IN THE SUPREME COURT OF FLORIDA

NO. 85,693

TIMOTHY CURTIS HUDBON,,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT/ CROSS APPEAL ANSWER BRIEF

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ARGUMENT IN REPLY

ARGUMENT I

Tim Hudson was a man whose life was controlled by his addiction to crack cocaine. Prior to his addiction, he held down a job and was in a stable, steady relationship with Becky Collins (R. V 196, X 75). He was well mannered and polite and treated Ms. Collins with respect and kindness. Ms. Collins testified that they had a good relationship, so good that they began living together and decided to get married (R. V 196). But then Mr. Hudson began using crack cocaine and became a different man (R. V 186, 197-98, X 123). He quit his job and became hyper and moody (R. V 197, X 99-100). Although he attempted to get treatment for his addiction, he was unable to get an appointment in less than two months at any of the places he contacted, and his efforts to overcome his addiction failed (R. V 198). Because of this drastic change in his personality, his future with Ms. Collins was destroyed. He became abusive, jealous, and obsessive towards Ms. Collins, traits that had not been present before his cocaine addiction. Around March or April of 1986, Ms. Collins ended the relationship with Mr. Hudson and moved in with the victim, Mollie Ewings, and Mr. Hudson basically began living in the streets. But he continued to contact Ms. Collins frequently. He told her he worked for the Mafia, a claim that was obviously untrue, and unlike anything he had ever told her prior to his drug use. In his conversations with Ms. Collins, he made accusations that were untrue and unfounded and it was obvious to Ms. Collins that he

was still on drugs (R. V 196-201). Shortly after the breakup with Ms. Collins, Mr. Hudson was jailed for two months, and he continued to contact Ms. Collins from the jail almost every day. Then four days after he was released from jail, he went to Ms. Collins place of residence to speak with her. At the time of that visit -- the visit that resulted in the death of the victim -- Mr. Hudson had been smoking crack cocaine and was very high (R. VI 373-74).

Both Gerald and Anthony Bembow testified about Mr. Hudson's extensive drug use on the night of the crime. Gerald Bembow was so alarmed by Mr. Hudson's drug induced state that he tried to get Mr. Hudson to remain at his home for the night and sleep it off, a suggestion he had never felt the need to make to Mr. Hudson on any of the other nights they did drugs together (R. V 373-78). Mr. Hudson did crack cocaine at Gerald Bembow's and got higher and higher as the night progressed. He was preoccupied with Becky Collins and was very upset. He left Mr. Bembow's to go find Ms. Collins (Id.). But instead he found the victim. In his highly intoxicated state, his mental state was substantially impaired and he was unable to conform his conduct to the law. When the victim screamed at him to leave the house, he stabbed her four times in an attempt to quiet her screams.

The primary question involved in this appeal is quite straightforward: are the circumstances surrounding this homicide similar to those cases in which death was previously deemed improper? *See* Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).

And the answer is yes. Rather than address this question, the State's answer brief attempts to create different questions which are not specific to this case and to create a record other than the record which exists in this case. The State's arguments should be rejected, and Mr. Hudson should be granted relief.

First, the state contends that this Court previously rejected a characterization of this case as a domestic dispute, thus ending the enquiry. But substantial evidence not presented in the first trial is now available for this Court that supports this characterization. As noted above and in the initial brief, Becky Collins testified extensively about her relationship with Mr. Hudson and how it had changed after he became addicted to crack cocaine. She explained that she had broken off the relationship with Mr. Hudson only months before this homicide and that Mr. Hudson had maintained almost daily contact with her throughout the time leading up to the homicide. Contrary to the state's assertion, Mr. Hudson does not assert that the domestic context of his case automatically renders his death sentence invalid.[1] Mr. Hudson asserts that this Court must look closely

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[1]The state contends that Mr. Hudson's trial counsel did not argue "domestic dispute" to the jury. Not only is this patently untrue, the apparent contention that failure to argue "domestic dispute" at the trial somehow forecloses Mr. Hudson from asserting that his death sentence is disproportionate is contrary to the law of this Court. Uncontroverted evidence was presented in the resentencing that Mr. Hudson and Becky Collins were romantically involved, that this romantic involvement had terminated because of Mr. Hudson's drug addiction, and that since the termination of the relationship Mr. Hudson had repeatedly attempted to speak with and meet with Ms. Collins, and that his behavior bordered on the obsessive. This uncontroverted evidence was presented at resentencing and argued to the jury. Of course

at the facts of this case as compared with other similar cases to determine if his death sentence is disproportionate.

The **state's** argument that Mr. Hudson's comments to other mental health experts that he planned to steal jewelry from the victim shows that his real motive **was to** rob the victim is not supported by the record. There was no evidence presented that Mr. Hudson went to the house to kill Ms. Ewing or to even **speak** to Ms. Ewing. Police found no evidence of robbery and the state presented no evidence at trial that Mr. Hudson stole any objects from the victim's home. ***See*** **Nibert v. State,** 574 So. 2d 1059, 1060 (Fla. **1990)(Although** there was testimony that defendant indicated his intention to rob the victim a few **days** before the murder, there **was** no evidence of robbery. Death is disproportionate).

The state's argument that **Fitzpatrick v. State**, 527 So. 2d 809 (Fla. **1988),** is distinguishable from the case at bar is flawed. As the state correctly notes, in **Fitzpatrick,** there was a unanimous opinion by several mental health professionals that both statutory mental mitigators were present. In the case at bar, there was testimony from several mental health professionals that both statutory mental mitigators were present and the trial court found the existence of both statutory mental health

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defense counsel did not argue proportionality to the jury. Proportionality review is a function solely of this Court. Additionally, any proportionality review prior to the imposition of a death sentence would have been premature. See **Clark v. State,** 1997 WL 136304 (Fla. March 27, 1997).

mitigators.* The state's portrayal of Dr. Maher's testimony as "severely damaged" is belied by the record. Dr. Maher testified that he was confident that his conclusions were sound (R. VI 434), and the state did not, and could not, elicit any testimony in cross-examination of Dr. Maher to dispute his conclusions concerning the substantial statutory and non-statutory mitigation present in this case. The state's assertion that Dr. Maher "acknowledged that [Mr.] Hudson's post-homicidal actions were logical and rational" misrepresents the record. See State's Brief at 29. Dr. Maher's actual testimony was that although some of the acts Mr. Hudson did after the victim was killed were logical acts, this does not support the conclusion that Mr. Hudson was acting rationally and logically throughout this crime or even after this crime (see R. VI 459-62).

In arguing that Mr. Hudson is not aided by the cases cited in his brief to support his argument that his sentence is disproportionate, the state leaves out important facts from each case that impact upon this review. For example, the state fails to mention that the Kramer defendant's prior violent felony aggravator was based upon a similar beating of another victim with a concrete block within two hundred feet of where the

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[2]The basis for the state's assertion that "the trial court found the presence of only one statutory aggravator" is unclear. See State's Brief at 26. In Fitzpatrick, the court found the existence of five aggravators, so this reference is not to the Fitzpatrick opinion. If this statement is an error, and the state intended to say "mitigators", then this statement is simply untrue, because the trial court in Hudson found both mental mitigators. See Sentencing Order, R. 397-98.

homicide occurred, that the victim of the homicide suffered defensive wounds, and that the defendant pulverized the victim with a series of nine or ten blows, none of which were fatal until the final two. Kramer v. State, 619 So. 2d 274, 276-78 (Fla. 1993). In Morgan, the defendant brutally murdered a 66 year old woman, crushed her skull with a crescent hammer, stabbed her sixty times, bit her breasts and traumatized her genitals. Numerous defensive wounds were found on the victim's hands. Morgan v. State, 639 So. 2d 6, 9 (Fla. 1994). In Penn, the defendant killed his mother with a claw hammer, hitting her thirty-five times. The victim had defensive wounds on her hands and the testimony was that death may have taken forty-five minutes. Also, on the night of the homicide in Penn, the defendant's wife told him his mother was getting in the way of a reconciliation with her and suggested that he "get her out of the way." Penn v. State, 574 So. 2d 1079, 1080, 1083-84 (Fla. 1991). Unlike the victim in each of these cases, the victim in the case at bar died quickly, and there were not "numerous defensive wounds" on her hands and body. Additionally, unlike Penn, there is no evidence that the Mr. Hudson had any motive or intent to get the victim "out of the way."

In White, the defendant had several altercations with the victim prior to the murder, prompting her to obtain a restraining order against him. He had broken into her apartment a few months prior to the homicide and attacked her companion with a crowbar. While in jail for this offense, he informed another inmate that

he was going to kill the victim when he was released, and immediately upon his release he got a gun, stalked down the victim and shot her as she was running away. After she fell to the ground, he approached her and fired a second shot to her back. White v. State, 616 so. 2d 21, 22 (Fla. 1993). The state contends that the effects of the use of cocaine in Mr. Hudson's case was not as extensive as in White, but two witnesses who had business dealings with Mr. White immediately prior to and following the crime testified that he did not appear to be under the influence of alcohol or drugs. *Id.* After shooting the victim, Mr. White hailed a cab and sold the murder weapon to a pawn shop. *Id.* Contrary to Mr. Hudson's case, there was substantial evidence presented in Mr. White's trial that he was able to act in a logical and coherent manner both before and after the commission of the homicide, and that the homicide was planned and premeditated.[3]

The state argues that Mr. Hudson's case is more closely aligned with Pope v. State, 679 So. 2d 710 (Fla. 1996), but a review of the facts in Pose illustrates the flaw with this argument. The uncontroverted evidence in Pope was that the

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[3]The state's only support for the argument that Mr. Hudson was not under the influence of cocaine at the time of this homicide comes from the testimony of Jasmine Robertson that Mr. Hudson appeared normal to her shortly before the crime. The state neglects to mention that Ms. Robertson also testified that she was not a drug user, she would have trouble recognizing if someone were under the influence of drugs and that she only had a very brief conversation with Mr. Hudson. Additionally, Ms. Robertson testified that when she spoke with Mr. Hudson he was standing outside the apartment of Gerald Bembow, a known drug user.

defendant told an eyewitness to the homicide that he was going to kill the victim for her car and money. The defendant then proceeded to beat the victim's head against a sink, stomp on her head and back with his boots, and stab her. He only left the scene after the eyewitness assured him that the victim was dead, taking the eyewitness with him. After being apprehended, he made comments that he hoped the "bitch" was dead. The victim was in fact alive and conscious when the defendant left, and she remained conscious long enough to drag herself across the street to a neighbors and give a statement to police. She died eight days later. Id. at 712. Unlike the case at bar, the evidence supported a conclusion that the crime was committed solely for pecuniary **gain.**[4] Also, unlike the case at bar, the victim in **Pope** was alive and conscious for at least several hours after the attack.

The state erroneously cites to **Ferrell** to support the argument that this Court has found the death penalty proportionate when only one aggravator is present. State's Brief, p. 37. In fact, the Court in **Ferrell** found ***four*** aggravators, and contrary to the state's assertion, neither the

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[4]**Although** the state relies upon **Orme** for support of its argument, it understandably declines to discuss the facts of **Orme**. A review of the facts shows that **Orme** is also clearly distinguishable from the case at bar. The defendant in **Orme** lured the victim to his room, then beat her so badly that she was covered with extensive bruising and hemorrhaging on the face, skull, arms, chest and abdomen. Semen was found in all orifices and each of the injuries sustained by the victim occurred before death by strangulation. Jewelry belonging to the victim was never discovered. Orme v. State, 677 So. 2d 258, 259-60 (Fla. 1996).

crime nor the aggravators in that case had anything to do with a crime of violence against a woman.[5]

The state concludes its argument with a conclusory statement that defendant's reliance on Wilson, Penn, Blakely, Livingston and Smalley is inappropriate. Yet the state fails to explain why this reliance is inappropriate and a review of these cases shows why the state has so declined. Of these cases, only Blakely concerns a dispute between a defendant and his lover/wife. Blakely v. State, 561 So. 2d 560 (Fla. 1990). The defendant in Blakely bludgeoned his wife to death with a hammer. Based on the facts of the crime, the Court found both the heinous, atrocious or cruel aggravator and the cold, calculating and premeditated aggravator were present. The Court only found one statutory mitigator of no significant criminal history, yet still found that death was not a proportionate sentence. The Court noted in Blakely that the killing resulted from a long-standing domestic dispute. Mr. Hudson asserts that the facts in his case support an identical finding. But for Mr. Hudson's obsession with Ms. Collins and their relationship, this murder would not have occurred. There is no evidence that Mr. Hudson had any reason to want the victim dead. There is no evidence that Mr. Hudson had any animosity towards the victim. There is no evidence that he

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[5]The homicide in Ferrell occurred during an armed kidnaping/robbery of a male crack dealer. The Court found four aggravators and one non-statutory mitigator of slight weight, and that the sentence of death was proportionate. Ferrell V. State, 686 so. 2d 1324 (Fla. 1996). Ferrell contains no similarity to the case at bar and provides no guidance for the Court.

had any plan to kill the victim. Becky Collins testified that Mr. Hudson had no dislike for the victim.

The homicide in **Livingston** occurred during the course of **a** convenience store robbery. The aggravators found in **Livingston** were the same as those found in the case at bar. **Livingston v. Sate,** 565 So. 2d 1288 (Fla. 1990). But unlike Mr. Hudson's case, there **was** no evidence that the crime in **Livingston** was committed for any **reason** other than pecuniary **gain.** And unlike Mr. Hudson's case, there was no evidence that the defendant was under the influence of any drug or alcohol at the time of the crime, or that his behavior was irrational as a result of this drug use.

In **Smalley,** the defendant abused a twenty-eight month old infant over a period of eight hours, including banging her head on the floor, and holding her head under water on three **separate** occasions. The Court found that it was unlikely that the defendant intended to kill the victim, and reduced the sentence to life without possibility of parole for 25 years. **Smalley** v. **State,** 546 So. 2d 720 (Fla. 1989). The facts in **Hudson** are comparable. There is no evidence that **Mr.** Hudson intended to kill this victim. When the infant in **Smalley** cried, the defendant irrationally beat it in an effort to quiet the cries. The facts presented at Mr. Hudson's trial support a finding that the killing **was** a result of an emotional, irrational response to the victim's scream. There was uncontroverted evidence that his cocaine addiction and use made him hypersensitive to noise. There was uncontroverted evidence that Mr. Hudson overacted when he was

under the influence of cocaine. The death in the case at bar occurred not because of any desire or wish of Mr. Hudson to see her dead, but because of an irrational reaction fueled by cocaine addiction and use. Additionally, like **Smalley,** there is plentiful evidence that Mr. Hudson was remorseful.

Although this Court found in **Hudson I** that **Wilson** was distinguishable from the case at bar, Mr. Hudson asserts that the record before the Court at that time was incomplete. This Court has before it substantial mitigation that was not presented in the first trial due to the ineffectiveness of trial counsel. When the case presents a different record than the earlier **appeal,** a death sentence that this Court earlier found proportionate may no longer be proportionate. See **Proffitt** v. State, 510 So. 2d 896, 897 (Fla. 1987). Becky Collins testified that she and the defendant had been in a loving relationship that she had terminated because of the defendant's drug use. She testified both in state habeas and in the resentencing that Mr. Hudson repeatedly tried to contact her after the termination. Jasmine Robertson testified that the defendant was looking for Ms. Collins on the night of the crime. The state did not, and could not, present any evidence that Mr. Hudson had any desire or plan to kill Ms. Ewings prior to her screaming at him when she saw him in her house.

Mr. Hudson's weight had dropped from 205 pounds to 168 pounds right before the homicide, a indicator of crack addiction (R. X 75). Mr. Hudson was acutely paranoid when under the

influence of cocaine and had unusually long reactions to the cocaine (R. X 124). He was severely addicted to crack cocaine at the time of the crime, consuming massive amounts of cocaine along with other drugs, mainly marijuana and alcohol and sometime heroin (R. XI 217). His addiction was to the point that it would produce a toxic psychotic state known as cocaine psychosis (Id.). The advanced addiction to cocaine grossly impaired his ability to reason **and** to process information and diminished his judgment, perception and insight (R. XI 217-19, X 123-24). As Dr. **Maher** noted, this impairment impacted both on his reaction to his breakup with Becky and ability to appropriately comprehend that situation, and on his reaction to the victim's scream on the night of the **homicide.**[6]

It is important to look at the policy behind the domestic dispute cases when considering the proportionality of Mr. Hudson's case. In those cases, the Court recognizes the emotions and relationships that occur between families and lovers. Due to the heightened emotions that are involved in domestic situations, people frequently commit acts in the heat of the moment that they would not otherwise commit. The elevated emotional state of a defendant in an unstable relationship is unlikely to provide the

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[6]**The** fact that the jury again voted for death by a vote of nine to three is irrelevant. State's Brief, p. 27. See **Nibert v. State**, 574 So. 2d 1059 (Fla. **1990)(death** sentence from resentencing vacated on proportionality grounds); **Proffitt** v. State, 510 So. 2d 896 (Fla. **1987)(death** sentence from resentencing ordered by federal court vacated on proportionality grounds); **Morgan v. State,** 639 So. 2d 6 (Fla. **1994)(death** sentence from ***fourth*** resentencing vacated on proportionality grounds).

defendant with any ability to rationally work out problems. The evidence adduced in the case at bar supports this exact scenario. It is irrelevant that the victim was not Mr. Hudson's girlfriend -- the policy reasons remain the same. Add to this volatile situation a defendant, like Mr. Hudson, who suffers from organic brain damage and a severe cocaine addiction, and you have an accident waiting to happen. Mr. Hudson was emotionally crippled by his obsession with Becky Collins and the breakup of their relationship. His judgment was grossly impaired by his drug addiction. He reacted in an irrational manner to his problems with Becky Collins. He had been trying to speak with her for weeks while he was in jail, and had been looking for her since he was released from jail a few days earlier. He stated to three different people on the night of the crime that he was looking for Becky Collins. The evidence is that Mr. Hudson had gone to Becky Collins home that night in an attempt to find Becky Collins. There is absolutely no evidence that Mr. Hudson thought he would find, wanted to find, or intended to find the victim at home, and certainly no evidence that he had any reason to kill her before encountering her in the home. When the victim screamed, he reacted in a grossly impaired manner and killed her. This facts of this case do not place it in the category of the most aggravated and least mitigated for which the death penalty is appropriate. See Terry v. State, 668 So. 2d 954, 965 (Fla. 1996); Kramer, 619 So. 2d at 278.

This record does not support a sentence of death. This

Court should reverse the death sentence and remand for imposition of a life sentence without the possibility of parole for **twenty-**five years.

ARGUMENT II

The law is clear that a sentencer may not give a mitigating factor no weight simply by excluding the evidence from their consideration. **Eddings v. Oklahoma,** 455 U.S. 104, 114-15 (1982). In an effort to clarify this issue, the Court issued guidelines that require "the sentencing court [to] expressly evaluate in its written order each mitigating evidence proposed by the defendant to determine whether it is supported by the evidence, and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." **Campbell v. State,** 571 So. 2d 415, 419 (Fla. **1990)(footnotes** and citations omitted). Contrary to the state's assertions, the court below failed to follow the dictates of **Campbell** and failed to even mention a wealth of uncontroverted mitigating evidence in its sentencing order.

The majority of the state's argument on this point concerns the weight the trial court should or did give to various mitigating factors. This argument highlights the problem this Court is faced with because of the trial court's incomplete sentencing order. Without a complete sentencing order, we cannot know what, if any, weight the court gave to these factors. This Court noted in **Campbell** the importance of expressly evaluating the nonstatutory mitigators to determine if the court appropriately found those factors that have been reasonably

established by the evidence. The order in the case at bar does not specify which nonstatutory mitigators the trial court found and the weight he attributed to those circumstances, so this court cannot conduct an appropriate proportionality review. *Compare* Sims v. State, 681 So. 2d 112, 119 (Fla. 1996)(trial judge listed the twenty-five additional non-statutory mitigating factors and stated the weight given to these factors).

The state argues that the cross-examination of Dr. Maher rendered the calling of contrary witnesses unnecessary. Although the state argues that Dr. Maher relied on self-report when investigating and analyzing Mr. Hudson's background, the state makes no attempt to show how Dr. Maher's testimony would have differed if he had interviewed other persons about Mr. Hudson's background. The state called no witnesses to refute Dr. Maher's conclusions, and the testimony presented at trial concerning Mr. Hudson's instable family background is consistent with and supports Dr. Maher's conclusions. Dr. Maher's assertion that he did not conduct independent interviews with other witnesses because he believed it would not change his conclusions is supported by the record. Additionally, the conclusions reached by Dr. Maher were consistent with each of the other mental health experts who evaluated Mr. Hudson. Dr. Maher's testimony is not contradicted by the facts of the case, so the state's conclusion that the trial court can permissibly give it minimal or no weight fails.

There was unrebutted evidence offered in mitigation that the

court failed to expressly evaluate, find and weigh (see Appellant's Initial Brief, pp. 46-47). The duty of the trial court is clear. The sentencing order must expressly discuss and weigh all of the evidence offered in mitigation. Reese v. State, 22 Fla. L. Weekly S150, S152 (Fla. March 20, 1997). A remand to the trial court is appropriate.

ARGUMENTS III-XVI

Mr. Hudson relies upon his Initial Brief for all other arguments.

ANSWER TO CROSS-APPEAL

ISSUE I.

WHETHER THE LOWER COURT ERRED IN FAILING TO INSTRUCT THE JURY AND FIND THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING FACTOR.

The state argues that the trial court below did not give this jury the instruction on the heinous, atrocious, and cruel aggravating circumstance[7] based on a "law of the case" theory, and that it was unaware of this Court's "clean slate" rule.[8] The State misreads the record below.

The State Attorney asked for an instruction on the HAC aggravating factor. Mr. Hudson opposed the instruction on two grounds: one, a law of the case theory that the HAC factor had been excluded in the first trial on a directed verdict which was

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[7] Hereinafter HAC.

[8] As set out in Preston v. State, 607 So.2d 404, 408 (Fla. 1992), cert. denied, 503 U.S. 999 (1993) and Merck v. State, 664 So.2d 939, 945 (Fla. 1995)(Wells, J., concurring). See also: King v. Dugger, 555 So.2d 355, 358 (Fla. 1990) and Teffeteller v. State, 495 So.2d 744, 745-46 (Fla. 1986).

binding in the present case, and, two, factual insufficiency in the 1995 second sentencing trial. After hearing argument the trial court declined to give the instruction but did not clearly set out the theory on which it had ruled.

The pertinent record is:

> THE COURT: You're asking for heinous, atrocious and cruel, Ms. Cox?
>
> (ASSISTANT STATE ATTORNEY]: Yes, I am, Your Honor.
>
> THE COURT: I thought the law had changed on that since I was over here before.
>
> [DEFENSE COUNSEL]: Well, I think it has, and I have some cases on it, if I may give you first a copy of the penalty phase from the first trial and a stack of cases.
>
> Now, in the penalty phase, Mr. Benito requested heinous, atrocious and cruel. Judge Griffin didn't give it. I don't think it's changed a wit, actually, and we're now back at the same posture aettina the same reauest.
>
> First, this hearing only exists because the defendant was found he had constitutionally ineffective counsel in second phase. So it would seem somewhat of a further violation of the Sixth Amendment rights to allow the State to allow on just another judge, not even another -- not even different facts, to now get heinous, atrocious and cruel as they failed to get the first time.
>
> I'm citing the first case in the stack, State v Gary, which is at 609 So.2d 1291, which dealt with a -- an attempt by a successor judge to change a ruling on a change of venue in the Lozano case, and it was held essentially that was beyond a successor judge's powers. And whether you call it law of the case, collateral estoppel, re judicata, I would ask the Court to find that this is an issue that's already been litigated and decided against the State.
>
> Additionally I think it's factually unsupported and if the Court wants to take up the law of the case issue first or wants me to continue through the factual -- lack of factual support --
>
> THE COURT: Okay. What about the law of the case, Ms. Cox?

[ASSISTANT STATE ATTORNEY]: Your Honor, with regard to that argument, he is citing cases that do not deal with the death penalty. Specifically Preston versus State, Supreme Court of Florida, 1992, 607 So.2d, which deals with a resentencing, and says that the judge can -- a successor judge can consider and allow circumstances -- penalty circumstances that were not given the first time.

Another case is Ferguson versus State, Supreme Court! 1985, 474 So.2d 208. It says: "We further find that nothing in the federal or state constitution prohibited the application of the then new aggravating circumstance to any pending cause presented for sentencing." And it was a resentencing hearing in a capital case.

And I've got also Spaziano, 433 So.2d 508, which is a Supreme Court case decided in '83.

"In the original sentencing phase, the trial judge rejected the State's proffer of evidence to the jury which established the appellant's conviction of forcible carnal knowledge and aggravated battery because the conviction was then on appeal. Upon remand, because this conviction was as an aggravating circumstance in the resentencing proceeding."

And they said that's okay. It does not expand the scope of the remand by allowing the State to introduce new evidence.

And it says: "The Court may properly apply the law and is not bound in the remand proceeding by prior legal error."

I have a couple other cases, but those three I think pretty much cover the idea that it's certainly something that is within the Court's discretion. You're not bound by Judge [Griffin's] decision.

[...]

[DEFENSE COUNSEL]: I would note, I don't have copies of any of these cases, but I would note just from what I heard in the Spaziano case the convictions were affirmed. So in that case there was a change in circumstances, and beyond that, I can't respond not having seen the cases.

THE COURT: Conviction was affirmed in this case, right?

[DEFENSE COUNSEL]: I think -- 1 thought what they were saying is there were prior violent crimes and the convictions for those prior violent crimes were affirmed.

[ASSISTANT STATE ATTORNEY]: Basically what happened is they were on appeal, and the judge was incorrect in not allowing the jury to hear about them. So because they're not final, the judge didn't allow it.

At the resentencing, the State tried to use them. They said even though the judge was in error the first time not letting them in, you can't say this judge can't correct the error and let them in because the first judge was wrong in his reason for not letting them in.

And our position is that even though Judge Griffin didn't find it was heinous, atrocious and cruel, Judge Padgett is not bound by Judge Griffin's error under the law.

THE COURT: Judge Griffin found there was not going to be an instruction on heinous, atrocious and cruel because the evidence did not support it?

[ASSISTANT STATE ATTORNEY]: In that proceeding, yes.

THE COURT: Is there additional evidence in this case?

[ASSISTANT STATE ATTORNEY]: Your Honor, I can't say I remember specifically absolutely everything. I can tell you that it's essentially the same, but I can't tell you -- don't recall there being testimony as to you know how far into the room the broken fingernails were.

I don't recall there being testimony as to the fact that the bloody sheets appeared to have been removed from the bed and were stuck in the closet.

I mean I think there's some things that are different but the essence is the same.

[...]

THE COURT: I think it's also close to a judge granting a motion for JOA on a matter when the judge decides, well, there's no evidence to support this so we're going to take that out of the case. And it goes up on appeal and comes back and the State says, well, we can roll right over that and get another shot.

[ASSISTANT STATE ATTORNEY]: Well, the Supreme Court doesn't feel that way because it says sentencing is kind of a clean slate. So you can present new aggravating circumstances that weren't even asserted the first time.

THE COURT: The State can. But I think where the court has already ruled there is insufficient evidence to support

> **it and you can't tell me there would be additional evidence** to **support** it, I **think** like in a trial **where** the **judge JOAs Count III, for example, the whose case is remand**ed, **and** now the **State says** we want to reintroduce Count III because **we ha**ve **additional evidence, well, you can't do that.**
>
> **So, anyway,** for that reason, rightly or wrongly, the Court will sustain Mr. **Donerly's objections** on the grounds of law of the case.

R. VII 487-492 (emphasis added).

The trial court was well aware of the **"clean slate"** rule and advised of Preston v. State, 607 **So.2d** 404 (Fla. **1992),** cert. denied, 507 U.S. 999 **(1993),** by the State Attorney. He expressly acknowledged that **"[t]he** State **can"** seek new aggravating circumstances in a second sentencing proceeding (R VII 492). Yet the trial court still declined to give the HAC instruction or find the HAC aggravating circumstance when sentencing Mr. **Hudson.**[9]

The trial court asked the basis of the first trial court's ruling on the HAC jury instruction and both sides agreed that it was insufficiency of the evidence. He had the transcript from the first punishment phase before him. The trial court specifically asked the prosecutor if there was any more evidence in this record and was told there was not (R. VII 487, 491-92). He then declined to give the HAC instruction. His off hand remark about **"law** of the case" does not take away from the clear meaning of his questions about sufficiency of the evidence just

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[9]**No** doubt the trial court was also aware of Omelus v. State, 584 **So.2d** 563 (Fla. 1991) where this Court reversed a death sentence because of jury was erroneously given the HAC instruction.

seconds earlier. The trial judge certainly was allowed to consider the prior judge's ruling in arriving at his own independent ruling as to the sufficiency of the evidence presented at the 1995 sentencing proceeding.

Given the alternative theories that Mr. Hudson argued in opposition to HAC, the trial court's questions about additional evidence of HAC, and the State's acknowledgment that there was no new evidence on that aggravating factor in this second punishment phase, this court must assume that the trial court ruled on the valid grounds. In the opinion of the trial court, the evidence was not sufficient to justify the HAC instruction.[10]

This appeal is most concerned with proportionality review by this Court, the only point in the process which can undertake such review. Proportionality review "is not a comparison between the number of aggravating and mitigating circumstances," Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). See *also* Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990) and Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989). Proportionality is a weighing of the facts which underlie those circumstances. The factual details of the crime, the factual details of Mr. Hudson's history, and

[10]After the penalty phase and prior to the judge's sentencing, counsel presented further argument on the applicability of the HAC aggravator. Defense counsel presented a detailed factual argument explaining why the HAC factor did not apply to this case. In conclusion, counsel argued: "[A]nd so it's the Court's job to look at the factors the Supreme Court has found to be indicators and then apply them to the case at hand..." (R. 660-75). After hearing argument, the court took the matter under consideration and concluded that the HAC factor was not supported by the record. Any argument that the trial court misunderstood the law is belied by this transcript.

the factual details of the experience of the victim. Attaching the HAC label to some portion of those facts doesn't alter those facts in any way, nor does withholding the HAC label from them.

The State's claim should be rejected by this Court.

ISSUE II

WHETHER THE LOWER COURT ERRED IN FAILING TO FIND TEAT THE INSTANT HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The state's brief amounts to an invitation to this Court to adopt a per se rule that all stabbing murders qualify for the HAC aggravating circumstance. This Court has not adopted such a rule in the past and this case shows why such a rule would be inappropriate.

The facts below established that the victim, Mollie Ewing, was stabbed four times in the chest. The medical examiner, Dr. Charles A. Diggs, testified as a State witness (R. VI 296-310). The medical examiner told the jury Ms. Ewing was stabbed four times. While he could not establish their sequence, "[e]ach one of these wounds were lethal wounds." The wounds penetrated the victim's lungs which caused rapid bleeding, resulting in shock, unconsciousness, and death (R. VI 302-03). The medical examiner testified that the victim was conscious and alive two minutes or less. Her body showed no signs of a struggle. The only indication of a defensive wound was a laceration on her fifth finger (R. VI 304-06).

On cross-examination the medical examiner testified that

four lethal wounds would have hastened death, as compared to one, **two,** or three such wounds. Nothing in his examination of the victim suggested the four fatal wounds were not inflicted in quick succession in a very brief time frame. He also noted that the victim could have lost consciousness in as few as twenty seconds. He acknowledged that he could only speculate as to how long the victim was conscious because different people lose blood at different rates (R. VI **309-10).**[11]

Is this a tragedy? Of course it is. Mr. Hudson has never said otherwise. Any murder is a terrible thing. Nothing Mr. Hudson has or will argue is intended to take away from that sad fact.

But was this murder especially heinous, atrocious, or cruel within the repeatedly expressed standards of this Court? No, **it's** not even close, and the trial court properly recognized that it wasn't. The medical examiner's testimony made it clear that while not instantly fatal, the victim's wounds brought a quick death and were accompanied by no non-fatal trauma or physical violation.

Beginning with Dixon v. State, 283 **So.2d** 1 (Fla. **1973),** cert. denied, 416 U.S. 943 **(1974),** this Court has made it clear that HAC is reserved for the most outrageous, cruel,

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[11] At trial the prosecutor tried to **enflame** the jury with comments about what Mr. Hudson did with the victim's body after the murder. This Court has already made it clear that such evidence is irrelevant to HAC. See Herzog v. State, 439 **So.2d** 1372, 1380 (Fla. 1983) and the cases cited therein.

conscienceless murders where the perpetrator either sought to inflict pain on the victim or was completely indifferent to it:

> The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious, or cruel capital felony constitutes an aggravated capital felony. **Fla.Stat.** sec. **921.141(6)(h),** F.S.A. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

283 So.2d at 9. The standard set out in **Dixon** has been repeated by this Court time and again. **"[T]his** aggravating 'factor is permissible only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another."

A capital murder **may** be "utterly reprehensible" but still requires "additional acts [such] as . . . set the crime apart from the norm of capital felonies" before a HAC finding will be upheld. **Williams** v. **State,** 386 **So.2d** 538, 543 (1980).

In order for HAC to be properly found there must be a combination of both physical pain and psychological pain inflicted by the murderer. This Court has said **"the** crime must be **both** conscienceless or pitiless **and** unnecessarily torturous to

the victim. Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992)(emphasis in original), citing to Sochor v. Florida, 119 L.Ed.2d 326, 339 (1992).[12]

In Cannaday v. State, 620 So.2d 166 (Fla. 1993), this Court disapproved HAC in a shooting murder with the comment:

> As we recently explained in Robinson v. State, 574 So.2d 108, 112 (Fla.), cert. denied, -- U.S. --, 112 S.Ct. 131, 116 L.Ed.2d 99 (1991), "[o]rdinarily, an instantaneous or near-instantaneous death by gunfire does not satisfy the aggravating circumstance of heinous, atrocious, or cruel." Additionally, we explained in Williams v. State, 574 So.2d 136, 138 (Fla. 1991), that this aggravating "factor is permissible only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." See also Dixon. We find that neither of these murders complies with the definition of heinous, atrocious, or cruel as defined in Robinson, Williams, and Dixon. **If we applied this aggravating factor under these circumstances, we would in effect be applying it to most, if not all, first-degree murders. Such a holding could result in a constitutional challenge to section 921.141(5)(h), Florida Statutes (1989).** See Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

620 So.2d at 169 (emphasis added).

The state argues that "[t]his Court has consistently upheld a finding of HAC where the victim has been killed with multiple

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[12] Richardson disapproves a HAC finding where a woman victim was shot twice with a shotgun and the evidence showed:

> At trial, medical evidence showed that [the victim] had suffered a gun blast to the chest that punctured the heart. Death probably was not instantaneous, but occurred only after sufficient blood seeped into the chest cavity to prevent the heart's beating.

604 So.2d at 1108.

stab **wounds,"**[13] followed by a string of citations to stabbing murder cases. Were this Court to adopt the rigid approach of declaring all stabbing murders to be **HAC** the State's authority might be persuasive. **"Multiple** stab wounds" can be any number more than one. A closer examination of the State's authority establishes how different each of these cases are from that of Mr. Hudson.

The victim in Hansbrough v. State, 509 **So.2d** 1081 (Fla. 1987) was stabbed 30 times, including defensive wounds, during a daylight assault at her work place. The **Hansbrough** opinion gives few facts beyond the "thirty-some stab **wounds"** suffered by the victim. 509 **So.2d** at 1086.

In Nibert v. State, 508 **So.2d** 1 (Fla. 1987) a 57-year-old man is stabbed 17 times during a robbery of his home. **"There** was testimony that some of his wounds were defensive wounds and that the victim remained conscious throughout the stabbing," 508 **So.2d** at 4. The victim remained conscious at least long enough to walk to a neighbor's **home.**[14]

Flovd v. State, 497 **So.2d** 1211 (Fla. 1986) and Flovd v. State, 569 **So.2d** 1225 (Fla. 1986) are the same crime. There the victim was an 86-year-old woman stabbed in her home. She suffered twelve stab wounds in the chest, abdomen, and left wrist, Many of the wounds were **"potentially** fatal, [from which

[13]**State's** Brief at 90.

[14]**Even** with the presence of the **HAC** aggravator, this Court found Mr. **Nibert's** death sentence disproportionate and reduced his sentence to life. Nibert, 508 So. 2d at 1063.

she] would take a longer time to **die."** There was also evidence on the body of a struggle. 569 **So.2d** at 1232. In finding HAC after Floyd's first trial, the sentencing judge wrote:

> The medical examiner testified that the victim died from the deep stab wound to the chest within a short period of time, perhaps two to five minutes, after sustaining that wound. <u>However, **from** the **evidence,** it **may reasonably be inferred that the defendant continued stabbing the victim while s**he was still **alive** for a **total of twelve stab wounds to her torso and what was characterized by the medical examiner as one defensive st**ab **wound** to then **hand.**</u>

497 **So.2d** at 1214 (emphasis added). Thus it appears that this trial judge felt death in two to four minutes from stab wounds by itself did not qualify for HAC, but Floyd's repeated stabbing of the victim up to twenty times while she died was a different matter. This Court apparently agreed when it affirmed with the standard quote from <u>**Dixon**</u>. 497 **So.2d** at 1214.

In <u>**Johnson** v. **State**</u>, 497 **So.2d** 863 (Fla. 1986) the victim was an 84-year-old woman, In approving HAC this Court noted:

> The medical examiner testified that the victim, an **84-**year-old woman who had retired to bed for the evening, was strangled and stabbed three times completely through the neck and twice in the upper chest. The medical examiner's testimony also revealed that it took the helpless victim three to five minutes to die after the knife wound severed the jugular vein. The court also mentioned, correctly, that the victim was in terror and experienced considerable pain during the murderous attack.

497 **So.2d** at 871.

In <u>**Hardwick v.** State</u>, 521 **So.2d** 1071 **(Fla.)**, <u>cert. **denied**</u>, 488 U.S. 871 **(1988),** the testimony in support of HAC was:

> The medical evidence at trial indicated that the victim was stabbed three times in the chest and back, then shot in the lower right back and then struck about

> the head. According to this testimony, the victim became unconscious within five to six minutes of being stabbed. The blows to the head apparently occurred immediately after death, since there was almost no bleeding from the resulting wounds. There was some evidence the victim's hands had been bound, but the medical examiner could not say with certainty that this had happened.

521 **So.2d** at 1073. The murder took place in the context of drug trafficking.

Haliburton v. State, 561 **So.2d** 248 (Fla. **1990),** presents another extreme example. After hearing testimony of the victim's 31 stab wounds while in his bed, many of which were defensive wounds during the struggle that followed, the jury was instructed on HAC. Even though the trial court did not find the HAC aggravating factor, this Court found no error in the instruction on such facts.

This Court's opinion in **Pittman v. State, 646 So.2d** 167 (Fla. **1994), cert.** denied, 131 **L.Ed.2d** 870 **(1995),** gives less detail as to the extent of the injuries inflicted on the three murder victims, but it is still clearly not a situation comparable to Mr. Hudson's, All three were relatives, a daughter and her parents, killed in a murderous rampage going from room to room of their home. In approving the HAC aggravating factor this Court wrote:

> The record reflects that each victim was stabbed numerous times and bled to death. In addition, Bonnie Knowles' throat was cut. We have previously held that numerous stab wounds will support a finding of this aggravator.

646 **So.2d** at 173 (citations omitted).

The State goes on to cite other authority involving stabbing

cases with somewhat more candor as to the facts in support of HAC. denied r v. State, 626 **So.2d** 1325 (Fla. **1993),** cert. ' **,** 128 **L.Ed.2d** 221 **(1994)(a** 64-year-old man stabbed forty times with increasing severity and where the medical examiner testified that death or unconsciousness occurred one or two minutes after the most serious life threatening wounds); Trotter v. State, 576 **So.2d** 691 (Fla. **1990)(70-year-old** woman stabbed at least seven times, disemboweling her and bringing death after several hours); Da 's v. State, 648 **So.2d** 107 (Fla. **1995)(73-year-old** woman "repeatedly **stabbed"** in a case setting out fewer details on a finding the HAC challenge was defaulted for lack of an objection at trial); and Derrick v. State, 641 **So.2d** 378 (Fla. **1994),** cert. denied, 130 **L.Ed.2d** 887 **(1995)(33** knife wounds, including defensive wounds, after which the victim lived long enough to crawl twenty feet leaving a trail of blood).

There are some common themes in these HAC stabbing cases. In each **"multiple** stab **wounds"** means not two or three or four or even five, but a great many. The stabbings are accompanied by some physical violation or psychological torture that greatly increase then victim's sense of terror. This is the **"inflict[ion** of] a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others," this Court has often spoken of. Dixon. There is a savagery to such cases, they represent frenzied killings, a taunting of victims, an intentional effort to make the victim suffer or a complete and utter disregard for the pain and terror experienced by the

victim. Defensive wounds are a key consideration because they represent a victim fighting for his or her life, and being slashed and cut all the more because they do struggle for their lives.

A close examination of this murder clearly indicates that it was not heinous, atrocious, and cruel. In the language so often employed by this Court in describing the valid application of the HAC aggravator, this murder was not "conscienceless or pitiless and unnecessarily torturous of the **victim."** **Hartley v. State, 21** Fla. L. Weekly S391, S394 (Fla. September 19, 1996). This is not an either/or proposition. As this Court wrote in Richardson v. State, 604 **So.2d** 1107, 1109 **(Fla. 1992), "the** crime must **be both** conscienceless or pitiless **and** unnecessarily torturous to the **victim"** (emphasis in original). There was no effort to inflict pain and indignity on the victim. This murder was not an orgy of blood and slashed tissue as characterizes so many of the **cases** where this Court has approved the HAC factor.

Mr. Hudson is confident this Court does not wish to adopt **a** per se rule that all stabbing murders, regardless of their individual facts, qualify for HAC. Such a rule would significantly expand Florida's capital murder statute in such a way as to endanger its ability to withstand vagueness challenges. See **Maynard v.** Cartwriaht .[15]

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[15]**This** appeal is most concerned with proportionality review by this court, the only point in the process which can undertake such review. Proportionality is a weighing of the facts which underlie those circumstances. The factual details of the crime are not altered in anyway by this State claim. Attaching the HAC

The State's claim should be rejected by this Court.

ISSUE III

Whether the Lower Court **Erred** in Failing to Consider **and** Apply the Aggravating Factor of Capital Felony Committed While Under a **Sentence** of Imprisonment or Community Control.

The trial court below did not find as an aggravating circumstance that Mr. Hudson was under a sentence of imprisonment as a result of his being on community control at the time.

Subsequent to trial this Court issued Trotter v. **State**, 22 Fla. L. Weekly S12 (Fla. December 19, 1996) deciding a similar issue adversely to Mr. Hudson's position below. Mr. Hudson submits that **Trotter** is distinguishable from the case at bar and should not control. In **Trotter**, the resentencing court found that the community control aggravator did not apply. In the case at bar, after hearing argument from both sides, the trial court determined that the community control aggravator did not apply to Mr. Hudson's case. Notwithstanding this Court's decision in **Trotter**, Mr. Hudson asserts that the application of this factor to his case would be an improper ex post ***facto*** application of the law.

In support of his argument, Mr. Hudson is guided by the dissent in Trotter. In that dissent Justice **Anstead** stated:

> The community control aggravator did not exist when appellant committed the crime at issue.
>
> Express provisions of the constitutions of the United States and of the State of Florida prevent the state from changing the law and then applying the new law to past events.

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label to some portion of those facts doesn't alter them.

The United States Constitution expressly prohibits the states from passing ex post facto laws. Similarly, article I, section 10, of the Florida Constitution expressly declares:

> No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

The prohibition against ex post facto laws is universally accepted in all civilized societies and is easily understood and applied. Further, this prohibition has been consistently and rigorously applied to bar the retroactive application of penal laws.

The United States Supreme Court has invoked the ex post facto provisions to prohibit not only the retroactive application of statutes defining or creating new crimes, but also to changes in statutory schemes for punishment like Florida's sentencing guidelines. Miller v. Florida, 482 U.S. 423, 434, 107 S.Ct. 2446, 2453, 96 L.Ed.2d 351 (1987). In extending the application of ex post facto provisions to Florida's statutory parole scheme, the Court has declared that these provisions serve to "uphold[] the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." Weaver v. Graham, 450 U.S. 24, 29 n. 10, 101 S.Ct. 960, 964 n. 10, 67 L.Ed.2d 17 (1981). This Court has also rigorously upheld the constitutional provisions. We have held that the state constitutional provision against ex post facto laws applies if a law "(a) . . . is retrospective in effect; and (b) . . . diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense." Duaaer v. Williams, 593 So.2d 180, 181 (Fla. 1991). We held in Dugger that Williams could not be denied the advantage of a recommendation for executive clemency by the Department of Corrections if he met the requirements existing under the statute when his crime took place.

The application of these ex post facto provisions is clear in this case. We have expressly held that aggravating circumstances "actually define those crimes ... in which the death penalty is applicable." State v. Dixon 283 So.2d 1, 9 (Fla. 1973), cert. denied 416 U.S. 943: 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). There can be no doubt under our holding in Dixon that aggravating circumstances are part of the substantive

> law of capital crimes. Obviously, redefining a death penalty crime is a far more substantive change in the law than the changes involved in **Miller**, **Weaver**, and **Dugger**. Further, it is crystal clear that the legislature changed the substantive death penalty law when it amended section **921.242(5)(a)** after our decision in Trotter v. State, 576 **So.2d** 691 (Fla. **1990)** 3, and expressly added **"community control"** as an aggravating circumstance. It is apparent that being on community control was **not** part of the definition of a death penalty crime as described in **Dixon** at the time of the homicide involved herein. Hence, the new statutory aggravator of **"community control"** cannot constitutionally be applied to Trotter at this late stage.

Trotter, 22 Fla. L. Weekly at **S13-14.**

Mr. Hudson would again argue, as he did to the trial court, that the line of cases including **Combs** v. **State,** 403 **So.2d** 418, 421 (Fla. 1981) and **Valle** v. State, 581 **So.2d** 40, 47 (Fla. **1991),** are distinguishable in that they concerned a new aggravating factor which was not entirely new but had already been part of existing case law prior to Legislative action (See R. II 267-70). Mr. Hudson argues that application of this aggravating factor to him violates both Florida and United States constitutional law prohibiting ***ex*** post ***facto*** applications of the law.

At the risk of being overly redundant, in an appeal such as this where the primary issue is proportionality the finding or rejection of this additional aggravating circumstance is irrelevant. The adoption or rejection of this additional label does not alter the facts upon which the proportionality decision is made one whit.

The state's claim should be denied.

CONCLUSION

Appellant, based on the foregoing and on the discussion in his initial brief, 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 ~~31st day of March~~ April 17th, 1997.

Respectfully submitted,

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