not require a future dangerousness verdict to put the issue in play with a punishment phase jury. Simmons v. South Carolina, 114 S.Ct. 2187 (1994). The issue of a defendant's future dangerousness is a proper consideration for the jury when it is weighing the aggravating factors agains the mitigators. Due process requires that the jury be given accurate information when engaging in sentencing phase determinations.

In Simmons, the Supreme Court found that due process if offended when a capital defendant is prevented from rebutting the assertion that his future dangerousness should be considered as an aggravating circumstance, be it a statutory aggravating circumstance of not. Further, the Court found that "a defendant's future dangerousness bears on all sentencing determinations in our criminal justice system," Id. at 2193, and that when "assessing future dangerousness, the actual duration of the defendant's prison sentences is indisputably relevant." Id. at 2194. Mr. Hudson's jury received incomplete, inaccurate information concerning the duration of his sentence and his potential future dangerousness. A resentencing is required.

ARGUMENT X

MR. HUDSON'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE IN VIOLATION OF MAYNARD V. CARTWRIGHT, LOWENFIELD V. PHELPS, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Florida, the "usual form" of indictment for first-degree murder under Fla. Stat. § 782.04 murder . . . committed with a premeditated design to effect the death of [the victim]." Barton v. State, 193 So. 2d 618, 624 (Fla. 2d DCA 1968). Mr. Hudson was charged with first-degree murder in the "usual form": i.e., murder "from a premeditated design to effect the death of" [the victim] in violation of Fla. Stat. § 782.04. An indictment such as this which "tracked the statute" charges felony murder: sec. 782.04 is the felony murder statute in Florida. Lishtbourne v. State, 438 So. 2d 380, 384 (Fla. 1983).[46]

The prosecutor, in her closing argument, told the jury:

> The first aggravating circumstance is that her murder was done in the course or commission of a burglary. There's no doubt about that, and the judge is going to tell you that he's already been convicted of a burglary, as he has already been convicted of murder.

R. VII 507. The court thereafter charged the jury that as a second possible aggravating circumstance, they could consider whether "the crime for which the defendant is to be sentenced, was committed while he was engaged in the crime of a burglary of

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[46] The defense filed a pretrial Motion to Declare § 921.141 and/or §921.141(5)(d) and/or the Standard (5)(d) Instruction Unconstitutional Facially and as Applied, arguing that this was an automatic aggravator and did not apply in Mr. Hudson's case. R. II 220-23, VIII 613-25. This motion was denied. Id.

which he has been convicted." R. VII 546.

There is no way at this juncture to know whether the jury relied on this aggravating circumstance in returning its death recommendation. In Mavnard v. Cartwright, 486 U.S. 356, 362 (1988), the Supreme Court held that the jury instructions must "adequately inform juries what they must find to impose the death penalty." Hitchcock v. Dugger, 481 U.S. 393 (1987), and its progeny require Florida sentencing juries to be accurately and correctly instructed in compliance with the Eighth Amendment.

The court itself found as one of the two aggravating circumstances that "the capital felony was committed while the defendant was engaged in the commission of an armed burglary." R. III 398.

If felony murder was the basis of the conviction, then the subsequent death sentence is unlawful because it is predicated upon an automatic finding of a statutory aggravating circumstance -- the very felony, i.e. burglary, that formed the basis for conviction. Cf. Stromberg v. California, 283 U.S. 359 (1931). Automatic death penalties imposed upon conviction of first-degree murder violate the Eighth and Fourteenth Amendments. Sumner v. Shuman, 483 U.S. 66 (1987).

As the present sentencing scheme operates every felony-murder involves, by necessity, the finding of a statutory aggravating circumstance. This fact, under the particulars of Florida's statute, violates the Eighth Amendment since an automatic aggravating circumstance is created which does not

narrow. Zant v. Stephens, 462 U.S. 862, 876 (1983)("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ."). In short, if Mr. Hudson was convicted of felony murder, he then faced an automatic statutory aggravator. This system is too circular and capricious to meaningfully differentiate between who should live and who should die. More importantly, it violates the Eighth and Fourteenth Amendments.

The United States Supreme Court addressed a similar challenge in Lowenfield v. Phelss, 484 U.S. 992 (1988). The discussion in Lowenfield illustrates the constitutional shortcoming in Mr. Hudson's capital sentencing proceeding. In Lowenfield, the petitioner was convicted of first-degree murder under Louisiana law which required a finding that he had "a specific intent to kill to inflict great bodily harm upon more than one person," which was the exact aggravating circumstance used to sentence him to death. The United States Supreme Court found that the definition of first degree murder under Louisiana law that was found in Lowenfield provided the narrowing necessary for eighth amendment reliability. Id. However, the Court in Lowenfield noted the difference in schemes like the ones in Louisiana and Texas, on the one hand, and the Georgia and Florida schemes (citing Proffitt v. Florida, 428 U.S. 242 (1976)). By implication a different result would occur under the Florida scheme.

Thus, if narrowing occurs either in the conviction stage (as

in Louisiana and Texas) or at the sentencing phase (as in Florida and Georgia), then the statute satisfies the Eighth Amendment. As applied in this case, however, the operation of Florida law failed to provide constitutionally adequate narrowing at either phase because the conviction and the aggravation were predicated upon the same factor, i.e. felony-murder.

The conviction-narrower state schemes require something more than felony-murder at guilt/innocence. Louisiana requires intent to kill. Texas requires intentional and knowing murders. This narrows. Here, however, Florida allows a first-degree murder conviction based upon a finding that expands the class eligible for the death penalty rather than narrowing it. Mr. Hudson's conviction of first-degree murder required only a finding that he committed a felony during which a killing occurred, and as the prosecutor and court explained to the jury no finding of premeditation was necessary for a felony murder conviction.

Clearly, "the possibility of bloodshed is inherent in the commission of any violent felony, and . . . is foreseen," Tison v. Arizona, 481 U.S. 137, 151 (1987), but armed robbery, for example, is nevertheless an offense "for which the death penalty is plainly excessive." Id. at 148. The same is true of burglary, as Proffitt, 428 U.S. 242 (1976)(burglary felony murder insufficient for death penalty) made clear. With felony-murder as the supposed narrower in this case, neither the conviction nor the statutory aggravating circumstance does not meet constitutional requirements. There is no constitutionally valid

criteria for distinguishing Mr. Hudson's sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

ARGUMENT XI

MR. HUDSON'S ABSENCE FROM CRITICAL STAGES **OF** THE PROCEEDINGS PREJUDICED HIS PENALTY PHASE AND VIOLATED THE FIFTH, SIXTH. EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During the trial, Mr. Hudson was absent from several bench conferences where critical discussions concerning his resentencing were held.

At the beginning of the voir dire, the trial judge stated to the jury panel that the possible sentences were death or life without parole. R. IV 4. Defense counsel, who had earlier filed a motion requesting that the judge instruct the jury on life without parole, requested a bench conference. At the bench conference, counsel argued about this possible instruction and how the jury should be instructed regarding Mr. Hudson's sentence on the prior crime. Id. at 4-6. Although the discussions concerned vital considerations that the jury would undertake in the determining whether Mr. Hudson should be sentenced to death, Mr. Hudson was not present at this conference.

Counsel for both the state and defense again approached the bench in the middle of voir dire to discuss the dismissal of jurors for cause based upon their answers concerning the death penalty. R. IV 18. At this conference, the judge and counsel addressed the questio of removing **several jurors** from the panel. Id. As noted in Argument VII, the removal of these jurors was

improper and was in contravention of established law. This conference determined whether Mr. Hudson was tried by a fair and impartial jury of his peers, yet Mr. Hudson was not present at the conference.

During closing, the prosecutor impermissibly commented on Mr. Hudson's failure to call mental health experts to testify. R. VII 521. Defense counsel requested a bench conference, where he objected to this argument and moved for a mistrial. Id. Mr. Hudson was not present at this bench conference and did not participate. No waiver of presence was sought by counsel nor by the court. Mr. Hudson's exclusion from this conference was error.

A similar error occurred at the close of the testimony of Officer Bush. Defense counsel requested a bench conference to discuss a number of objections. R. V 286. Mr. Hudson was not present at this conference. The discussions concerned the admissibility of Mr. Hudson's prior convictions. These convictions were used to support one of the two aggravating factors found by the trial court, and were critical in the resentencing proceedings. Again, the exclusion of Mr. Hudson from this conference constitued error. Although these conferences concerned critical decisions about witnesses, evidence, and Mr. Hudson's fate, he was not present and did not participate in any way in any of them.

A capital defendant is absolutely guaranteed the right to be present at all critical stages of judicial proceedings. This

right is guaranteed by the federal constitution, see, e.g., Drope v. Missouri, 420 U.S. 162 (1975); Illinois v. Allen, 397 U.S. 337 (1970); and Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), by Florida constitutional and statutory standards, Francis v. State, 413 So. 2d 1175 (Fla. 1982), and by Rule 3.180 of the Florida Rules of Criminal Procedure.

A capital defendant has "the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence." Francis, 413 So. 2d at 1177. This right derives in part from the Confrontation clause of the Sixth Amendment and the Due Process clause of the Fourteenth Amendment. Proffitt, 685 F.2d at 1256.

The federal constitution defines those stages where presence is required as any proceeding at which the defendant's presence has a "reasonably substantial relationship to his ability to conduct his defense." Proffitt, 685 F.2d at 1256. The determination of whether the defendant's presence is required should focus on the function of the proceeding and its significance to trial. Proffitt, 685 F.2d at 1257.

A defendant's constitutional right to presence at his criminal trial is a cornerstone of the American justice system. This right grows out of the Confrontation Clause of the Sixth Amendment, but has been expanded by the Due Process Clause to cover many situations where the defendant is not confronting witnesses or evidence. United States v. Eagnon, 470 U.S. 524 (1985) ; see United States v. Chrisco, 493 F.2d 232 (8th Cir.

1974) (voir dire); Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984) (communications between judge and jury); Lee v. State, 509 P.2d 1088 (Alaska 1973) (rendering of the verdict).

Mr. Hudson was denied this basic right when the trial court excluded him from numerous conferences throughout the trial. This was in direct contravention of the decision in Kentucky v. Stincer, 482 U.S. 730 (1987), in which the Supreme Court held that "a defendant is entitled to be present at any stage of a criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." 482 U.S. at 745. The Court recognized that a defendant had no right to be present at a proceeding "when presence would be useless, or the benefit would be just a shadow." Stincer, 482 U.S. at 745, quoting Snyder v. Massachusetts, 291 U.S. 97, 106-107 (1934).

Following Stincer, several courts have held that if a defendant could contribute to the fairness of the particular hearing or assist in the decision making process, he has a right to be present at that hearing. State v. Seaberry, 388 S.E.2d 184 (N.C.App. 1990); State v. Caldwell, 388 S.E.2d 816 (S.C. 1990); United States v. Shukitis, 877 F.2d 1322 (7th Cir. 1989). In Mr. Hudson's case, his presence was essential to the fairness of the hearings as he had the most to contribute to the decision making process. Mr. Hudson's presence at these conferences was necessary and required. Under the rule of Stincer, Mr. Hudson was clearly entitled to attend these critical bench conferences because his presence would have significantly affected the

outcome and the fairness of the proceeding.

These involuntary absences constitute fundamental error, see, Salcedo v. State, 497 So. 2d 1294 (Fla. 1st DCA 1986), and Mr. Hudson is entitled to relief on this claim.

ARGUMENT XII

THE TRIAL COURT'S IMPROPER RULINGS DENIED MR. HUDSON HIS RIGHT TO A FAIR TRIAL, DUE PROCESS AND THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The circuit court's denial of the majority of Mr. Hudson's pre-trial motions precluded Mr. Hudson from receiving a full and fair setencing hearing and denied him due process of the law. These motions were proper and based upon valid case law, and should have been granted. The Court denied the following motions: Motion to Preclude the Death Penalty (R. I 58-85, R. VIII 590-97); Motion to Withdraw Plea of in the Alternative, Petition for Writ of Error Coram Nobis (R. I 86-96, R. VIII 569-90); Motion to Preclude Enhancement Based on Prior Conviction (R. I 97-99, R. VIII 569-90); Motion for Daily Transcripts of Trial (R. I 100-103, R. VIII 598); Motion for Pretrial Ruling of Admissibility of Penalty Phase Evidence (R. I 104-05, R. VIII 598-99); Motion in Limine re: Penalty Phase (R. I 106-07, R. VIII 599-601); Motion in Limine to Strike Portions of Florida Standard Jury Instructions in Criminal Cases (R. I 108-10, R. VIII 601); Motion for Disclosure of Impeaching Evidence (R. I 115-17, R. VIII 602-03); Motio to Declare § 921.141 Unconstitutional Because it Precluded Consideration of Mitigation by Imposing Improper

Burdens of Proof or Persuasion (R. I 124-30, R. VIII 604-05); Motion to Declare § 921.141 Unconstitutional for Lack of Adequate Appellate Review (R. I 131-57, R. VIII 605-07); Motion to Declare § Unconstitutional Because Only a Bare Majority of Jurors is Sufficient to Recommend a Death Sentence (R. I 158-60, R. VIII 607-08); Motion to Declare § 921.141 Unconstitutional for Failure to Provide Adequate Guidance in the Finding of Sentencing Circumstances, and to Preclude the Death Sentence, or to Allow Unrestricted Consideration of Mitigating Evidence (R. I 161-75, R. VIII 608-10); Motion for Findings of Fact by the Jury (R. I 191-92, VIII 610-11); Motion for Statement of Particulars (R. II 196-210, R. VIII 612); Motion to Prohibit Reference to the Advisory Role of the Jury at Sentencing (R. II 211-12, R. VIII 612); Motion to Declare § 921.141 and/or § 921.141(5)(b) and/or the Standard (5)(b) Instruction Unconstitutional Facially and as Applied (R. II 213-219, R. VIII 612-13); Motion to Declare § 921.141 and/or § 921.141 (5)(d) and/or the (5)(d) Standard Instruction Unconstitutional Facailly and as Applied (R. II 220-23, R. VIII 613-15); Motion to Declare § 921.141 and/or § 921.141(5)(h) and/or the Standard (5)(h) Instruction Unconstitutional Facially and as Applied (R. II 227-43, R. VIII 615); Motion to Declare § 921.141 Unconstitutional and/or to Declare § 921.141 (5)(i) Unconstitutional Facially and as Applied (R. II 244-60, R. VIII 615-16); Motion to Prohibit Testimony of Survivors (R. II 281-83, R. VIII 632-39); Motion to Exclude Evidence or Argument Designed to Create Sympathy for the Deceased

(R. II 284-94, R. VIII 632-39); Motion to Exclude Victim Impact Evidence and Argument, Motion to Declare §§ 921.141 and 921.141(7) Unconstitutional (R. II 295-318, R. VIII 632-39); Motion to Prohibit Application of Charter 92-81 as as Ex Post Facto Law (R. II 319-22, R. VIII 632-39). Because of the page limits of this brief, Appellant will rely upon the arguments made in the resentencing below with respect to these motions, except to the extent that further arguments relating to the denial of the motions are presented to this Court in other claims in the brief.

Additionally, the circuit court repeatedly overruled proper objections made by the defense counsel, thereby denying Mr. Hudson his right to a fair sentencing procedure and due process of law. R. V 150, 155, 177, 183, 280-82, 283, 285-86, VII 521, 551).

As a result of these and other improper trial court rulings and prosecutorial misconduct pled throughout this pleading, Mr. Hudson was denied his rights to due process and equal protection under the United States Constitution and the corresponding provisions of the Florida Constitution. Mr. Hudson's sentence of death must therefore be reversed.

ARGUMENT XIII

THE AGGRAVATING CIRCUMSTANCE OF PRIOR VIOLENT FELONY IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD, AND WAS IMPROPERLY APPLIED IN MR. HUDSON'S CASE.

The "prior violent felony" aggravating factor of Fla. Stat. § 921.141 (5)(b) and its corresponding standard instruction are

unconstitutionally vague and overbroad and was applied in an overbroad, arbitrary and inconsistent fashion in this case.

The prior violent felony, as it has been interpreted in Florida, does not satisfy the constitutional concerns required in death cases. See Godfrev v. Georgia, 446 U.S. 420 (1980); Potter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990)(a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty).

This Court's application of the circumstance does not require the "prior" conviction be used as a basis for imposing a death sentence to be final. Even a conviction pending on appeal may be used as a circumstance. Ruffin v. State, 397 so. 2d 277, 282-83 (Fla. 1981); Peek v. State, 395 So. 2d 492, 499 (Fla. 1981). Such an interpretation violates the due process clause and equal protection rights to an appeal and the Eighth Amendment narrowing requirement and proscription that death sentences "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process,'" or on "materially inaccurate" information. Johnson v. Mississippi, 486 U.S. 578, 590 (1988).

The second problem is the expansion of the circumstance to permit contemporaneous violent felony convictions to be treated as "prior violent felony." Florida permits any conviction prior to sentencing to be treated as a prior violent felony, even if that conviction arises from the same criminal episode as the capital felony. Lucas v. State, 376 So. 2d 1149, 1152 (Fla.

1979). By allowing both contemporaneous convictions and non-final convictions to be used to support the aggravator of "prior violent felony", Florida has failed to sufficiently limit the application of this aggravator.

Additionally, the standard instruction, and the instruction given in Mr. Hudson's resentencing, is unconstitutionally vague in that it fails to adequately define for the jury what they must find to impose the death penalty. See Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988). The application of this unconstitutional aggravator to Mr. Hudson's case was error. Relief on this claim is proper.

ARGUMENT XIV

MR. HUDSON'S JURY WAS IMPROPERLY LED TO BELIEVE THAT THE RESPONSIBILITY FOR THE SENTENCE RESTED ELSEWHERE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Hudson's jury was repeatedly instructed that their role in the sentencing process was to only "recommend" a sentence. The trial court instructed the jury as follows:

> As you have been told, the final decision as to what punishment shall be imposed is my reswonsibilitv; however, it is your duty to follow the law that will now be given you by me and rendered -- and render to me an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence that has been presented to you in these proceedings.

R. VII 544 (emphasis added).

This error was compounded by repeated misstatements of the

juror's burden during voir dire. For example, the prosecutor commented to the jury panel: "Now, again, you have heard that your recommendation can be overridden." R. IV 93. What the prosecutor did not explain was that this recommendation could only be overridden if the trial court found that the facts suggesting a different sentence were **so clear** and convincing that no reasonable person could differ. Tedder v. State, 322 So. 2d **908, 912 (Fla. 1975).** Throughout the trial, the jurors were given improper statements concerning their duty without ever being informed of the proper weight for their verdict under Tedder. R. IV 3, 55-57, 79, 104.

Trial counsel moved for an instruction that would properly inform the jury of their role and made **a** timely objection to the court's instruction, but his motion and objection were denied. R. II 211-12, VII 499-500, VIII 612.

> The United States Supreme Court **has** held:
> It is constitutionally impermissible to rest **a death** sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

Caldwell v. Mississippi, 472 U.S. 320 (1985). In Mr. Hudson's case, the jurors were improperly allowed to believe that their sentence was only advisory, and were not adequately informed of their role in the sentencing process. This was error. The Caldwell rationale applies to the Florida's sentencing scheme, and requires that the jurors be given adequate full instructions concerning their sentence recommendation. Adams v. Wainwright, 804 F. 2d 1526, 1529-30 (11th Cir. 1986). Repeated references to

the advisory role of the jury in Mr. Hudson's case denied him due process and a fair trial as guaranteed by the Fifth, sixth, Eighth and Fourteenth Amendments.

ARGUMENT XV

THE DEATH PENALTY CONSTITUTES CRUEL AND UNUSUAL **PUNISHMENT IN THE STATE OF FLORIDA IN THAT IT IS APPLIED IN AN ARBITRARY AND CAPRICIOUS FASHION. THE APPLICATION OF THE DEATH PENALTY STATUTE TO MR. HUDSON VIOLATED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.**

For the same reason that the previous death penalty scheme was declared unconstitutional, the present scheme in Florida is unconstitutional in that it is impermissibly vague and promotes arbitrary and capricious prosecution and utilization, in violation of the Eighth and Fourteenth Amendment of the United States Constitution. United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977).

The current scheme outlines eleven circumstances where the death penalty may be imposed. However, no guidelines are provided to the differing jurisdictions' state attorneys on how to apply or interpret them. What constitutes a crime eligible for death penalty in one county may not be considered as an eligible death penalty crime in the adjacent county. Each state attorney in each county or circuit determines those cases that are death penalty eligible, instead of having a narrowly defined criteria to meet the requirements of the Constitution.

In Lockett v. Ohio, 438 U.S. 586, 605 (1978), the United States Supreme Court stated there is "no perfect procedure for deciding in which cases governmental authority should be used to

impose death." This is a critical issue because even though there is mandatory appellate review of each death sentence in Florida, there is no mandatory review of the other murder cases with aggravating circumstances not deemed death penalty eligible, and the review in and of itself does not even remotely address the issue as to when or why the government seeks to impose death. Mr. Hudson's case is a classic example of the flaw in the present death penalty scheme in Florida (see Argument I).

The United States Supreme Court, in Furman v. Georgia, 408 U.S. 238 (1972) warned that a system's standards could be so vague that the jury's sentencing decisions would not be properly channelled, with the result being arbitrary and capricious sentencing, To avoid the constitutional flaw found in Furman, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862 (1983). A system that does not clearly define standards for eligibility for the death penalty to guide in the exercise of sentencing discretion is constitutionally intolerable. United States v. Kaiser.

When the prosecutor announces she seeks the death penalty in a particular case, it is normal that the community will be placated. But, that still does not address the issue of why and when each prosecutor decides to seek the death penalty in a particular case. That means it is a discretionary decision of

the prosecutor's, and is therefore unacceptable under Furman and its progeny because the decision is subject to arbitrariness and capriciousness.

In Gardner v. Florida, 430 U.S. 349, the Supreme Court stated it "is of vital importance to the Defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Id. at 358. (Emphasis supplied). "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrev v. Francis, 613 F.Supp. 747, at 755 (D.C. Ga. 1985). The same argument applies to the instant matter before this court. Application of the Florida death penalty statute to Mr. Hudson violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

ARGUMENT XVI

MR. HUDSON'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE **FIFTH, SIXTH, EIGHTH, AND FOURTEENTH** AMENDMENTS.

> [Our] decisions underscore the truism that "[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). '[D]ue process is flexible and calls for such protections as the particular situation demands.' Morrissev v. Brewer, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. Arnett v. Kennedy, 416 U.S., at 167-68 (Powell, J., concurring in part); Goldberg v. Kelly,

> 397 U.S. 254, 263-266 (1970); Cafeteria Workers v. McElroy, 367 U.S., at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." See, e.g. Goldberg v. Kelly, 397 U.S., at 263-71.

Mathews v. Eldridge, 425 U.S. 319, 334-35 (1976)(emphasis added). Mathews, of course, dealt with the fundamental question of the necessity of requiring formal hearings on disputed issues. The Supreme Court's analysis of the considerations regarding the necessity of procedural safeguards is highly enlightening and instructive. Mathews teaches that it is simply not enough for the Government to provide "a process" to dispose of disputed matters. Rather, the process must be fair to all parties and must be flexible enough to accommodate the particular litigation involved. A capital defendant has a "constitutional right to a fair trial regardless of . . . [the crime]." Heath v. Jones, 941 F.2d 1126, 1131 (11th Cir. 1991).

Mr. Hudson contends that he did not receive the fundamentally fair sentencing to which he was entitled under the Eighth and Fourteenth amendments. It is Mr. Hudson's contention that the process itself has failed him. It has failed because the sheer number and types of errors involved in his resentencing, when considered as a whole, virtually dictated the sentence that he would receive.

The flaws in the system which sentenced Mr. Hudson to death are many. While there are means for addressing each individual error, the fact is that addressing these errors on an individual basis will not afford adequate safeguards against an improper conviction and improperly imposed death sentence -- safeguards which are required by the Constitution.

The Supreme Court has reiterated the point that death is an unusual penalty, unique in its severity, and thus greater caution and safeguards must be utilized to ensure the constitutional validity of each death sentence:

> Death is a different kind of punishment from any other which may be imposed in this country . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357 (1977)(citations omitted). This same principle was posited in Woodson v. North Carolina, 428 U.S. 280 (1976):

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a correspondins difference in the need for reliability in the determination that death is the appropriate wunishment in a specific case.

Woodson, 428 U.S. at 305 (emphasis added).

This rationale has been applied to both the sentencing and guilt-innocence phases of a capital defendant's trial:

To insure that the death penalty is indeed imposed on

> the basis of "reason rather than caprice or emotions," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasonins must apply to rules that diminish the reliability of the quilt determination.

Beck v. Alabama, 447 U.S. 625, 638 (1980)(emphasis added).

Mr. Hudson contends that numerous and varied violations occurred at both stages of his trial. These claims have been raised in his initial direct appeal, his appeal from his Motion to Vacate or are currently being raised. However, the claims which arise as a result of Mr. Hudson's resentencing should not only be considered separately. Rather, it is Mr. Hudson's contention that these claims should be considered in the aggregate, for when the separate infractions are viewed in their totality it is clear that Mr. Hudson did not receive the fundamentally fair trial and resentencing to which he was entitled under the Eighth and Fourteenth Amendments. The numerous constitutional claims in this petition show that this trial and resentencing were fundamentally flawed.

The United States Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman, 408 U.S. at 287 (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S.

862, 885 (1983). Accordingly, the cumulative effects of harmless error must be carefully scrutinized in capital cases.

A series of errors may accumulate a very real, prejudicial effect. The burden remains on the state to prove that the individual errors did not affect the verdict, and more importantly, that the cumulative impact of these errors did not affect the verdict. In Mr. Hudson's case, relief is proper.

ADDITIONAL CLAIMS

Because of page limitations, Mr. Hudson cannot provide further briefing to the Court on any additional claims. Mr. Hudson notes that he does not waive any constitutional claims and that he incorporates by specific reference to the motions, evidence and arguments made below each constitutional violation that occurred in his resentencing.

CONCLUSION

Appellant, Timothy Curtis Hudson, based on the foregoing, respectfully urges that the Court vacate his unconstitutional death sentence and grant all other relief which the Court deems just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing document has been furnished by United States Mail, first class postage prepaid, to all counsel of record on the 25th day of September, 1996.

Respectfully submitted,

KENNETH DAVID DRIGGS
Florida Bar No. 0304700
229 Chapel Drive
Tallahassee, Florida 32304
(904) 575-2988

M. ELIZABETH WELLS
Florida Bar No. 0866067
376 Milledge Avenue
Atlanta, Georgia 30312
(404) 614-2014

By: Jennifer M. Corey Fla. Bar No. 0999717
Counsel for Appellant

Copies sent to:

Candance Sabella
Department of Legal Affairs
Tampa Office
2002 North Lois Avenue
Suite 700
Tampa, Florida 33607-2366

EXHIBIT A

Journals

of the

Florida
House of Representatives

Volume II

1992

Continuation of Regular Session, 1992
March 10 - March 13, 1992

[Special Sessions are lettered from the Organization Session for the two-year term of the House of Representatives.]

and the title is amended as follows:

On page 1, line 2, after the semicolon insert: amending s. 794.011, F.S., creating the "Jimmy Ryce Martinez, Jr., Act of 1992"; prohibiting the grant of basic gain-time for persons convicted of sexual battery against certain persons;

Rep. Sansom moved the adoption of the amendment, which was adopted.

On motion by Rep. Long, the rules were waived by the required two-thirds vote and CS/HB 423, as amended, was read the third time by title. On passage, the vote was

Yeas—115

The Chair	Friedman	Jones, Dennis	Rojas
Abrams	Garcia	Kelly	Rudd
Albright	Geller	King	Rush
Arnall	Glickman	Langton	Safley
Arnold	Goode	Laurent	Sanderson
Ascherl	Gruber	Lawson	Sansom
Bainter	Graham	Lewis	Saunders
Benjamin	Grindle	Liberti	Sembler
Boyd	Guber	Lippman	Silver
Brennan	Hafner	Logan	Simon
Bronson	Hanson	Lombard	Simone
Brown	Harden	Long	Sindler
Burke	Hargrett	Mackenzie	Smith, C.
Chestnut	Harris	Mackey	Smith, K.
Chiney	Hawkes	Martinez	Stafford
Clark	Hawkins	McEwan	Starks
Clemons	Healey	Mims	Stone
Corr	Hill	Mishkin	Thomas
Cosgrove	Hoffmann	Mitchell	Tobinson
Crady	Holland	Morsani	Tobin
Davis	Holzendorf	Muscarella	Trammell
De Grandy	Huenink	Ostrau	Valdes
Deutsch	Ireland	Peeples	Vicenzi
Diaz-Balart	Irvine	Press	Wallace
Feeney	Jamerson	Pruitt	Weatherford
Figg	Johnson, Bo	Reaven	Wetherell
Flagg	Johnson, Buddy	Reddick	Wise
Foley	Jones, C.F.	Ritchie	Young
Frankel	Jones, Beryl	Roberts	

Nays—None

So the bill passed, as amended, and was immediately certified to the Senate after engrossment.

CS/CS/HB 447—A bill to be entitled An act relating to theft; creating s. 812.15, F.S.; providing that it is unlawful to obtain property or equipment by trick or false pretenses, to hire or lease property with intent to defraud, or to fail to return hired or leased property; providing penalties; providing prima facie evidence of fraudulent intent; providing an exception; providing an effective date.

—was read the second time by title.

Further consideration of CS/CS/HB 447 was temporarily deferred.

CS/HB 453 was taken up. On motion by Rep. Albright, the rules were waived and SB 362 was substituted for CS/HB 453. Under the rule, the House bill was laid on the table and—

SB 362—A bill to be entitled An act relating to capital felonies; amending s. 921.141, F.S.; providing for the admission of victim impact evidence in certain proceedings on the issue of penalty; providing an effective date.

—was read the second time by title.

Representative Albright offered the following amendment:

Amendment 1—On page 1, line 9, strike everything after the enacting clause and insert:

Section 1. Subsection (7) of section 921.141, Florida Statutes, is renumbered as subsection (6), and a new subsection (7) is added to said section to read:

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(7) VICTIM IMPACT EVIDENCE.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Section 2. Subsection (8) is added to Section 921.142, Florida Statutes, to read:

921.142 Sentence of death or life imprisonment for capital drug trafficking felonies; further proceedings to determine sentence.—

(8) VICTIM IMPACT EVIDENCE.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (6), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Section 3. This act shall take effect July 1, 1992.

and the title is amended as follows:

On page 1, line 5, strike all of said line and insert: ss. 921.141 and 921.142, F.S.; providing for the admission

Rep. Albright moved the adoption of the amendment.

Further consideration of SB 362, with pending amendment, was temporarily deferred.

CS/HB 458—A bill to be entitled An act relating to education; creating the "Blind Students' Literacy Rights and Education Act"; providing definitions; providing for assessment of blind students and development of individualized education programs; providing requirements for an individualized education program; providing teacher certification requirements; providing an effective date.

—was read the second time by title. On motion by Rep. Hawkes, the rules were waived by two-thirds vote and the bill was read the third time by title. On passage, the vote was:

Yeas—107

The Chair	Foley	Jamerson	Muscarella
Albright	Frankel	Johnson, Bo	Peeples
Arnall	Friedman	Johnson, Buddy	Press
Arnold	Garcia	Jones, C. F.	Pruitt
Ascherl	Glickman	Jones, Beryl	Reaven
Bainter	Goode	Jones, Dennis	Reddick
Benjamin	Grindle	King	Ritchie
Boyd	Guber	Langton	Roberts
Brennan	Gutman	Laurent	Rudd
Bronson	Hafner	Lawson	Rush
Brown	Hanson	Lewis	Safley
Chestnut	Harden	Lippman	Sanderson
Chiney	Hargrett	Logan	Sansom
Clark	Harris	Lombard	Saunders
Clemons	Hawkes	Long	Sembler
Corr	Hawkins	Mackenzie	Silver
Crady	Healey	Mackey	Simon
Davis	Hill	Martinez	Simone
De Grandy	Hoffmann	McEwan	Sindler
Deutsch	Holland	Mims	Smith, C.
Diaz-Balart	Holzendorf	Mishkin	Smith, K.
Feeney	Huenink	Mitchell	Stafford
Figg	Ireland	Morse	Starks
Flagg	Irvine	Morsani	Stone

Wallace Wetherell Wise Young
Webster

Nays—None

So the bill passed and was immediately certified to the Senate.

SB 362—A bill to be entitled An act relating to capital felonies; amending s. 921.141, F.S.; providing for the admission of victim impact evidence in certain proceedings on the issue of penalty; providing an effective date.

—was taken up, having been read the second time earlier today; now pending on motion by Rep. Albright to adopt Amendment 1.

The question recurred on the adoption of Amendment 1, which was adopted.

On motion by Rep. Albright, the rules were waived by the required two-thirds vote and SB 362, as amended, was read the third time by title. On passage, the vote was:

Yeas—114

The Chair	Goode	Langton	Rudd
Abrams	Graber	Lawrence	Rush
Albright	Graham	Lawson	Safley
Arnall	Grindle	Lewis	Sanderson
Arnold	Guber	Liberti	Sansom
Ascherl	Gutman	Lippman	Saunders
Bainter	Hafner	Logan	Sembler
Banjarin	Hanson	Lombard	Silver
Bloom	Harden	Long	Simon
Boyd	Harpreet	Mackenzie	Simone
Brennan	Harris	Mackey	Sindler
Bronson	Hawkes	Martinez	Smith, C.
Brown	Hawkins	McEwan	Smith, K.
Chestnut	Healey	Mims	Stafford
Chiney	Hill	Mishkin	Starks
Clemons	Hoffmann	Mitchell	Stone
Corr	Holland	Morse	Thomas
Cosgrove	Holzendorf	Mortham	Tobiassen
Davis	Hvenink	Muscarella	Tobin
De Grandy	Ireland	Ostrau	Trammell
Deutsch	Irvine	Peeples	Valdes
Diaz-Balart	Jamerson	Press	Viscusi
Figg	Johnson, Buddy	Reyson	Webster
Foley	Jones, C. F.	Reaves	Wetherell
Frankel	Jones, Daryl	Reddick	Wise
Friedman	Jones, Dennis	Ritchie	Young
Garcia	Kelly	Roberts	
Geller	King	Rojas	

Nays—2

Burke Clark

Votes after roll call:
Yeas—Glickman

So the bill passed, as amended, and was immediately certified to the Senate after engrossment.

HB 1301—A bill to be entitled An act relating to firefighters' pension trust funds; amending s. 175.021, F.S.; providing that it is the legislative intent that firefighters employed by special fire control districts should be entitled to the same retirement benefits as municipal firefighters; amending ss. 121.021, 175.032, 175.041, 175.061, 175.071, 175.081, 175.091, 175.101, 175.111, 175.122, 175.131, 175.141, 175.152, 175.162, 175.191, 175.201, 175.211, 175.251, 175.261, 175.291, 175.301, 175.311, 175.321, 175.351, and 175.361, F.S.; providing for pension funds and retirement benefits for firefighters employed by special fire control districts, which funds and benefits are subject to the same statutory requirements as pension funds and retirement benefits for municipal firefighters; amending s. 175.121, F.S.; clarifying that undistributed funds are annually transferred to support the firefighters' supplemental compensation program; providing for redistribution of certain funds to specified cities and special districts; amending s. 624.520, F.S., to conform; amending s. 633.362, F.S.; providing for curing of deficits; providing for redistribution of certain funds; providing an effective date.

—was read the second time by title

Representative Bloom offered the following amendment:

Amendment 1—On page 2, line 1, insert:

Section 1. Paragraph (c) of subsection (2) of section 943.22, Florida Statutes, is amended to read:

943.22 Salary incentive program for full-time officers.—

(2)

(c) The maximum aggregate amount which any full-time officer may receive under this section is $180 per month. No education incentive payments shall be made for any state law enforcement or correctional position for which the class specification requires the minimum of a 4-year degree, or higher. ~~No contributions shall be required and no benefits shall be paid under the provisions of the Florida Retirement System with regard to any payment made under the provisions of this section.~~

Section 2. *The Legislature finds that a proper and legitimate state purpose is served when employees and retirees of the state and its political subdivisions, and the dependents, survivors, and beneficiaries of such employees and retirees, are extended the basic protections afforded by governmental retirement systems which provide fair and adequate benefits and which are managed, administered, and funded in an actuarially sound manner. Therefore, the Legislature hereby determines and declares that the provisions of this act fulfill an important state interest.*

Section 3. *Nothing in this act shall require that Rule 22B-6(6)(b)3., Florida Administrative Code, be modified until a specific appropriation is provided to fund this bill.* (renumber subsequent sections)

and the title is amended as follows:

On page 1, lines 1-3, strike all of said lines and insert: A bill to be entitled An act relating to law enforcement officers and firefighters; amending s. 943.22, F.S.; deleting language with respect to the salary incentive program for full-time law enforcement officers which provides that contributions shall not be required and benefits shall not be paid under the Florida Retirement System for payments made under the program; providing legislative intent; amending s. 175.021, F.S.; providing

Rep. Bloom moved the adoption of the amendment.

Point of Order

Rep. Goode raised a point of order, under Rule 11.8, that the amendment was not germane.

Further consideration of HB 1301, with pending amendment and pending point of order, was temporarily deferred.

Motions Relating to Committee References

On point of order by Rep. Saunders, Chair, that it does not affect appropriations, the following bill was removed from the Committee on Appropriations and placed on the Calendar: CS/HB 1497.

On motion by Rep. Ostrau, Chair, agreed to by two-thirds vote, SB 2314 was withdrawn from the Committee on Regulated Industries and placed on the Calendar.

Continuation of Special and Continuing Orders

Continuation of Consent Calendar

CS/HB 1207—A bill to be entitled An act relating to criminal sentencing; amending s. 921.187, F.S.; authorizing the court to require an offender on community control, probation, or probation following incarceration to make a good faith effort toward completion of basic or functional literacy skills or a high school equivalency diploma; amending s. 948.03, F.S.; requiring an offender, as a condition of his probation or community control, to make a good faith effort toward completion of basic or functional literacy skills or a high school equivalency diploma; providing a definition; providing an effective date.

EXHIBIT B

Journal

of the

S E N A T E

State of Florida

CONTINUATION OF

TWENTY-FOURTH REGULAR SESSION

UNDER THE CONSTITUTION AS REVISED IN 1968

JANUARY 14 THROUGH MARCH 13, 1992

rions, and to defining the term "caustic"; reviving and readopting ss. 499.001, 499.002, 499.003, 499.004, 499.005, 499.0053, 499.0054, 499.0055, 499.0057, 499.006, 499.007, 499.008, 499.009, 499.01, 499.015, 499.018, 499.019, 499.023, 499.024, 499.025, 499.026, 499.03, 499.032, 499.035, 499.039, 499.04, 499.041, 499.051, 499.052, 499.055, 499.057, 499.06, 499.062, 499.063, 499.064, 499.066, 499.067, 499.069, 499.07, 499.071, 499.081, F.S., providing a copayment schedule for the state employees' prescription drug program; specifying supply limits for filling prescriptions; requiring all programs or contracts under the State Group Health Insurance Plan to allow prescriptions to be dispensed by any licensed pharmacy; providing for a reimbursement schedule; providing for a prescription utilization review program; providing for review of pharmacy records of members and their dependents; providing duties of the Department of Administration; amending s. 893.03, F.S.; revising controlled substance schedules for certain drugs; providing an appropriation; providing an effective date.

On motion by Senator Weinstock, the Senate concurred in House Amendment 1 as amended and requested the House to concur in the Senate amendment to the House amendment.

On motion by Senator Weinstock, CS for CS for SB 84 passed as amended and the action of the Senate was certified to the House. The vote on passage was:

Yeas—37 Nays—None

The Honorable Gwen Margolis, President

I am directed to inform the Senate that the House of Representatives has passed with amendment SB 362 and requests the concurrence of the Senate.

John B. Phelps, Clerk

SB 362—A bill to be entitled An act relating to capital felonies; amending s. 921.141, F.S.; providing for the admission of victim impact evidence in certain proceedings on the issue of penalty; providing an effective date.

House Amendment 1 (with Title Amendment)—On page 1, line 9, strike everything after the enacting clause and insert:

Section 1. Subsection (7) of section 921.141, Florida Statutes, is renumbered as subsection (8), and a new subsection (7) is added to said section to read:

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(7) VICTIM IMPACT EVIDENCE.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Section 2. Subsection (8) is added to Section 921.142, Florida Statutes, to read:

921.142 Sentence of death or life imprisonment for capital drug trafficking felonies; further proceedings to determine sentence.—

(8) VICTIM IMPACT EVIDENCE.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Section 3. This act shall take effect July 1, 1992.

And the title is amended as follows:

On page 1, line 3, strike all of said line and insert: ss. 921.141 and 921.142, F.S.; providing for the admission

On motion by Senator Langley, the Senate concurred in the House amendment.

SB 362 passed as amended and was ordered engrossed and then enrolled. The action of the Senate was certified to the House. The vote on passage was:

Yeas—38 Nays—1

The Honorable Gwen Margolis, President

I am directed to inform the Senate that the House of Representatives has passed with amendment CS for SB 676 and requests the concurrence of the Senate.

John B. Phelps, Clerk

CS for SB 676—A bill to be entitled An act relating to the Spaceport Florida Authority; creating s. 331.355, F.S.; prohibiting the use of names containing the word "spaceport" unless the Spaceport Authority approves the name in writing; authorizing the Department of State to dissolve corporations that unlawfully use such name; providing for ownership rights of authority with respect to patents, trademarks, copyrights, certification marks and similar rights; providing for the appropriation of royalties to the authority; providing an effective date.

House Amendment 1—On page 1, in the title, line 5, strike all of said line and insert: words "spaceport Florida" or "Florida spaceport" unless the Spaceport Authority

On motion by Senator Gardner, the Senate concurred in the House amendment.

CS for SB 676 passed as amended and was ordered engrossed and then enrolled. The action of the Senate was certified to the House. The vote on passage was:

Yeas—39 Nays—None

The Honorable Gwen Margolis, President

I am directed to inform the Senate that the House of Representatives has passed with amendment CS for CS for SB 1134 and requests the concurrence of the Senate.

John B. Phelps, Clerk

CS for CS for SB 1134—A bill to be entitled An act relating to the Florida Mutual Aid Act; amending s. 23.12, F.S.; clarifying the short title; amending s. 23.121, F.S.; specifying that the purpose of the act is to prepare law enforcement agencies to deal with natural or manmade disasters or emergencies; authorizing a law enforcement agency to enter a mutual aid agreement; amending s. 23.1225, F.S.; specifying terms and conditions to be included in a mutual aid agreement; deleting obsolete provisions; requiring filing of a copy of the agreement with the Department of Law Enforcement within a specified time period; authorizing certain persons to enter such an agreement; amending s. 23.127, F.S.; granting to an employee of a law enforcement agency the same powers, duties, rights, privileges, and immunities when performing extraterritorially; clarifying financial responsibility for equipment and employees; granting to employees of an agency their usual rights, privileges, and immunities when performing extraterritorially; providing for real parties in interest, recoupment of damages, and liability actions; amending s. 23.1231, F.S.; deleting a reference to administration of the Florida Mutual Aid Plan by the Division of Local Law Enforcement Assistance; deleting the authority of the executive director of the Department of Law Enforcement to maintain certain lists and otherwise revising the powers and duties of the executive director; deleting the reference to the deadline for filing a mutual aid agreement; clarifying the duties of the department; providing an effective date.

House Amendment 1 (with Title Amendment)—On page 8, between lines 20 and 21, insert:

Section 6. Subsection (6) is added to section 316.655, Florida Statutes, to read:

316.655 Penalties.—

(6) In addition to any other penalty provided for violation of the state uniform traffic control law pursuant to this chapter or chapter 318, any county which participates in an intergovernmental radio communication program approved by the Division of Communications of the

EXHIBIT C

REVISED: BILL NO. SB 362

DATE: January 27, 1992 Page 1

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR		REFERENCE	ACTION
1.	Dugger	Liepshutz	1.	CJ	Favorable
2.	Gibson	Lang	2.	JU	Favorable
3.			3.		
4.			4.		

SUBJECT: Capital Felonies

BILL NO. AND SPONSOR: SB 362 by Senator Langley and others

I. SUMMARY:

A. Present Situation:

Victims of crime in Florida have the right "to be informed, to be present, and to be heard when relevant, at all crucial stages of a criminal proceeding, to the extent that this right does not interfere with constitutional rights of the accused." Fla. Const. art. I, s. 16(b). These rights are implemented statutorily by the prescribed guidelines in s. 960.001, F.S., which call for the fair treatment of victims and witnesses in the criminal justice system.

Section 921.141, F.S., provides a procedure for determining a sentence of death or life imprisonment upon conviction or adjudication of guilt of a capital felony. Pursuant to this procedure, a jury hears evidence and renders an advisory sentence to the court based upon the amount and the sufficiency of aggravating and mitigating circumstances of the capital felony. The court may accept or reject the jury's advice in entering the sentence. All death sentences are subject to review by the Supreme Court.

Section 921.143, F.S., specifically requires the court to allow a victim, at a criminal sentencing hearing, to make a victim impact statement for the record or to file a written statement with the court. These statements must be restricted to the facts of the case and to the extent of any harm resulting from the crime.

Up until June 27, 1991, victim impact evidence was inadmissible at the penalty phase of a capital trial, except to the extent that it "relate[d] directly to the circumstances of the crime" because it violated the Eighth Amendment. Booth v. Maryland, 482 U.S. 496, 507 n. 10 (1989). However, in Payne v. Tennessee, 111 S.Ct. 2597 (1991), the United States Supreme Court recently overruled its earlier holding in Booth and instead held that:

> [I]f a State chooses to permit the admission of victim impact evidence and prosecutorial argument an that subject, the Eight Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder an the victim's family is relevant to the jury's decision as to whether *or* not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated..

Id. at 2609.

About a month before the Payne decision was rendered, the Florida Supreme Court vacated the death sentence of a defendant who was found guilty of murdering a highway patrol trooper and remanded the case for a new sentencing hearing. Burns v. State, 16 F.L.W. 389 (Fla. May 16, 1991). The court ruled that the victim impact evidence submitted at the guilt phase of the capital trial may have affected the decision of the jury at the sentencing phase of the trial and therefore was impermissible under Booth, Id. at 391. On September 5, 1991, however, the court chose to revisit this issue by requesting counsel in the Burns case to re-brief an the issue of victim impact evidence in light of Payne. The court's decision has yet to be rendered.

B. Effect of Proposed Changes:

SB 362 would amend s. 921.141, F.S., to specify that victim impact evidence would be admissible in the sentencing phase of a capital felony trial. The bill provides that once the prosecution has shown the existence of aggravating circumstances and the defendant has shown mitigating evidence of his uniqueness as a human being, the state could then introduce and argue victim impact evidence. This evidence would be designed to show the victim's uniqueness as a person and the loss to the community as a result of his death. Characterizations and opinions about the crime, defendant, and appropriate sentence would be impermissible under the bill.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

None.

B. Government:

None.

III. MUNICIPALITY/COUNTY MANDATES RESTRICTIONS:

None.

IV. COMMENTS:

Section 921.142, F.S., provides a procedure for determining a sentence of death or life imprisonment for capital drug trafficking felonies. The procedure is very similar to the procedure specified in s. 921.141, F.S., relating to capital felonies. Since the bill amends s. 921.141, F.S., and does not amend s. 921.142, F.S., it may be argued that the Legislature, in enacting the bill, did not intend to permit the admission of victim impact evidence in the sentencing stage of a capital felony drug trafficking case.

V. AMENDMENTS:

None.

REVISED: January 21, 1992 BILL NO. SB 362

DATE: December 12, 1991 Page 1

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR		REFERENCE	ACTION
1.	Oliver	Liepshutz	1.	CJ	Favorable
2.			2.	JU	
3.			3.		
4.			4.		

SUBJECT: Capital Felonies

BILL NO. AND SPONSOR: SB 362 by Senator Langley

I. SUMMARY:

A. Present Situation:

Victims of crime in Florida have the right "to be informed, to be present, and to be heard when relevant, at: all crucial stages of a criminal proceeding, to the extent that this right does not interfere with constitutional rights of the accused." Fla. Const. art. I, s. 16(b). These rights are implemented statutorily by the prescribed guidelines in s. 960.001, F.S., which call for the fair treatment of victims and witnesses in the criminal justice system.

Section 921.143, F.S., specifically requires the court to allow a victim, at a criminal sentencing hearing, to make a victim impact [illegible] for the record or to file a written statement with the court. There statements must be restricted to the facts of the case and to the extent of any harm resulting from the crime.

Up until June 27, 1991, victim impact evidence was inadmissible at the penalty phase of a capital trial, except ha tha extent that it "relate[d] directly to the circumstances of the! crime" because it violated the Eighth Amendment, Booth v. Maryland, 482 U.S. 496, 507 n. 10 (1989). However, in Payne v. Tennessee, 111 S.Ct. 2597 (1991), the United States Supreme Court recently overruled its earlier holding in Booth and instead held that:

> [I]f a Stake chooses to permit me admission of victim impact evidence and prosecutorial argument on that subject, the Eight Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the,, impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Id. at 2609.

About a month before the Payne decision was rendered, the Florida Supreme Court vacated the death sentence of a defendant who was found guilty of murdering a highway patrol trooper and remanded the case for a new sentencing hearing. Burns v. State, 16 F.L.W. 389 (Fla. May 16, 1991). The court ruled that the victim impact evidence submitted at the sentencing phase of the capital trial was impermissible under Booth. Id. at 391. On September 5, 1991, however, the court chose to revisit this issue by requesting counsel in the Burns case to re-brief on the issue of

victim impact evidence in light of Payne. The court's decision has yet to be rendered.

B. Effect of Proposed Changes:

SB 363 would make it clear that in Florida, in light of Payne, victim impact evidence would be admissible in the sentencing phase of a capital felony trial under s. 921.141. F.S. Specifically, the bill would provide that once the prosecution has shown the existence of aggravating circumstances and the defendant has shown mitigating evidence of his uniqueness as a human being, the state could then introduce and argue victim impact evidence. This evidence would be designed to show the victim's uniqueness as a person and the loss to the community as a result of his death. Characterizations and opinions about the crime, defendant, and appropriate sentence would be impermissible under the bill.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

None.

B. Government:

None.

III. MUNICIPALITY/COUNTY MANDATES RESTRICTIONS:

None.

IV. COMMENTS:

None.

V. AMENDMENTS:

None.

A bill to be entitled

An act relating to capital felonies; amending ss. 921.141 and 921.142, F.S.; providing for the admission of victim impact evidence in certain proceedings on the issue of penalty; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (7) of section 921.141, Florida Statutes, is renumbered as subsection (8), and a new subsection (7) is added to said section to read:

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(7) VICTIM IMPACT EVIDENCE.--Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Section 2. Subsection (8) is added to section 921.142, Florida Statutes, to read:

921.142 Sentence of death or life imprisonment for capital drug trafficking felonies; further proceedings to determine sentence.—

(8) VICTIM IMPACT EVIDENCE.--Once the prosecution has provided evidence of the existence of one or more aggravating

CODING: Words stricken are deletions; words underlined are additions.

circumstances as described in subsection (6), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Section 3. This act shall take effect July 1, 1992.

CODING: Words stricken are deletions; words underlined are additions.

S C1362 1992 SESSION PATE 04/01/92 TIME 08:59 PAGE 1

GENERAL BILL/1ST ENG by Langley and others (Similar CS/H 0453, Compare 1ST ENG/S 0178)
Victim Impact Evidence/Felonies; provides for admission of victim impact evidence in certain proceedings on issue of penalty. Amends 921 .141 , .142.
Effective Date: 07/01/92.
10/25/91 S Prefiled
11/08/91 S Referred to Criminal Justice! Judiciary
01/14/92 S Introduced, referred to Criminal Justice; Judiciary -SJ 00024
01/16/92 S On Committee agenda-- Criminal Justice, 01/21/92, 2:00 pm, Room-2(301C)
01/21/92 S Comm. Action: Favorable by Criminal Justice -6J 00101
01/22/92 S low in Judiciary -SJ 00101
01/24/92 S Extension of time granted Judiciary
01/28/92 S On Committee agenda-- Judiciary, 01/30/92, 9:00 am, Room-1(309C)
01/30/92 S Comm. Action:-Favorable by Judiciary -SJ 00181
01/31/92 S Placed on Calendar -SJ 00181
02/06/92 S Placed on Consent Calendar -83 00180; Passed; YEAS 37 NAYS 1 -SJ 00172, -SJ 00197
02/12/92 H In Messages
02/25/92 H Received, referred to Appropriations -HJ 00545
03/06/92 H Withdrawn from Appropriations -HJ 01123; Placed on Calendar
03/11/92 H Substituted for CS/HB 453 -HJ 01412; Read second time -HJ 01412; Amendment(s) adopted -HJ 01477; Read third time; Passed as amended; YEAS 114 NAYS 2 -HJ 01477
03/11/92 S In returning messages
03/12/92 S Concurred; Passed as amended; YEAS 28 NAYS 1 -SJ 01486, -SJ 01490; Ordered engrossed, then enrolled -SJ 01486
03/24/92 Signed by Officers and presented to Governor

BILL VOTE SHEET

(VS-90: File with Secretary of Senate) BILL NO. SB 362

COMMITTEE ON: Judiciary

DATE: January 30, 1992

TIME: 09:00 AM - - 12:00 P M

PLACE: Room 1, Capitol

OTHER COMMITTEE REFERENCES: (in order shown)

ACTION:

X Favorably with amendments

___ Favorably with Committee Substitute

___ Unfavorably

___ Submitted as a Committee Bill

___ Temporarily Passed

___ Reconsidered

___ Not Considered

___ No Quorum

THE VOTE WAS:

FINAL BILL VOTE		SENATORS									
Aye	Nay		Aye	Nay	Aye	Nay	Aye	Nay	Aye	Nay	Aye	Nay
X		Dudley										
X		Girardeau										
		Grant										
		Jenne										
X		Johnson										
X		Langley										
		Scott										
X		VICE-CHAIRMAN Yancey										
X		Weinstein										
6	0	TOTAL										
Aye	Nay		Aye	Nay	Aye	Nay	Aye	Nay	Aye	Nay	Aye	Nay

Please Complete: The Key sponsor appeared ( )
A Senator appeared ( )
Sponsor's aide appeared ( )
Ocher appearance ( )

EXHIBIT D

STORAGE NAME: s0362z.cj **AS PASSED BY THE LEGISLATURE**
DATE: April 22, 1992 CHAPTER #: 92-81, Laws of Florida

MOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIMINAL JUSTICE
FINAL BILL ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: SB 362

RELATING TO: Capital Felonies

SPONSOR(S): Senator Langley and others

STATUTE(S) AFFECTED: §§ 921.141 and 921.142, Fla. Stat.

COMPANION BILL(S): CS/HB 453 (s), SB 178 (c)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE: CS/HB 453
(1) CRIMINAL JUSTICE YEA 12 NAY 0
(2) APPROPRIATIONS WITHDRAWN
(3)
(4)
(5)

****

I. SUMMARY:

On June 27, 1991, in Payne v. Tennessee, 111 S.Ct. 2597 (1991), the United States Supreme Court overruled its earlier decisions relating to victim impact evidence in capital felony cases and held that:

> [I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Id. at 2609.

This bill provides that the prosecution may introduce, and subsequently argue, victim impact evidence during the separate sentencing proceeding in capital felony and capital drug trafficking felony cases. Victim impact evidence may be introduced once the prosecution has provided evidence of the existence of one or more statutory aggravating circumstances. The victim impact evidence must be designed to demonstrate the victim's uniqueness as a human being and the resultant loss to members of the community by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence cannot be part of the victim impact evidence.

If passage of thir bill generates appeals in capital felony and capital drug trafficking felony cases, there may be a fiscal impact to state government.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

section 775.082, Fla. stat., provides that a capital felony is punishable by either death or life imprisonment, with a mandatory minimum 25 years imprisonment before becoming eligible for parole. Upon a defendant's conviction or adjudication of guilt of a capital felony, the court must conduct a separate sentencing proceeding, Pursuant to s. 923,141, Fla. Stat., to determine whether the defendant should be sentenced to death or life imprisonment. In the proceeding, *evidence* may be presented regarding any matter that the court deems relevant to the nature of the crime and the character of the defendant. Consideration must be given to evidence regarding any aggravating or mitigating circumstances enumerated in ss. 921.141(5) and (6), Fla. Stat. Aggravating circumstances include, but are not limited to; the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; the capital felony was especially heinous, atrocious, or cruel;, and the victim was a law enforcement officer engaged in the performance of his official duties. Mitigating circumstances include, but are not limited to: the age of the defendant at the time of the offense; the defendant's history of prior criminal activity; and the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. After hearing all the evidence, the jury deliberates and submits an advisory sentence to the court based on: whether sufficient aggravating circumstances exist; whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances; and whether, based on the these considerations, the defendant should be sentenced to death or life imprisonment. Notwithstanding the jury's recommendation, *the court*, after weighing the aggravating and mitigating circumstances, will enter a sentence of death or life imprisonment.

During the 1990 session, the Legislature created s. 921.142, Fla. stat,, which provides for separate sentencing proceedings in capital drug trafficking felony cases. The proceedings to determine whether a defendant will be sentenced to death or life imprisonment for a capital drug trafficking offense are similar to the sentencing proceedings described above.

Section 16(b) of Article 1 of the Florida Constitution provides that victims of crime or their lawful representatives, including the next of kin of homicide victims, have the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

Chapter 960, Florida Statutes, addresses victim assistance and is known as the "Florida Crimes Compensation Act." Section 960.001,

Fla. Stat., requires various agencies, including state attorneys, law enforcement agencies, and circuit court administrators, to develop and implement guidelines for the fair treatment of victims and witnesses in the criminal justice system. Among other things, these guidelines must provide for notification to the victim of the victim's right to submit an oral or written impact statement pursuant to s. 921.143, Fla. Stat. Section 921.143(1), Fla. Stat., provides that prior to sentencing any defendant who has been convicted of any felony or who has pled guilty or nolo contendere to any crime, the sentencing court must permit the victim of the crime or the victim's next of kin, if the victim has died from causes related to the crime, to:

- appear before the sentencing court for the purpose of making a statement under oath for the record; or
- submit a written statement under oath to the state attorney's office, which statement must then be filed with the sentencing court.

Section 921.143(2), Fla. Stat., provides that *the victim's* oral or written statement must relate solely to the facts of the case and the extent of any harm, including psychological or physical harm, and financial losses which directly or indirectly resulted from the crime for which the defendant is being sentenced.

In Grossman v. State, 525 So.2d 833 (1988), the Florida Supreme Court held that the provisions of s. 921.143, Fla. Stat., are "invalid insofar as they permit the introduction of victim impact evidence as an aggravating factor in death sentencing."

Prior to June 27, 1991, victim impact evidence was inadmissible at the sentencing phase of a capital felony case in accordance with the United States Supreme Court's decision in Booth v. Maryland, 107 S.Ct. 2529 (1987). In Booth, the court held that the introduction of a victim impact statement at the sentencing phase of a capital murder trial violates the Eighth Amendment. The court *rejected* the State's contention that the presence or absence of emotional distress of the victims' family and the victims' characteristics are proper sentencing considerations in a capital case. The court found that such information is irrelevant to a capital sentencing decision, and its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner.

In May of 1991, the Florida Supreme Court vacated the death sentence of a defendant convicted of first-degree murder, holding that the defendant was deprived of a fair sentencing determination because evidence of the personal characteristics of the victim was presented to the jury contrary to Booth, [Burns v. State, 16 F.L.W. 389 (Fla. May 16, 1991)]. In Burns, the court held that "we cannot say beyond a reasonable doubt that the jury would have recommended a sentence of death had it not heard the testimony concerning the victim's character," Id. at 391. The Florida Supreme Court affirmed the murder conviction but remanded the case for a new sentencing hearing before a new jury.

On June 27, 1991, in Payne v. Tennessee, 111 S.Ct. 2597 (1991), the United States Supreme Court overruled its earlier decision in Booth and held that:

> [I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no par se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to ths jury's decision as to whether or not ths death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Id. at 2609.

In light of the Payne decision, the Florida Supreme Court chose to revisit its decision in the Burns case in September of 1991. Counsel was requested to re-brief on the issue of victim impact evidence and the case is currently pending before the court.

B. EFFECT OF PROPOSED CHANGES:

This bill amends ss. 923.245 and 921.142, Fla. Stat., to provide that the prosecution may introduce, and subsequently argue, victim impact evidence during the separate sentencing proceeding in a capital felony or a capital drug trafficking felony case. Victim impact evidence may be introduced once the prosecution has provided evidence of the existence of one or more statutory aggravating circumstances. The victim impact evidence must be designed to demonstrate the victim's uniqueness as a human being and the resultant loss to the members of the community by the victim's death. Characterizations and opinions about the crime, tha defendant, and the appropriate sentence cannot be part of the victim impact evidence.

C. SECTION-BY-SECTION ANALYSIS:

Section 1 amends s. 921.141, Fla. Stat., relating to sentencing proceedings in capital felony cases, as described above.

Section 2 amends s. 921.142, Fla. stat,, relating to sentencing proceedings in capital drug trafficking felony cases, as described above.

Section 3 provides that the act takes effect on July 1, 1992.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

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A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Indeterminate.

2. Recurring Effects:

Indeterminate.

3. Long Run Effects Other Than Normal Growth:

Indeterminate,

4. Total Revenues and Expenditures:

Indeterminate,

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Indeterminate.

a. Recurring Effects:

Indeterminate.

3. Long Run Effects Other Than Normal Growth:

Indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None anticipated.

2. Direct Private Sector Benefits:

None anticipated.

3. Effects on Competition, Private Enterprise and Employment Markets:

None anticipated.

D. FISCAL COMMENTS:

If passage of this bill generates appeals in capital felony and capital drug trafficking felony cases, there may be a fiscal impact to state government.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Not applicable.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

Not applicable.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

Not applicable.

V. COMMENTS:

On March 11, 1992, SB 362 was substituted for CS/HB 453, amended, and passed the House (YEA 114, NAY 2). The Senate concurred in the House amendment and the bill passed the Senate on March 12, 1992 (YEA 28, NAY 1).

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES!

None.

VII. SIGNATURES:

COMMITTEE ON CRIMINAL JUSTICE:

Prepared by:	Staff Director:
Kristin S. Pingree	Susan G. Bisbee

FINAL ANALYSIS PREPARED BY COMMITTEE ON CRIMINAL JUSTICE:

Prepared by:	Staff Director:
Kristin S. Pingree	Susan G. Bisbee