IN THE SUPREME COURT OF FLORIDA

KAYLE BARRINGTON BATES,

Appellant,

v. Case #: **86,180**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The State does not accept Bates' renditions of the Case or Facts as put forth in his initial brief, as they are both argumentative.[1] In addition, Bates' initial brief exceeds the 100 page limitation and he has not asked for leave to file an enlarged brief. Individually, and collectively, these violations present reasonable grounds for a motion to strike Bates' brief. However, given the inexcusable delay in the filing of his brief, which included repeated contemptuous disregard for this Court's directives, the State will refrain from so moving.[2]

A. *Bates I*

On Bates' original direct appeal, then Chief Justice Boyd, in

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[1]Appellant was the Defendant in the trial court. Appellee, THE STATE OF FLORIDA, was the prosecution. Henceforth, Appellant will be identified as "Bates" or Defendant. Appellee will be identified as the "State". The Record and Transcript of this Case are contained in 16 Volumes, which are numbered at the top of the document by Roman numeric I through XVI. References shall be by volume number and page. Therefore, the reference I/33, is to page 33 of Volume I. There is also a Supplemental Record containing 20 additional volumes, numbered XVII through XXXVI, which includes transcripts of a mistrial and Mr. Dunn's personal file on Bates. If reference is made to the same, it shall be the same as reference to the original record. Thus, XXII/10, designates supplemental record, volume XXII, p. 10. "p" designates pages of Bates' brief. All emphasis is supplied unless otherwise indicated.

[2]After repeated delays in filing his brief, on October 17, 1997, this Court ordered that opposing counsel's brief was to "be filed no later than 2:00 p.m. on October 22, 1997, or counsel is to appear in person before the Honorable Don T. Sirmons ... at 9:00 a.m. on October 23, 1997, to show cause why he should not be held in contempt." Based upon this Court's Notice of Filing, dated November 10, 1997, counsel's brief was filed on October 31, 1997.

his concurrence/dissent, wrote as follows:

> I concur in the decision of the Court to affirm the judgments of conviction of first-degree murder, robbery, kidnaping, and attempted sexual battery. I dissent to the Court's order remanding for reconsideration of the sentence for the capital offense. The trial judge's findings were all supported by evidence, the process of weighing of circumstances was properly carried out, and the sentence imposed by the trial court was the appropriate one under the law. The pertinent portions of the sentencing order are set out in a footnote. (footnote omitted)
>
> The evidence showed and the trial judge found that the murder was committed while appellant was engaged in the commission of kidnaping and attempted sexual battery. Both kidnaping and sexual battery are among the serious crimes listed in section 921.141(5)(d), Florida Statutes (1981), defining an aggravating circumstance under the Florida Capital Felony Sentencing Law. Commission of a capital felony "while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any" of the offenses listed there constitutes an aggravating circumstance. Id. (This aggravating circumstance should not be confused with the felony murder doctrine, which is part of the statutory definition of first-degree murder. Sec. 782.04(1)(a), Fla. Stat. (1981)).
>
> The evidence showed and the trial court found that the murder was committed for the purpose of avoiding or preventing a lawful arrest. This factor is supported by logical inference from the proven circumstances. After appellant's commission of the crimes of kidnaping, attempted sexual battery, and robbery, the victim of all of these crimes was also the only eyewitness to them. The trial judge, having heard all the evidence directly, concluded that appellant killed the woman to eliminate her as a witness who could bring about his arrest and prosecution. Past decisions of this Court in capital cases show that this circumstance may be supported by such a logical inference from

the circumstances. See, e.g., Bolender v. State, 422 So.2d 833 (Fla.1982), cert. denied, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983); Martin v. State, 420 So.2d 583 (Fla.1982), cert. denied, 460 U.S. 1056, 103 S.Ct. 1508, 75 L.Ed.2d 937 (1983); Jones v. State, 411 So.2d 165 (Fla.), cert. denied, 459 U.S. 891, 103 S.Ct. 189, 74 L.Ed.2d 153 (1982). In support of its disapproval of the finding, the majority cites Menendez v. State, 368 So.2d 1278 (Fla.1979), where we rejected the contention that this circumstance was established by proof of the fact that the murder firearm was equipped with a silencer. See also Menendez v. State, 419 So.2d 312 (Fla.1982). Menendez does not say that this factor may not be established by logical inference from circumstantial evidence. (emphasis Chief Justice Boyd's)

If the majority's characterization of the instant criminal episode as "a burglary ... simply getting out of hand" is intended to mitigate the murder on the ground of the victim's resistance, it is erroneous. A murder precipitated by a robbery victim's resistance is not necessarily removed from the category of first-degree murders to which a death sentence is appropriate. Armstrong v. State, 399 So.2d 953 (Fla.1981).

The evidence showed and the trial court properly found that the murder was committed for pecuniary gain. As the majority properly concludes, this factor has force separate and independent from the factor of commission during the course of the inherently violent felonies of kidnaping and attempted sexual battery. The fact that appellant did not need to kill the victim in order to rob her does not detract from the validity of the finding of this circumstance; we have approved this factor when it was a concurrent though not the exclusive motive for the criminal episode resulting in the murder. See, e.g., Porter v. State, 429 So.2d 293 (Fla.), cert. denied, -- U.S. --, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983); Middleton v. State, 426 So.2d 548 (Fla.1982), cert. denied, -- U.S. --, 103 S.Ct. 3573, 77 L.Ed.2d 1413 (1983).

The evidence showed and the trial court found that the murder was especially heinous, atrocious,

or cruel.

> The evidence showed and the trial court found that the murder was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification. As the trial court's written findings indicate, the trial court found from the evidence that appellant broke into the office and lay in wait there for his victim, knowing that she would soon return and probably would be alone. He had hidden his truck in the woods nearby so that it could not be seen from the road. Such advance planning as is indicated by stalking or lying in wait supports a finding of this aggravating circumstance. See, e.g., Middleton v. State, 426 S.2d 548 (Fla. 1982), cert. denied, -- U.S.--, 103 S.Ct. 3573, 77 L.Ed.2d 1413 (1983); Hill v. State, 422 So.2d 816 (Fla.1982), cert. denied, 460 U.S. 1017, 103 S.Ct. 1262, 75 L.Ed.2d 488 (1983); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982).
>
> Because all the trial court's findings were proper, I do not see any need for reconsideration of sentence. I would affirm the sentence of death.
>
> ADKINS, J., concurs.

Bates v. State, 465 So.2d 490, 493-96 (Fla. 1985). Justice Alderman also filed a concurrence/dissent, in which he opined:

> I concur with that portion of the decision which affirms Bates' convictions for first-degree murder, robbery, kidnaping, and attempted sexual battery. I dissent, however, to the vacating of Bates' death sentence. Even assuming that the two aggravating factors stricken by the majority were erroneously found, the remaining aggravating factors warrant imposition of the death penalty in this case. When this Court strikes invalidly found aggravating factors and several validly found aggravating factors remain, we are not compelled to vacate the death sentence merely because there may be mitigating circumstances. Basset v. State, 449 So.2d 803 (Fla.1984); Brown v. State, 381 So.2d 690 (Fla.1980), cert. denied, 449 U.S. 1118, 101 S.Ct.

> 931, 66 L.Ed.2d 847 (1981); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979). I would affirm the death sentence.

Id., at 496. The majority vacated the death sentence because it struck two of five aggravating circumstances and "[a]s a reviewing court, we do not reweigh the evidence." *Id*., at 493. Therefore, it remanded "to the trial court for a reweighing of the valid aggravating circumstances against the mitigating evidence." *Id*.

B. *Bates II*

Clearly, all that was required of the trial court on remand was to reweigh the remaining three valid aggravating circumstances against one mitigating circumstance. *Id*., at 493. However, the trial court allowed Bates to present additional mitigatory evidence, i.e. Dr. Elizabeth McMahon (See Appendix, Judge Turner's Order, June 3, 1985). *Bates v. State*, 506 So.2d 1033, 1034 (Fla. 1987).[3] At the trial level, Judge Turner found Dr. McMahon's failure to fully acquaint herself with the facts of the case, and her view of the death penalty, undermined her opinion regarding mitigation. *Id*., at 1035. Justices Ehrlich, Shaw, and Adkins concurred that the record reflected proper consideration of evidence of alleged additional mitigating circumstance, so that there was no error in resentencing defendant to death. Justice Kogan concurred in the result only. Chief Justice MacDonald

[3]Dr. McMahon's name is misspelled in the opinion as McMann.

dissented with an opinion expressing that the trial court's order did not mention the additional evidence, and he could not tell from said order whether it properly weighed this mitigation. Justices Overton and Barkett joined Chief Justice MacDonald.

C. ***Bates III***

In November, 1989, subject to a death warrant, Bates filed a petition for writ of habeas corpus and a motion for post-conviction relief in the trial court. In March, 1990, Chief Judge DeDee Costello conducted an evidentiary hearing, and at the end of July, 1990, vacated Bates' death sentence owing to ineffective assistance of counsel, but denied his remaining claims. Bates appealed to this Court, and the State cross-appealed. *Bates v. State*, 604 So.2d 457 (Fla. 1992). This Court held that the denied claims were not preserved, or if they were, they would not have led to reversal of conviction. *Id*. As to the cross-appeal, it held that the record supported the trial judge's conclusions that Bates' counsel failed to adequately investigate his background, and absent that failure, there was a reasonable probability that the sentence would have been different. *Id*. On that basis, this Court remanded this cause for resentencing. *Id*.

D. ***Bates IV***

Bates rendition of the January, 1995, mistrial, and May 1995, Resentencing, is argumentative, particularly as it relates to his quest below, and before this Court, to have the jury instructed on

what would have constituted an illegal sentence if he had received it -- "life without eligibility of parole." The State will relate the portions of the case concerning this matter in its argument as to this issue. The juror question was not indicative of its determination "that Bates was not deserving of death" as he alleges on p.8 of his initial brief. Rather, it was indicative of his closing argument in which his counsel argued for life repeatedly without advising the jury of the 25-year minimum mandatory (XV/784-820, 832).[4]

The jury recommended death by a margin of nine (9) to three (3) (III/548; XV/836-37). In aggravation, the trial court found that Renee White's murder was committed while Bates "was engaged in the commission of or attempt to commit Kidnaping or Attempted Sexual Battery, or flight after committing or attempting to commit the crime of Kidnaping or Attempted Sexual Battery," and "pecuniary gain" (III/549). It also found her murder was "especially heinous, atrocious or cruel" (III/549-51). The State will address the trial courts findings for both aggravation and mitigation in depth in its proportionality argument.

STATEMENT OF THE FACTS

If the majority's characterization of the instant criminal episode as "a burglary ... simply getting

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[4]From Bates' Closing Argument: "Think of Mr. Bates serving life in prison." (XV/807) "...because when you spend your life in prison you are cut off from all of that. Because it's punishment. It is punishment. Don't think that it's not." (XV/808)

> *out of hand" is intended to mitigate the murder on the ground of the victim's resistance, it is erroneous. A murder precipitated by a robbery victim's resistance is not necessarily removed from the category of first-degree murders to which a death sentence is appropriate*.
>
> *Bates I*, at 495, C.J. Boyd concurrence/dissent.

A. **<u>The Capital Murder of Janet Renee White</u>**.

Geraldine Flynn[5] testified that on June 14, 1982, she was a client of Jim Dickerson's State Farm Agency (IX/52-53). She called the agency from her job on that day and Renee, who she knew, answered the phone, and immediately started screaming (IX/53-55). They were "horrifying, bone-chilling screams," and were so loud she held the receiver away from her ear (IX/55). Ms. Flynn handed the phone to a fellow employee, Ed Claymen, and the line went dead as he was listening (IX/56). She quickly called the Lynn Haven Police Department, reported what she had heard, and was informed they would check on it right away (IX/56). Unconvinced they were going to respond right away, five minutes later she contacted the Bay County Sheriff's Department (IX/57). Ms. Flynn spoke with Investigator Robinson the day after the murder, and informed him she called Dickerson's agency at 1:05 p.m. (IX/60). However, she also added her watch ran 5 minutes fast all the time (IX/60).

Jim Dickerson testified that he was a State Farm Agent in 1982, and that he had one employee, Janet Renee White, who was an

[5]In 1983 her surname was Gilchrist.

insurance secretary, primarily responsible for taking care of the policy holders (IX/74). When he returned to his office after lunch the day of the murder, he observed the telephone turned around, facing forward on the desk, high heel shoes in the middle of the floor, and a small canister of Mace also in the middle of the floor (IX/75). He checked the bathroom and went out the front door because Renee's car was there (IX/75-76). As he exited the front, he was met by a Lynn Haven policewoman (IX/76). He told her something was wrong, and the officer drew her weapon and began searching the premises (IX/76). He checked his watch, and it was 1:07 p.m. (IX/76).

Mr. Dickerson further testified that the first investigator on the scene was Guy Tunnell (IX/85). He saw Bates come out of the woods "at the very end of [his] building." (IX/85-86). He also saw Officer Cioeta apprehend Bates with a shotgun at the front of the building (IX/86). Bates stated he was by the pond picking cattails (IX/86-87). Bates' shirt was wet and appeared to have red stains on the front of it (IX/87). Bates answered the officers' questions and was oriented to time and place (IX/88).

Under cross-examination Mr. Dickerson testified that Bates was apprehended somewhere between 1:45 to 1:55 p.m. (IX/98). He was "with [Investigator] Tunnell ***a good 20 minutes*** before so 1:30, yeah. And it could have been longer than 20 minutes." (IX/98) On redirect, Mr. Dickerson testified he was with Investigator Tunnell

20 minutes or so because the latter “was making a crime scene investigation.” (IX/101). Renee’s body was found in a heavily wooded area, and she was located by someone literally stumbling over her (IX/102).

Don Cioeta testified he was a patrolman with the Lynn Haven Police on the day of the murder, and he responded to Dickerson’s agency in a marked vehicle while off-duty (IX/104-05). He armed himself with a shotgun, which he aimed at Bates, when he saw the latter turning the north end of the office building (IX/106). Bates “was dressed in fatigue pants, a blue shirt, and tennis shoes.” (IX/106) He had cattails in his hand, commented he had picked them on his lunch hour and wanted to get back to his truck to continue on his route (IX/106-07). Bates attempted to walk away from him (IX/106).

Officer Cioeta was joined by Mr. Dickerson, Investigator Tunnell, and Chief Roy (IX/106-07). Bates repeated his cattail story, adding he had lost his company ball cap (IX/107). Bates answered the questions posed him, and was oriented to time and place (IX/108). His shirt was “muddy, wet, and some staining on the left side of the shirt, ... also small particles of vegetation ...” (IX/109). He appeared hot, sweaty and excited (IX/109). When Officer Cioeta first appeared on the scene he notice a truck parked in the woods (IX/111). He and Chief Roy went down there to check it out (IX/111). Bates had scrapes on his arms and it “appeared as

if he ran through the woods." (IX/111)

Under cross-examination, Officer Cioeta testified that when he arrived on the scene, Chief Roy was already there (IX/112). They had already begun searching in the back when he arrived (IX/112). He was present 20 to 30 minutes before Investigator Tunnell arrived (IX/113). Investigator Tunnell was present when Bates was apprehended (IX/114).

On June 14, 1982, Bobby Knowle was a Sergeant with the Bay County Sheriff's Office, in charge of the "Crime Scene Investigation Division" (IX/115). When he arrived, several officers were already on the scene, "protecting ... the crime scene" (IX/116-17). He discovered "forced entry" at the rear of the office (IX/119). He observed that a "flat metal object had been used to force the striking plate off of its locking device to gain entry and that door was ajar." (IX/119) He located a "garbage can holder", which he surmised could have been used to force the door (IX/119). He found no human blood in the building (IX/121).

One could not see Renee's body from the sliding glass door (IX/124). She was found 90 to 100 feet from the office (IX/126-28). Bates defecated within 3 feet of Renee (IX/130).

Sheriff Tunnell was a Investigator for the Bay County Sheriff's Office in 1982, and one of the lead investigators on the Renee White homicide (IX/159). When he arrived on the scene, Chief

Roy, Officer Spidel and Officer Cioeta were examining a utility delivery truck, with “Jim Walters Paper Company” listed on the side (IX/160). He cordoned off the area, and 10 minutes later Officer Cioeta announced over the radio that a black male, [Bates] came out of the woods (IX/160-61). Bates was “excited, winded ... a lot of dampness on his clothing, had a handful of cattails” (IX/161). Bates provided a Florida Driver’s License as identification, and related he was the driver of the paper company truck (IX/161). Bates explained that he picked the cattails “to transplant at his home that he just purchased or moved into in Tallahassee” (IX/162). He was very responsive, quick to answer (IX/162). He said the blood on his clothing came from a gum disease (IX/162).

Sheriff Tunnell observed that Bates had a number of scratches on his arms, which was not consistent with the amount of blood on his clothing (IX/162). His observations as to Bates’ demeanor came after the latter had been placed in Officer Cioeta’s police car (IX/165). Inside Dickerson’s office, Sheriff Tunnell could see from outside, a high heel shoe, perhaps a purse, and maybe some jewelry (IX/165). He also observed “tennis shoe type” footprints outside the office, at the northwest corner of the building (IX/166).

Bates provided various accounts for his presence in the area, including stopping before his lunch break to get directions, and attempting to stop a large white male [later embellished to 2 white

males] from attacking Renee and being struck in the mouth in the process (IX/166-68). Finally, Bates admitted entering the Dickerson agency, and for some reason Renee attacked him with no provocation on his part (IX/167). He denied carrying a knife (IX/167). He alleged that Renee came at him with a pair of scissors and stabbed herself (IX/167). At the Sheriff's office he learned that Investigator McKeithen discovered the victim's ring on Bates' person (IX/168). Bates alleged that the ring was his wife's and he was going to get it repaired (IX/168).

Two days after the murder, Sheriff Tunnell, accompanied by Investigator McKeithen, drove to Tallahassee to speak with Bates' wife (IX/173). They learned that the ring found on Bates was not his wife's (IX/173). They further learned that his wife bought him a Buck knife and scabbard at Governor's Square Mall (IX/173). Bates had attached to the scabbard a distinctive Army green-colored cord, which was related to his military reserve duty (IX/174). His wife also had given Bates a watch as an early Father's Day gift (174).

The two officers went to Governor's Square Mall, located a store that identified the scabbard they found near the victim's body, and Sheriff Tunnell bought a Buck knife like the one Bates' wife bought him (IX/174-75). The Medical Examiner, who performed the autopsy on Renee, told him that her two stab wounds were consistent with being caused by a Buck knife (IX/175). Bates'

wristwatch had a pin missing, and such a pin was located inside the insurance agency (IX/176).

Because of the length of time between the murder and Bates' resentencing, Sheriff Tunnell could not remember what Bates' wife had told him about his mood the day of the murder (IX/176-77). His memory was refreshed by his June 17, 1982, investigative report, in which he remarked Bates' "was in a regular everyday mood, normal, nothing unusual." (IX/177) On the day of the murder, Bates was not disoriented as time, place, or person at all (IX/178). He was never treated for any mental disorder (IX/180).

Suzanne Livingston, FDLE serologist, testified there were indications of semen on Renee's blue panties which she could not positively identify as spermatozoa (X/207). Renee's blood was on Bates' blue shirt and green fatigue pants (X/208). There was semen on the fly of Bates' briefs, but there were no active spermatozoa, and, therefore, no positive identification could be made (X/208).

Frank McKeithen, Sheriff of Gulf County, was an investigator with the Bay County Sheriff's Office in 1982 (X/213). As with Sheriff Tunnell, Sheriff McKeithen's first encounter with Bates was when he was in the back of Officer Cioeta's patrol car (X/213-14). He was the one that interviewed Bates on the two recorded tapes taken at the Bay County Sheriff's Office (X/216-17).

In his first statement, Bates related that every Monday he drove a paper truck to Panama City from Tallahassee (X/221). He

stopped at the State Farm Agency located on Highway 77 to get "information" (X/221). He asked a girl at the front of the office if she had any information regarding buildings in the area (X/222). She said she was the only one there (X/222). He moved his truck to take a 30-minute lunch break and "find a cattail," which he wanted to beautify his yard (X/222-23).[6] He walked to a creek until he found cattails (X/224). In Bates' right pocket was a handful of change and a lady's diamond ring (X/225-26). He said the ring was on the ground by a bunch of change in front of the agency and he picked it up (X/226-27).

Earlier, Bates had related he found a woman lying out in the woods (X/227). He "picked up the hand to see if she had any pulse." (X/228) He learned that from his reserve duty (X/228). He checked her eyes and noted she was not breathing (X/228). This scared him bad because he had never seen a dead person before (X/228). At the scene Bates had related the blood on his shirt was his, as he had pyorrhea in his teeth, his gums started to bleed, and he used his shirt to wipe it away (X/229). Initially, he said he never saw the woman in the woods (X/230-31). He said he was afraid of being blamed for something he didn't do (X/230-31).

In his second recorded statement, Bates stated he went to the agency, and there was a lady at her desk with long hair and a dress

[6]On the scene he told officers he didn't go inside the agency. He only "leaned inside the door." (X/223)

(X/237). The lady was mad, “kind of upset about something,” and she started arguing with him (X/237). She “attempted” to spray him with Mace, but it only went on his arms (X/238). She “grabbed a pair of scissors something like that” (X/238). Bates tried to take them from her and they slipped (X/238). He took her outside and she was walking at first, but he had to pick her up (X/238). The scissors were in his hands (X/239). He took her to the edge of the woods (X/239). He related “the scissors might have hit her in the chest.” (X/239)

Bates took his penis out of his pants and either masturbated or ejaculated on top of her (X/241). This occurred before he stabbed her (X/242). He thought he broke his watch during the scuffle inside the agency (X/243). The victim’s ring was “on the sidewalk.” (X/244) Bates equivocated and stated Renee had already been stabbed when he had his sexual reaction (X/245-46). Then he had a bowel movement (X/246).

The first time he went to the agency there were two men inside (X/248). He parked his truck at the dead end and ate lunch (X/248). He went up to the office a second time and there were no cars present (X/248). He found the ring after Renee was stabbed and left in the woods (X/249-50). He did not know how much time elapsed between his leaving her in the woods and when police arrived on the scene (X/250).

Sheriff McKeithen testified he recovered a watch from Bates’

pocket (X/252). The watch was unattached on one side of the crystal (X/253). Initially, Bates told him “he had broken the watch earlier that morning on his first delivery ...” (X/253). Later, Sheriff McKeithen confronted Bates with the fact that an officer had found the watch pin inside the agency (X/253). Sheriff McKeithen testified: “Each time I would confront him about something I thought he was lying about, he would come up with another story or another excuse.” (X/254) Bates next story, occurring before the second taped statement, was that the watch was broken during his alleged attempt to rescue Renee from a large white male, who hit him in the mouth (X/254). He denied stabbing the victim with a knife (X/258).

All in all, “ten or more” stories were concocted by Bates as to what happened to Renee (X/259). Bates had an answer for every question asked (X/259). Sheriff McKeithen did not detect any mental inability during the seven hours he spent with Bates (X/260).

John Boney saw a “Jim Walter’s” truck around 12:30 p.m. near the Aztec Village area, which meant that probably somewhere around 12:40 p.m. Bates was pulling on to Peachtree Lane (X/276). Sheriff Tunnell was the first investigator on the scene at 1:21 p.m. (X/277). Bates was apprehended at approximately 1:30 to 1:31 p.m. (X/277). Therefore, from 12:40 p.m. until 1:31 p.m. Bates secreted his truck, broke into the back of the agency, confronted Renee,

subdued her, drug her out the back door, carried her from the back door to the woodline where he stabbed her twice (X/277-78). The victim had 15 contusions, 7 abrasions; her jaw, as well as her upper and lower lips were bruised (X/278). Bates had "...sufficient time to ejaculate, defecate and pick up cattails ..." (X/278). He was smart enough to walk to the front of the agency as opposed to the back where all the police officers were (X/278).

Dr. Lauridson, Medical Examiner, testified that he did not perform the autopsy on Renee White, but he had reviewed the photographs and particularly the autopsy report prior to testifying (X/292). Renee "died as a result of stab wounds to the chest." (X/293). She bled to death (X/294). She had 20 to 25 areas of bruising, which "occurred prior to her death" (X/294-95). The stab wounds did not result in instantaneous death (X/297). Rather, she would have become unconscious in a minute to two minutes, with death occurring in five minutes (X/297). She was lying back when she was stabbed, based upon "lots of blood over the face" (X/298-99). There were hemorrhages in her eyes indicative of "partial strangulation" (X/300-01). A single edged knife, similar to a 110 Buck knife like Bates' wife bought for him, was the murder weapon, and it "was plunged to its deepest point" (X/303).

SUMMARY OF THE ARGUMENT

I.

If Bates had been sentenced to life without parole it would have constituted an *ex post facto* sentence. He can't agree to an illegal sentence. The Florida legislature ***replaced*** life with the possibility of parole after 25 years with life without parole, a harsher sentence. In the absence of a legislated alternative, Bates could not elect to be sentenced under the harsher sentence.

II.

Bates second argument is a continuation of his first. The jury's recommendation comported with Florida statutory and constitutional law, as well as the U.S. Constitution.

III.

Bates received an individualized and reliable sentencing determination based upon ***relevant*** mitigating evidence, which was properly addressed by the trial court in its sentencing order. The mitigation Bates complains should have been entertained, including "life without parole," was ***irrelevant***.

IV.

Given the particular circumstances of this case, when compared to similar decisions of this Court, death is the appropriate penalty in this case.

V.

The trial court considered all of the non-statutory mitigation

evidence, and it correctly exercised its discretion in its findings on such mitigation.

VI.

General qualification does not constitute a "critical stage" of the proceedings, and the trial court complied with this Court's order staying proceedings for 24 hours.

VII.

When Dr. Barry Crown's opinion of Bates as having organic brain damage was refuted by a CAT scan, he elected as a matter of strategy not to use him as an expert or pursue that theory as mitigation. He waived consideration of this as mitigation. He utilized two experts to present mental mitigation.

VIII.

The trial court applied the right rule of law and competent, substantial evidence supports its finding on aggravation. It correctly exercised its discretion in presenting to the jury constitutional instructions on each of the three aggravating factors it found.

IX.

There is ***no*** constitutional right to have lingering doubt about a defendant's guilt considered as a mitigating factor.

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN DECLINING TO INSTRUCT THE JURY ON WHAT WOULD HAVE CONSTITUTED AN ILLEGAL *EX POST FACTO* SENTENCE.

> ***If this Court were to agree with Defendant's argument, and if the jury recommended life and the Defendant received a life sentence, without the possibility of parole, he could then argue the illegality of his sentence under the Ex post facto provisions of the Constitutions and/or question his waiver***.
>
> From Judge Sirmon's Order (II/337-38).

A. The Trial Court's Ruling

Any discussion of Bates' first issue on appeal must begin with the trial court's order regarding his request for the jury to be instructed upon the possibility of a life sentence without eligibility of parole:

> 1. The Defendant was convicted and sentenced to death on March 11, 1983.
>
> 2. On July 23, 1992, Circuit Judge Dedee Costello granted the Defendant's Rule 3.850 motion based upon ineffective assistance of counsel at the penalty phase and vacated his death sentence. The Florida Supreme Court upheld this decision in an opinion cited at 604 So.2d 457.
>
> 3. On May 25, 1994, an amendment to Section 775.082(1) of the Florida Statutes became effective which provided that a person convicted of murder in the first degree shall be punished, if death is not found, by life imprisonment without eligibility for parole.
>
> 4. The Defendant seeks to affirmatively elect to be sentenced under this amended statute and wishes the jury to be so instructed. He bases his

decision upon his “fear that the jury may vote for death ... not because he is deserving ... but because they believe he may be released too soon.” The State opposes the Defendant’s motion.

5. This Court agrees with the argument raised by the State. Ex post facto laws are prohibited by Article 1, Section 9, 10 of the United States Constitution and Article 1, Section 10 of the Florida Constitution. The Court’s [sic] have held that a penal statute can violate the Ex post facto clause if the “quality of punishment is changed”. See: Dobbert v. Florida, 97 S.Ct. 2290, 53 L.Ed.2d 17 (1977); Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). In other words, statutes altering [a] penal provision can violate the Ex post facto clause if they are both retrospective and more onerous than the law in effect on the date of the offense. In State v. Williams, 397 So.2d 663, 665 (Fla. 1981) the Florida Supreme Court set out a two prong Weaver test.

1. Does the law attach legal consequences to crimes committed before the law took effect?

2. Does the law effect the persons who committed those crimes in a disadvantageous fashion?

The United States Supreme Court has ruled that a statute making [a] maximum sentence mandatory without parole was an increase in punishment and violated the Ex post facto clause. See: Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937).

In Williams v. Dugger, 566 So.2d 819 (1st DCA 1990, affirmed [with opinion] 593 So.2d 180 (Fla. 1991), the Court held a change in the law that prohibits a person convicted of a capital felony from being recommended for a reasonable commutation of his sentence violates the Ex post facto clause. In Lee v. State, 294 So.2d 305 (Fla. 1974) the Florida Supreme Court held that a resentence of a defendant under an amended penalty statute providing for a minimum 25 years effective after his conviction, but before resentence, would violate the ex post facto clause.

Based upon these cases, this Court agrees with the State that the application of the amendment to 775.082(1) effective May 25, 1994 to this Defendant who was convicted in 1983 would violate the Ex post facto clauses of the United States and Florida Constitutions. This is a ***substantive law change*** and not a procedural one.

5. As to the Defendant's argument that he can affirmatively elect to have this statute applied to his case, the Court notes that the legislature did not provide, in the terms of the capital statute, that the Defendant could make such an election. In the absence of such language, the Defendant cannot agree to what would be an illegal sentence. If it is an illegal sentence, he cannot waive his rights. See: Williams v. State, 500 So.2d 501 (Fla. 1986). ***If this Court were to agree with the Defendant's argument, and if the jury recommended life and the Defendant received a life sentence, without the possibility of parole, he could then argue the illegality of his sentence under the Ex post facto provisions of the Constitutions and/or question his "waiver".*** The Court further notes all of the cases finding violations of Ex post facto laws did not have the "affirmative selection" language contained in the statutes they were reviewing. In those cases involving sentencing guidelines, the legislature provided specifically that a Defendant could make such an election. Without that statement of legislative intent, the Defendant cannot make such an election. It is therefore

ORDERED AND ADJUDGED that the Defendant, Kayle Barrington Bates', request that this Court enter an order that "life without the possibility of parole" be considered a sentencing option be and is hereby denied.[7] (II/335-338)

Bates at p.35 of his initial brief "asserts that he was

[7]On the same day this Order was issued, January 30, 1995, Bates filed with this Court a Petition for Writ of Prohibition and/or Writ of Mandamus, and for Stay Pending Review, requesting a pretrial ruling on life without parole as a sentencing option. The petition was denied.

unsentenced at the time the statute became law and was entitled to the benefit of this change in law." The trial court correctly concluded that "application of the amendment to 775.082(1) effective May 25, 1994, to this Defendant who was convicted in 1983 would violate the Ex post facto clauses of the United States and Florida Constitutions." (II/337) Bates' first argument must fail based upon that simple fact, life without parole would have constituted an *ex post facto* violation if applied to him. It matters not that he was willing to waive said violation, because he could not agree to an illegal sentence. In essence, Bates was inviting the trial court to error, but it did not rise to the bait, for it foresaw that if it capitulated to his demand, ***"he could then argue the illegality of his sentence under the Ex post facto provisions of the Constitutions and/or question his 'waiver'."*** That in a nutshell is all that Bates' first claim is about. Before individually addressing Bates' various attempts to convince this Court otherwise, the State desires to clarify some factual matters he raised on pp.39-41 of his initial brief.

First, at p. 39 of his brief, he asserts that he requested of the trial court that he be allowed to share with the jury a transcript of his purported waiver of "his" *ex post facto* protection and eligibility of parole. Obviously, the trial court was correct in not allowing him to misinform the jury as to the availability of an illegal sentence. Second, he alleges his

request of the trial court that he be allowed "to inform the jury that he was already sentenced on the robbery, kidnaping and attempted sexual battery counts to two life terms plus fifteen years to run consecutive to the sentence he would receive on the murder count." (XXIX/19-20) Here too, the jury would have been misinformed as the prosecutor alertly pointed out to the trial court:

> MR. MEADOWS: Judge, counsel misstates the existence of Mr. Bates' current sentencing. He has received these life sentences. However, he is eligible for parole. Were he to get a life recommendation here out of this jury, well, for whatever reason this conviction was overturned, he would be eligible to get out the next day. Were it not for the first degree conviction the other sentences are not keeping him in jail. Because at the time he committed these offenses the law at that time provided for parole on a life sentence. Now for example, second degree murder, life, there is no parole. However, if we get into this rabbit trail about what he's going to be serving on these other sentences, you know, it's going to open up a whole Pandora's Box of other information the jury is entitled to hear on. In fact, it is not really a life sentence, and I submit it is not proper mitigation evidence.
>
> THE COURT: At this time I will agree with the state that it would not be proper to discuss the sentences involved in the companion offense that were committed at the time that this offense was committed. And I will deny the defense' request on that basis. (XXIX/20-21)

At p.40 of his brief, Bates asserts that "media reports addressed [his] eligibility for release prior to selection of his May 1995 jury." He then remarks: "Several media stories quoted 'a source close to the case, [as saying] that Mr. Bates would be

eligible for release in eleven years.' (R.XXIX 4) There are several problems with Bates' presentation of this unproven allegation. First, and foremost, the obvious inference he sought to be drawn regarding this alleged quote was that the State divulged this information, in an attempt to bias the jury pool in favor of the death penalty. State Attorney, Jim Appleman, categorically denied this was the case as follows:

> MR. APPLEMAN: Your Honor, I can assure you that we have always been one standard in the State Attorney's Office and that is to the effect that once we begin selecting a jury we don't have contact with the media. I know that personally, myself, Mr. Meadow, did not discuss with any media personnel any of the things that appeared on T.V. and I was surprised myself, I was wondering who the individual was who is close to the case was telling them all this stuff because I certainly know it wasn't myself nor Mr. Meadows. It has always been my position we do not have discussions with he media after the case has begun selecting the jury and I can assure you we are not going to discuss anything with the media concerning this case in any form whatsoever. Your order is unnecessary. (XXIX/5)

The alleged "source close to the case" was never proven by Bates, rather it was simply placed in the record by his present counsel testifying to as much. (XXIX/3-4) Such was mere speculation and has no legitimate purpose before this Court other than to raise an inference as previously delineated.[8]

[8]The State could as easily speculate that someone from Bates' team divulged this information in order to bolster his position regarding his request for the *ex post facto* "life without parole" option.

Second, Bates' counsel divulged this information on January 31, 1995, which was the commencement of the resentencing which ended in mistrial (XXIX/3-8). As this Court is well aware, that mistrial is a nullity. There is no indication in the transcript of the Resentencing presently before this Court that such a media report occurred before it commenced, other than general statements about media exposure, which leads to the third reason this reference is totally disingenuous. The jurors which recommended death for Bates by a vote of 9 to 3 were individually voir dired regarding there knowledge of the case from media reports (IV/677-VII/1258). Therefore, what allegedly may have occurred prior to the mistrial has no relevancy to what transpired at Bates' resentencing.

What Bates refers to as a "compelling case of mitigation", at p.40 of his brief, does not appear so convincing when properly analyzed, as it was in the trial court's Sentencing Order. The State would note that the person who would have known him best, or at least thought she did, at the time of the murder, his ex-wife, did not appear on his behalf.

Bates alleges at pp.40-41 that the State argued "future dangerousness" to the jury both through its cross-examination of his character witnesses and in its closing argument. The State denies any such claim and relies upon the record as support. Bates' counsel oversteps the bounds of zealous representation by

alleging State Attorney Appleman "stabbed the knife into the wooden bar before the jury," when the Court Reporter recorded that he "slaps hand on table." (XV/778) The State again would rely on the record in this regard.

As regards the jury question, Bates argues it "makes clear that it had determined that Mr. Bates did not deserve death." The State respectfully submits there is another interpretation of this question, as seen by the prosecutors' observation in this regard:

> MR. MEADOWS: Judge, if you recall, back to the defense closing, I think that is the reason that there was some confusion was because he continuously left out the "without possibility of parole for 25 years" throughout his argument. And so that's why there is some degree of confusion. They have heard something different from you than they have heard from defense counsel up there. (XI/832)

A simple review of Mr. Dunn's closing argument bears out the prosecutor's observation (XV/807-08). The jury rendered there recommendation pursuant to correct instructions and the evidence before them. If Bates had his way, the jury would have been erroneously instructed that he could legitimately receive "life without parole," when in fact such would have constituted an illegal *ex post facto* sentence if he was in fact so sentenced.

B. **<u>Life Without Parole Was Not An Alternative</u>**.

The trial court's well reasoned order demonstrates it was correct in not instructing the jury on what would have constituted an illegal *ex post facto* sentence if Bates had received it. Bates'

analysis is flawed because it is premised on an erroneous assumption that life without parole was a legitimate alternative for him.

1. <u>The trial court's ruling was correct</u>.

Bates argues at p.43-45 of his brief that "the sentencing court failed to conduct any Eighth Amendment analysis of this issue." Premised upon a "death is different" foundation, Bates argues, given his special status[9] as a capital defendant, the trial court should have ignored Article I, § 10 of the United States Constitution's preclusion against *ex post facto* laws, and allowed the jury to be misinformed that he was eligible for life without parole.

However, the United States Supreme Court has made it clear regarding *ex post facto* analysis that "***[t]he inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual***." *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 966, 67 L.Ed.2d 17 (1981); *See also, Dobbert v. Florida*, 432 U.S. 282, 300, 97 S.Ct. 2290, 2300, 53 L.Ed.2d 344 (1977); *Lindsey v. Washington*, 301 U.S. 397, 401, 57 S.Ct. 797, 799, 81 L.Ed. 1182 (1937); *Rooney v. North Dakota*, 196 U.S. 319, 325, 25 S.Ct. 264, 265, 49 L.Ed. 494 (1905). Thus, life

[9]"Capital defendant's are not a 'suspect class' for equal protection purposes." *Thompson v. Lynaugh*, 821 F.2d 1054, 1062 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 5 (1987).

without parole if applied to Bates would constitute an *ex post facto* sentence, and the trial court so found. It was not required to conduct an Eighth Amendment analysis as argued by Bates in his brief, which is based upon what he alleges in essence is a "special circumstance," i.e. he is a capital defendant facing a "unique punishment"-- death.

2. Life without parole for Bates was *ex post facto*.

This Court has adopted the *Weaver* test as correctly pointed out by Bates at p.46 of his brief. However, his interpretation of the second prong of that test seems to be somewhat confused. This Court delineated both the test and the meaning of the second prong as follows:

> A statute is rendered ex post facto in application when (1) the law attaches legal consequences to crimes committed before the law took effect, and (2) the law affects the prisoners who committed those crimes in a disadvantageous fashion. State v. Williams, 397 So.2d 663 (Fla. 1981), citing Weaver v. Graham, [supra]. In other words "[t]he critical question is ***whether the law changes the legal consequences of acts completed before its effective date***." Weaver, 450 U.S. at 31, 101 S.Ct. at 965, 67 L.Ed.2d at 24. See also Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990).

Williams v. Dugger, 566 So.2d 819, 820-21 (Fla. 1st DCA 1990), *affirmed*, *Dugger v. Williams*, 593 So.2d 180 (Fla. 1991).

Bates was convicted of Janet Renee White's murder in 1983. At that time the legal consequences of that act were death or life with a minimum mandatory of 25 years. Subsequently, in 1994 § 775.082(1) Fla. Stat. was amended, and the legal consequences of

Renee's murder were changed to death and life without parole. Clearly, life without parole is a more onerous sentence than life with a minimum mandatory of 25 years after which he would be eligible for parole. If Bates was sentenced to the former, such would constitute an *ex post facto* sentence.

At p.47 of his brief, the foundation for his argument appears: *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). Despite the fact that *Simmons* is clearly distinguishable from the facts in this cause, Bates has tried to make it fit since prior to his resentencing. *Simmons* did not involve a potential *ex post facto* sentence, as Bates did here. Further, the United States Supreme Court's holding in *Simmons* was that "where the defendant's ***future dangerousness is at issue***, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Id*., 114 S.Ct. at 2190.

Future dangerousness was not placed at issue in this cause. Therefore, given the *ex post facto* nature of "life without parole" for Bates, the trial court was entirely correct in not allowing the jury to be informed that such was available to him. As Justice Connor noted in her concurrence, joined by the Chief Justice and Justice Kennedy:

> In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact. Likewise, if the

> prosecution does not argue future dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only alternative sentence to death is life imprisonment without possibility of parole.

Id., 114 S.Ct. at 2200.

Bates alleges at p.49 of his brief: "The amendment within the context of a capital prosecution does not violate the ex post facto provisions." Then, in his footnote 8, he attempts to distinguish the trial court's cited authorities in its order which demonstrate that within a capital case the amendment would violate the *ex post facto* provisions, by classifying them as "[o]utside the context of a death penalty prosecution."

In fact, both *Williams v. Dugger*, 566 So.2d 819 (1st DCA 1990), *affirmed*, *Dugger v. Williams*, *supra*, and *Lee v. State* were ***capital*** cases. In ***Williams***, the First District determined that the amendment to a statute that precluded a prisoner ***sentenced for a capital felony*** from receiving a recommendation for a reasonable commutation of his sentence was *ex post facto* when applied to a life prisoner convicted of capital felonies prior to its effective date, who would have otherwise been eligible for a recommendation of commutation upon maintaining a good institutional record for ten years. *Id*. at 820-21. ***Lee***, is directly on point. In that case, this Court held that where the requirement that a person convicted of a ***capital*** felony serve no less than 25 calendar years before becoming eligible for parole was added to the death penalty statute

following the commission of the offense, the resentencing of the defendant, whose death sentence for murdering a police officer had been set aside as unconstitutionally imposed, ***was to be had under the penalty statute as it existed at the time of the offense; to resentence him under the amended statute would be an ex post facto application thereof and unconstitutional***. *Id*. at 307.

When this matter was initially raised, on Friday, January 27, 1995, the State cited authorities that were primarily District Court opinions and not capital cases to support its position that "life without parole" would be *ex post facto* as applied to Bates. Bates' counsel was quick to point this out: "First, Your Honor, all of these cases which the state has provided to the court, there is one glaring problem with them all. And that is they are ***not capital cases***." When this matter was revisited on Monday, January 30, 1995, after hearing argument, the trial court ruled accordingly:

> THE COURT: Counsel, I've had a chance also over the weekend to look at the cases that you cited before and some of the cases that you cited today I've already reviewed. And I've also reviewed some other cases and, in light of your argument I'm going to have to revise some of what I have roughed out in terms of my notes and what was happening. ***But, I've also found some cases that have not been cited by either counsel that I thought would be somewhat appropriate in the review of this situation***. I've looked at the *Weaver v. Graham*, which is [*supra]*. Also *State v. Williams, supra; Lindsey v. Washington, supra*. And *Williams v. Dugger*, which is *supra*. Affirmed by the Florida Supreme Court at [*Dugger v. Williams, supra*].

That latter case, the *Dugger* case, ***Williams v. Dugger*** held that a change in the law that prohibits a person convicted of a capital felony from being recommended for a reasonable commutation of his sentence violates the *ex post facto* clause. That was a sentenced prisoner in the state prison system and they changed the law and DOC applied it to his sentence and that was ***ex post facto***.

The *Lindsey* case, the United States Supreme Court ruled that a statute making a maximum sentence mandatory without that was an increase in punishment violated *ex post facto* clause. All of the *Williams* case[s], ***State v. Williams*** and Florida Supreme Court 1981 set out the two-pronged test under *Weaver* as to what would constitute an *ex post facto* violation. They said, does the law attach legal consequences to crimes committed before the law took effect[?] And does the law affect persons who committed the crime in a disadvantageous fashion[?] And here, the strict ruling of the state or ***strict reading of the statute the court would find that, the statute as applied, if the state were arguing the statute would be an ex post facto application***.

And it is unusual in these situations that we have a defense arguing that it is not an *ex post facto* application and the state arguing that it is an *ex post facto* application. I then reviewed the cases on the sentencing guidelines which are the only cases that have language in there about exercising the options and I looked at ***Glover v. State***, at 474 So.2d 866. That was a First DCA case in 1985, affirmed by the Florida Supreme Court. And 605 So.2d 482 where the defendant's exercise [of] an option to choose to be sentenced under the guidelines did not violate the ex post facto laws. But the point that I found in reviewing the cases with the sentencing guidelines, the sentencing guidelines specifically provided in the language of the sentencing guidelines at 921.001(4)(a) that defendant has a right to elect to be sentenced under the guidelines. It is a legislative pronouncement of their intent that a defendant be allowed to elect affirmatively whether they use the

> term “affirmative election”, by the court knowingly and voluntarily electing to be sentenced under guidelines or not be sentenced under the guidelines and they gave that option to the defendant to make a choice. ***All of the cases that I have reviewed that have found laws to violate the ex post facto law did not contain any language that allowed the defendant to seek an option to be sentenced under that particular law. They found that it would, that the law itself violated the ex post facto clause***. So, the issue that boils down to, if there is no election made in the amendment or provided for by the Legislature when they amended the statute and provided that for life imprisonment without eligibility of parole, does that election exist to be raised by a defendant as in this case, if he decided to do so for whatever reason he chooses to do so and I will find at this point in time that based upon those cases I have reviewed, that the ***defendant does not have the right to elect to waive the ex post facto application of a sentencing penalty provision absent any legislative intent***. I think it came in that he has such a right to do so and I’ll deny the defendant’s motion that he can elect to be sentenced to life without possibility of parole, under the recently enacted amendment set out in 775.082(1) and I’ll try to enter -- I haven’t had a chance to enter any kind of an order yet in writing but I’ll do that in written form also. (XXVII/1512-16)

The trial court’s subsequent written order included the previously mentioned case on point, *Lee v. State, supra*, which it found, a capital case involving *ex post facto* analysis, in answer to Bates’ challenge that the State had included no capital cases. *Lee* was not “outside the context of death penalty prosecution,” nor was *Dugger v. Williams, supra*. The trial court’s authoritatively correct and well reasoned written order, as well as oral pronouncement, properly demonstrate that “life without parole”

would have been *ex post facto* if applied to Bates.

3. **Bates could not submit himself to an illegal sentence**.

"A defendant cannot by agreement confer on the court the authority to impose an ***illegal*** sentence." *Williams v. State*, 500 So.2d 501, 503 (Fla. 1986). If Bates had been sentenced to "life without parole," such would have violated the *ex post facto* provisions of the United States and Florida Constitutions. Therefore, it would have constituted an ***illegal*** sentence.

Bates' argument at pp.49-56 of his brief assumes he had a "vested" right in "life without parole." For example, at p.54 he argues: "Mr. Bates asserts that he is constitutionally ***entitled*** to this available sentencing option." However, no such right exists under *ex post facto* jurisprudence as this Court has delineated:

> In Florida, a law or its equivalent violates the prohibition against *ex post facto* laws if two conditions are met: (a) it is retrospective in effect; and (b) it diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense. Art. I, Sec. 10, Fla. Const.; Waldrup v. Dugger, 562 So.2d 687, 691 (Fla. 1990). There is no requirement that the substantive right be "vested" or absolute, since the *ex post facto* provision can be violated even by the retroactive diminishment of access (emphasis this Court's) to a purely discretionary or conditional advantage. Waldrup, 562 So.2d at 692. Such might occur, for example, if the legislature diminishes a state agency's discretion to award an advantage to a person protected by the *ex post facto* provision. This is true even when the person has no vested right to receive that advantage and later may be denied the advantage if the discretion otherwise is lawfully exercised. Id. ***In other words, the error***

> ***occurs not because the person is being denied the advantage (since there is no absolute right to receive it in the first place), but because the person is denied the same level of access to the advantage that existed at the time the criminal offense was committed.*** (footnote omitted) Id.

Dugger v. Williams, 593 So.2d 180 (Fla. 1981).

4. <u>There was no due process violation</u>.

Bates incorrectly and repeatedly argues he was "entitled" to "life without parole," but "there is ***no absolute right*** to receive it in the first place." Id. The State relies upon its previous authority and argument as to this portion of his claim on due process.

He also argues that since Georgia, by statute, explicitly addressed the problem of pre-statute unsentenced capital defendants, Florida's silence on this matter is indicative to him of the availability of the "life without parole" alternative. Yet, "[a]n inference from Congressional silence cannot be credited when it is contrary to all other textual and contextual evidence of Congressional intent." *Burns v. United States*, 501 U.S. 129 (1991). As the trial court correctly noted, the Florida Legislature, under the sentencing guidelines, "specifically provided that a Defendant could make such an election [choose to be sentenced pre-guidelines]. Without that statement of legislative

intent, the Defendant cannot make such an election."[10] (II/338) In short, the Florida legislature ***replaced*** the minimum penalty (life with parole possible after 25 years) with one ***more harsh*** (life without parole).

Bates relates at p.54 of his brief that "[t]he Oklahoma Court of Criminal Appeals recently confronted this very issue. Hain v. State, 852 P.2d 744 (Okla.Cr. 1993)." Yet, there was absolutely no mention of *ex post facto* in that opinion. Rather, it cited *Allen v. State*, 821 P.2d 371 (Okl.Cr. 1991) for its holding "we find no constitutional prohibition to the application of this possible sentencing option in cases where the penalty became law in the period while the offender awaited trial." Therefore, to understand *Hain*, one must look to *Allen*.

In *Allen*, the Court delineated that the potential penalties for capital murder at the time Allen committed his crimes were life

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[10]This Court has implicitly assessed the *ex post facto* implications of the amendment, and cautioned the trial court's accordingly. After the legislature amended the statute, this Court amended the jury instructions to reflect the same. *In re Standard Jury Instructions in Criminal Cases*, 678 So. 2d 1224 (Fla. 1996). After quoting the statutory changes, this Court noted: "§ 775.082(1), as amended in 1994, became effective on May 25, 1994. Ch. 94-228, Laws of Fla. Therefore, ***it applies to offenses committed on or after that date***." *Id*. at 1244, n.1. Further, the amended instructions contain this Court's "Note to Judge": "For murders committed prior to May 25, 1994, the penalties were somewhat different; therefore, for crimes committed before that date, ***this instruction should be modified to comply with the statute in effect at the time the crime was committed***." *Id*. at 1225.

imprisonment, with a possibility of parole, and death. Subsequently, but before Allen was convicted of the murder, the state legislature amended the statute to include a third option, "life without parole". Allen waived any *ex post facto* challenge, and requested an instruction on, as well as consideration of, life without parole, which the trial court denied.

On appeal, the Oklahoma Court of Criminal Appeals held that ***the amendment did not disadvantage the defendant because he was not subjected to a harsher penalty than was available at the time he committed the murder***. *Id*. at 375-76. In other words, the minimum (life with parole) and maximum (death) did not change; rather, the legislature simply added an intermediate option (life without parole). Therefore, given Allen's waiver, the Court held the trial court fundamentally erred in refusing to instruct on and consider the "life without parole" option.

Crucial to the Oklahoma Court's analysis was the fact that the amendment did not affect the minimum and maximum penalties to which a defendant would be subjected. In Florida, on the other hand, the legislature ***replaced*** the minimum penalty (life with parole possible after 25 years) with one more harsh (life without parole). This amendment, if applied retroactively to Bates would have caused an *ex post facto* violation.

It should also be noted that the Court in *Hain* was emphatic regarding the very circumcised application of its holding:

> The circumstances involved in this decision are unique and should not be interpreted to have any broader ramifications outside the very limited situation implicated under these facts. ***We will apply this analysis only in cases where the amendment adding the option of life without parole to Section 701.10 was in effect at the time of the trial***. Only those cases will receive consideration of the additional sentencing possibility. In the interests of fundamental fairness, we find that justice demands the action taken by this Court under these distinctively compelling facts.

Bates was tried and convicted 11 years before the life without parole amendment in Florida. Hain had not yet been convicted when Oklahoma adopted the life without parole alternative. The Oklahoma Court ***strictly limited its holding to cases pending when the change occurred***. Bates had already had his trial and been found guilty of the capital murder of Janet Renee White ***11 years*** before the Florida amendment. He was ***not*** being retried, he was being ***resentenced***.

The State has already distinguished *Simmons*; it is inapplicable to this cause because it did not involve *ex post facto* law; and future dangerousness" was not at issue in this cause, notwithstanding Bates' assertion that it was, which was obviously tailored to comport with *Simmons*.

C. **<u>The Trial Court Correctly Exercised Its Discretion</u>**.

"Life without parole" would have been *ex post facto* as applied to Bates, and the trial court correctly so found. The trial court correctly ruled that he could not waive his *ex post facto* protection because "he cannot agree to what would be an illegal

sentence." (II/337) It alertly noted what would happen if it had accepted his argument:

> ***If this Court were to agree with the Defendant's argument, and if the jury recommended life and the Defendant received a life sentence, without the possibility of parole, he could then argue the illegality of his sentence under the Ex post facto provisions of the Constitutions and/or question his "waiver".*** (II/337-38)

ISSUE II

THE JURY'S RECOMMENDATION COMPORTED WITH FLORIDA STATUTORY AND CONSTITUTIONAL LAW, AS WELL AS THE U.S. CONSTITUTION.

Bates' second argument, found on pp.57-60 of his brief, is nothing more than a continuation of his first, and it is based upon his sheer speculation as to the meaning, if any, of the following jury questions:

> Are we limited to the two recommendations of life with minimum 25 years or death? Or can we recommend life without a possibility of parole? (XV 830)

In *Waterhouse v. State*, 596 So.2d 1008 (Fla. 1992), this Court was presented with a factually similar situation, wherein the jury asked the trial judge the following questions: "If he's sentenced to life, when would he be eligible for parole? Does the time served count towards the parole?" *Id*; See also, *Whitfield v. State*, 22 Fla. L. Weekly S558, S559 (Fla. September 11, 1997). Rather than answering the question, the trial judge instructed the jury that they would have to depend on the evidence and

instructions. *Id*. This Court concluded the trial court acted properly because the jury instructions adequately informed the jury that a life sentence carried a minimum mandatory sentence of twenty-five years. *Id*. Similarly, the trial court in this cause informed the jury by written response as follows: "The court has advised you what advisory sentences you may recommend. Please refer to your copy of the jury instructions." (XV/833)

The charge to the jury included the following instructions:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole for 25 years. (XV/824)

Later, it instructed the jury:

> On the other hand, if by six or more votes the jury determines that Kayle Barrington Bates should not be sentenced to death, your advisory sentence will be:
>
> The jury advises and recommends to the court that it impose a sentence of life imprisonment upon Kayle Barrington Bates without the possibility of parole for 25 years. (XV/829)

In light of *Waterhouse*, the trial court correctly advised the jury regarding its questions.

From those two simple questions, Bates makes a gigantic leap of faith to the conclusion on p.60 of his brief that the "jury believed life, not death, was the appropriate sentence." The State respectfully submits such a conclusion does not necessarily follow. The jury was composed of 12 individuals, and it is distinctly possible that only one of those individuals sought the answer to

that question. Even if more than one juror was interested in answering these questions, that does not mean that "the jury" thought life was the appropriate sentence.[11] Besides, *Waterhouse* demonstrates that the trial court correctly exercised its discretion on this matter.

The crux of Bates' argument is found on p.60 of his brief: "When told that they [the jury] could not recommend a meaningful sentencing alternative to death -- life without the possibility of [parole] -- they rendered a verdict of death contrary to their instructions and the evidence before them." Yet, in reaching this conclusion, Bates completely ignores the instructions given his jury, which he provided on p.58 of his brief:

> The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and ***the law***. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based upon these considerations. (XV/827-28)

"Life without parole" was ***not the law*** as applied to Bates, and his insistence that the jury should have been instructed that it was applicable was an invitation to error, reversal, and yet another resentencing, as the trial court was well aware (II/337-38). A "court should not give instructions which are confusing, contradictory, or ***misleading***." *Butler v. State*, 493 So.2d 451, 452 (Fla. 1986). If the trial court would have accepted Bates'

[11]The State is aware that only six needed to see it Bates' way, but his argument repeatedly speaks of "the jury."

request, the jury would have been ***misled***, which it may well have been anyway given his closing argument.

Bates' lead counsel, Mr. Dunn, argued in closing as follows:

> Doesn't answer the question you have though. Is this man deserving of the [sic] death in the electric chair. ***Think of Mr. Bates serving life in prison***. He will get up in the morning. He will have a job. He will do it. He will try harder probably than anyone else in the prison system. He will do everything that he has done for his entire life. He won't cause problems. He knows obedience, he loves structure. He needs structure. He will make the best of a terrible sentence.
>
> You probably heard me and many of the witnesses as they were testifying about who Kayle Bates was and it almost sounded like he was dead. Like he wasn't here. Was Kayle a good kid, was he a loyal friend, was he a good dad, ***because when you spend your life in prison you are cut off from all of that. Because its punishment. It is punishment. Don't think that it's not. And when you realize that it's punishment think about that man and what he will do in that situation***. He's been cut off from his family for years but all he worries about are his ex-wife and his kids because he's a good man. He still cares about them. (XV/807-08)

Later, he argued:

> This is a case which requires from you that all your competence and your common sense and your concern about crime and decency and in this country to be able to come back in here, ***look at Mr. Bates in the eye and say you will spend the rest of your life in prison.*** And you shouldn't feel bad about that. And you shouldn't worry about his family because that's what this case calls for.
>
> He has forfeited his right to live among us. And he shouldn't do that. ***He should spend the rest of his life in prison***. But this is not a man that deserves the death penalty. This is not a crime that deserves the death penalty. (XV/818-19)

Mr. Dunn concluded:

> ***Listen to the law*** that Judge Sirmons is going to give you and think about the two questions. Who is Kayle Bates and why did this happen. And you will come to the proper and appropriate decision in this case. ***And that is that Kayle Barrington Bates should spend the rest of his life in prison***. (XV/820)

Given those highlighted remarks, it is not difficult to discern from whence the jury questions derived.

Bates' factual rendition on p.59 of his brief does not comply with the record and should be rejected. He alleges on p.59 that the State elicited from his witnesses during its cross-examination of them, and commented in its closing argument, that Bates "had already served half of the mandatory minimum of twenty five years." First, Bates never objected to such a comment being elicited during the cross-examination of his witnesses or being made during the State's closing argument, as he does now for the first time on appeal, and he is, therefore, procedurally barred from raising these complaints now. *Stenihorst v. State*, 412 So.2d 332, 338 (Fla. 1982). Second, the State did ***not*** elicit from his witnesses or comment during closing argument in such a fashion. In its closing argument it argued the aggravating circumstances which warranted the death sentence and rebutted his mitigation (XV/774-84) Further, it argued Bates' character as reflected by the nature of the crime, ***not*** that "his true character was still in place" as

he alleges on p.59 (XV/776-79). The State's reference to his correct potential life sentence was entirely proper:

> There are non-statutory mitigating circumstances. There are statutory mitigating circumstances. These are the things you take into consideration. ***As to go towards the sentence of life imprisonment with a minimum mandatory of twenty-five years before the defendant is eligible for parole***. They don't have to be proven the same way the aggravating circumstances are proven. No, they just have to be shown from the evidence.
>
> But the question is, even if they are established from the evidence, does not the vile, atrocious, heinous, cruel acts of the defendant outweigh that? And the manner in which he took the life of this woman. (XV/779-80)

The State's comment complied with the trial court's instructions to the jury on ***the law***.

The jury's 9 to 3 recommendation for death complied with the law in Florida as it existed when he murdered Janet Renee White, and in so doing comported with the Florida and United States Constitutions.

ISSUE III

BATES RECEIVED AN INDIVIDUALIZED AND RELIABLE SENTENCING DETERMINATION BASED UPON *RELEVANT* MITIGATING EVIDENCE.

A. Mitigation Must Be Relevant To Be Admissible.

A sentencer must be allowed to consider, as mitigation, "any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death... ." *Lockett v. Ohio*, 438 U.S. 586

(1978). However, a sentencing jury need ***not*** consider, in mitigation, evidence that is ***not relevant*** to the defendant's character, record, or the circumstances of the offense. *Jackson v. State*, 498 So.2d 406, 413 (Fla. 1986)(Jackson's sex irrelevant as mitigation), *cert. denied*, 483 U.S. 1010 (1987); *Accord, Cardona v. State*, 641 So.2d 361 (Fla. 1994)(guardian's report concerning mother's life being spared for sake of two remaining children irrelevant), *cert. denied* 115 S.Ct. 1122 (1995); *Stewart v. State*, 558 So.2d 416 (Fla. 1990)(testimony of Stewart's uncle regarding how Stewart's father was killed in a barroom fight, of Stewart's grandmother concerning cigarette burns on him when he was an infant, and a letter of remorse from him to one of the victims, irrelevant to mitigation). "The rules of evidence may be relaxed during the penalty phase of a capital trial, but they emphatically are not to be completely ignored." *Johnson v. State*, 660 So.2d 637, 645 (Fla. 1995), *cert. denied*, 116 S.Ct. 1550 (1996).

B. **Exclusion of Irrelevant Matters**

The alleged mitigation Bates complains was incorrectly excluded was irrelevant.

1. "**Life without parole**"

Bates' argument at pp.62-64 is merely a variation of his first two arguments regarding the "life without parole" option. As the State has previously delineated, "life without parole," if applied to Bates, would have constituted an ***ex post facto*** sentence. Again,

Bates could not agree to an illegal sentence. Not only was this matter irrelevant, it was illegal.

At p.63 of his brief, Bates argues his willingness to agree to an illegal sentence "is a clear sign of [his] remorse and his acceptance of responsibility for the tragic death of Ms. White." The State respectfully submits it was an obvious ploy to avoid capital punishment. He also argues that this would have allayed the jury's fears as to future dangerousness, which was generated by the State. Again, the State did ***not*** argue future dangerousness to the jury.

If this Court should deem the trial court erred in this regard, which the State does not concede, the State submits it was harmless beyond a reasonable doubt given the three aggravating factors, including heinous, atrocious or cruel, which outweighed relevant mitigation he was allowed to present, and the trial court's analysis of the same (III/551-557). *State v. DiGuilio*, 491 So. 1129, 1138 (Fla. 1986).

2. **Bates' other sentences were irrelevant**.

In *Nixon v. State*, 572, So.2d 1336, 1345 (Fla. 1990), *cert. denied*, 502 U.S. 854 (1991), this Court held that a capital murder defendant, who was also convicted of three other offenses which carried lengthy maximum penalties, was not entitled to an instruction for other crimes as a mitigating factor. *Accord*, *Marquard v. State*, 641 So.2d 54 (Fla. 1994), *cert. denied*, 513 U.S.

1132 (1995); *Franqui v. State*, 699 So.2d 1312, 1326 (Fla. 1997). In *Nixon*, this Court further opined: "The fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime." *Id*. at 1345. The "sole issue" before Bate's jury was the proper sentence for the murder of Renee White. *Franqui v. State, supra*.

The trial court correctly exercised its discretion in excluding irrelevant matters relating to other sentences in keeping with the aforementioned precedent (XXIX/21). Besides the fact that these other sentences were irrelevant, the State would also point out the true nature of these ***alleged*** life sentences:

> MR. MEADOWS: Judge, counsel misstates the existence of Mr. Bates' current sentencing. He has received these life sentences. However, he is eligible for parole. Were he to get a life recommendation here out of this jury, well, for whatever reason this conviction was overturned, he would be eligible to get out the next day. ***Were it not for the first degree conviction the other sentences are not keeping him in jail***. Because at the time he committed these offenses the law at that time provided for parole on a life sentence. Now for example, second degree murder, life, there is no parole. However, if we get into this rabbit trail about what he's going to be serving on these other sentences, you know, it's going to open up a whole Pandora's Box of other information the jury is entitled to hear on. In fact, it is not really a life sentence, and I submit it is not proper mitigation evidence. (XXIX/20-21)

As to Bates' argument on pp.65-66 of his brief, concerning Mr. Appleman's clarification as to those sentences running consecutive

to his death sentence, that does not change the irrelevancy of the same. It is apparent he intended nothing more than clarification for the record, not that the sentences were relevant to mitigation (VIII/1302).

Whether Bates could have gotten out the next day or many years later is of no consequence because his sentences for the other convictions were ***irrelevant*** as to the murder of Renee White. Any error in excluding irrelevant evidence constitutes harmless error beyond a reasonable doubt, because the jury was aware of his armed robbery, attempted sexual battery and kidnaping convictions as admitted by Bates in his brief at p.65. *See Nixon v. State, supra,* at 1345.

3. **The community petition was irrelevant**.

Forreste Williams, grew up with Bates, and testified as follows at his resentencing:[12]

> Q. After you learned of this when Kayle was arrested, did you do anything to try to help him?
>
> A. Yes, I did. I went to a couple of other friends, you know, basically trying to figure out, you know, what could we do. Because no one had approached us with anything and the only thing that we could come up with was maybe, hey, maybe we could put together some type of form or something to vouch for Kayle's character, petition.
>
> Q. And did you take it upon yourselves to try to get a petition together in support of Kayle?

[12]At p.67 of his brief, Bates presents Williams' testimony from February 1, 1995.

A. Yes, I did.

Q. And how successful were you with that?

A. We were very successful.

Q. How many names did you get; do you recall?

A. Approximately anywhere between a hundred to two hundred names were signed to that petition.

Q. What was this petition? What were the people signing their name for?

A. To vouch for Kayle's character.

Q. What kind of people did you approach to vouch for Kayle's character?

A. Mainly people who knew Kayle, you know, ministers, teachers, friends, relatives. You know, anybody, you know, that knew Kayle. That's who we really approached.

Q. Were people enthusiastic about supporting Kayle?

A. Yes, they were very supportive, very supportive.

Q. And you personally went out and collected the signatures?

A. Yes, I did.

Q. Did anyone ask you to do this, Mr. Williams?

A. No. (XI/384-86)

The State did in fact object to the petition being introduced into evidence, arguing among other points, that the people who signed there names as potential character witnesses were not available for cross-examination (XI/386-88).

The Court ruled:

> THE COURT: At this point he's testified that he presented a list, he has two hundred people that signed that and I don't think the document should come into evidence. He's already indicated that these people provided their names and they have got these people that could testify. So, I'll sustain the state's objection to the list itself coming into evidence. But he can certainly testify about it, which he's already done.
>
> Mark it for proffer. (XI/388).

Bates cites *Wasko v. State*, 505 So.2d 1314 (Fla. 1987) as authority for the admissibility of this petition, alleging it found "defendant's good character based upon letters, petitions and testimony from family and friends." However, this Court's opinion in *Wasko* stated he "presented ***testimony*** of his good character, good employment record, and a good family background." *Id*. at 1318.

The trial court correctly excluded Bates' petition. *Griffin v. State*, 639 So.2d 966, 970-71 (Fla. 1994)(Newspaper article correctly excluded where reporter who wrote article "was available and testified."), *cert. denied*, 514 U.S. 1005 (1995). Error if any would be harmless given the fact that the petition was cumulative to the testimony of Mr. Williams, and by Bates' count, 17 other character witnesses. *Johnson v. State*, 660 So.2d at 645.

4. **Bates' Army graduation photograph**.

Bates' claim here is spurious. As support for his claim he cites from the record of the mistrial, where he attempted to submit into evidence his basic training graduation photograph, which the State pointed out was "the size of a poster board," and argued that

it had no other purpose “than [as] a sympathy factor” (XXXII/540). In so doing, he attempts to mislead this Court as to the admission of this same photograph, except in a smaller form, into evidence as a defense exhibit #4, at his subsequent resentencing, as the following record clearly demonstrates:

> MR. DUNN: And then, Your Honor, if I can get Mrs. Harris to bring in that, that photo.
>
> THE COURT: Correct.
>
> MR. DUNN: Yes, Your Honor. We could get that on the record also.
>
> THE COURT: Okay, you did you actually put it into the record or did you --
>
> MR. DUNN: We, we did, and Mrs. Harris ...
>
> THE COURT: Walked off --
>
> MR. DUNN: Walked off with it, and that’s why I’m bringing it back, Your Honor, so we can get it back in the record.
>
> THE COURT: If that’s a family keepsake, then we --
>
> MR. DUNN: It’s a copy we had made, Your Honor. We can have it reduced for the record, whatever the Court wants to do on that.
>
> (Brief pause)
>
> MR. DUNN: That is identified as Exhibit Number 4 for identification.
>
> THE COURT: Okay. That will be marked for identification. That’s not come into evidence, but that’s part of the --
>
> MR. MEADOWS: ***We don’t object if they substitute a smaller copy***.
>
> MR. DUNN: ***We’ll do that, Your Honor. Thank you***.

> THE COURT: ***Let's state for the record, the, the photograph that the Defense is offering into, will be offering into evidence is a*** ...
>
> MR. DUNN: ***It's a color graduation photograph of Mr. Bates from basic training that was sent to his parents. It's approximately 7 by 11, I guess***.
>
> THE COURT: ***Approximately, 7 inches by 11 inches***.
>
> MR. DUNN: Yes, Your Honor. (XIII/706-08)

Mr. Dunn then spoke of the "***poster size***" photograph he attempted to have admitted at the mistrial:

> MR. DUNN: And it shows Mr. Bates in his dress green uniform. We, we proffered Mrs. Bates' testimony the last time on this issue --
>
> THE COURT: Correct.
>
> MR. DUNN: -- as non-statutory mitigating evidence.
>
> THE COURT: ***And the State said they had no objection to substituting a smaller photograph, and I wanted the record to be clear what we're talking about***.
>
> MR. DUNN: Yes, Your Honor.
>
> THE COURT: Okay.
>
> MR. DUNN: It may be bigger than 7 by 11.
>
> MR. APPLEMAN: It's more like life size, Your Honor.
>
> THE COURT: All right. Okay, so the Court will note that proffer and again have it marked as an exhibit for identification. (708-09)

Thanks to the trial court's attention to the record, this Court has the ***true*** picture of what transpired below concerning

Bates' basic training graduation photograph. A 7" by 11" photograph was admitted, as opposed to a "poster size" one. If this Court should deem that the poster size photo should have been admitted, imagine the defense reaction to a poster size photograph of Janet Renee White, before and after the murder, being offered into evidence. Error, if any, was most assuredly harmless given the cumulative nature of the photograph. *Johnson v. State, supra*, at 645. Many, if not all, Bates' character witnesses, including those he served with in the National Guard division in Tallahassee, testified as to his "pride ... in serving his country" as he alleges on p.68 of his brief.

C. Harmless Error

The State has already apprised this Court of the harmless error aspect of each of Bates' complained of instances. First, he was not entitled to "life without parole" because it would have been *ex post facto* as applied to him. Second, his sentences for his other convictions were irrelevant to his sentence for the murder of Renee White. Third, the community petition was irrelevant, and even if it were not, it would have been cumulative to the testimony of Forreste Williams and his other character witnesses. Finally, a photograph of Bates, albeit a smaller one than the poster size photograph he tried to place before the jury, was admitted into evidence, and it too was cumulative to testimony from his character witnesses as to his military service.

ISSUE IV

DEATH IS A PROPORTIONATE SENTENCE.

In conducting a proportionality review "this Court must consider the particular circumstances of the case on review in comparison to other decisions [it has] made, and then decide if death is an appropriate penalty in comparison to those other decisions." *Hunter v. State*, 660 So. 2d 244, 254 (Fla. 1995), *cert. denied*, 116 S.Ct. 946 (1996). Such a review in this cause demonstrates death is the appropriate sentence.

A. The Trial Court's Findings on Aggravation

Bates argues that the trial court erred in finding each of the three aggravating circumstances. This Court has opined:

> [I]t is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.

Willacy v. State, 696 So.2d 693 (Fla. 1997), *pet. for cert filed*; *Accord, Raleigh v. State*, 22 Fla. L. Weekly S711, S712 (Fla. November 13, 1997). Further, this Court's "duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent, substantial evidence." *Orme v. State*, 677 So.2d 258, 262 (Fla. 1996), *cert. denied*, 117 S.Ct. 742 (1997); *Willacy v. State, supra*,

n.7.

In aggravation, the trial court found that Renee White's murder was committed while Bates "was engaged in the commission of or attempt to commit Kidnaping or Attempted Sexual Battery, or flight after committing or attempting to commit the crime of Kidnaping or Attempted Sexual Battery." (III/549) It also found the murder was committed for "pecuniary gain":

> The Defendant broke into the State Farm office where the victim was employed with the intent to steal. The evidence establishes that just prior to the crime, the Defendant was encountering increased financial pressure due to a loss of an anticipated promotion, imminent birth of a child and the recent purchase of a new home. Although the arrival of the victim disrupted his plan, the evidence further establishes that during the commission of this crime the Defendant forcibly removed the victim's diamond wedding ring which was recovered from the Defendant after his arrest. (III/549).

Finally, it found Renee's murder was "especially heinous, atrocious or cruel" based upon the following findings:

> The circumstances of this killing indicated a consciousless [sic] and pitiless regard for the victim's life and was unnecessarily torturous to the victim, Janet Renee White. The victim did not die an instantaneous type of death. Although the evidence establishes a time frame of ***between five to ten minutes*** for this whole sequence of events to occur,[13] the evidence also establishes it was ***an eternity of fear, emotional strain and terror for Janet Renee White***. When she returned from her lunch, Janet Renee White was confronted by the Defendant at the office where she was employed and a struggle took place inside the office/lobby area.

---

[13]5 to 10 minutes is a conservative estimate as to how long the attack transpired. See X/277-78, 281-82.

> The terror and fear experienced by the victim at that point is best evidenced by her scream as vividly described by the phone caller, Geraldine Flynn, who placed the phone call at precisely the time Janet Renee White first encountered the Defendant. There is no physical evidence inside the office to establish that the victim suffered any fatal stab wounds in the office location. The victim was therefore alive during this time frame. Her ordeal of fear, emotional strain and terror continued as she was forcibly taken by the Defendant from the office to a secluded wooded area approximately 100 feet in the rear of the office building. During this same time frame, the victim was ***severely beaten*** as evidenced by the approximately 30 contusions, abrasions and lacerations on various parts of her face and body. The bruising to the lower lip indicates the victim was struck in the mouth by the Defendant. The marks on her neck and hemorrhages located in her eyeballs establish she was ***partially strangled*** during this struggle. Again, ***the victim was alive during this attempted strangulation and beating***. The Medical Examiner's testimony further establishes that the two fatal wounds occurred while the victim was lying on her back in the wooded area with her head forward ***so as to be able to see her assailant as the fatal stab wounds were inflicted by him. The victim had to be alive and conscious during this final attack*** because the evidence also establishes the victim had her arms in an upward position at the time the stab wounds were inflicted. She would then have been conscious for one to two minutes after infliction of the fatal stab wounds and fully aware of what had happened and was happening to her. Her death occurred within five minutes after the stab wound were inflicted due to loss of blood.[14] (X/549-51)

Although the trial court's findings in aggravation sufficiently explain why death is proportionate for the murder of Renee White,

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[14]This portion of the order was drawn from the medical examiner's testimony (X/297). Bates incorrectly states at p.72 of his brief that "Ms. White is unconscious within a minute from being stabbed and was most likely dead two minutes later."

Bates' depiction of the same at pp.78-80 of his brief necessitates a response.

Bates repeatedly refers to Renee's murder as "a burglary which simply got out of hand," emanating from this Court's unfortunate language in ***Bates I***, 465 So.2d 490, 493 (Fla. 1985). Chief Justice Ehrlich's observation in that opinion adequately dispels of this surplusage:

> ***If the majority's characterization of the instant criminal episode as "a burglary ... simply getting out of hand" is intended to mitigate the murder on the ground of the victim's resistance, it is erroneous***. A murder precipitated by a robbery victim's resistance is not necessarily removed from the category of first-degree murders to which a death sentence is appropriate.

Bates I, at 495, C.J. Boyd concurrence/dissent. So too, does the trial court's finding that Renee experienced "***an eternity of fear, emotional strain and terror,"*** which leads to Bates' repeated assertion "that the whole tragic incident occurred in less than three minutes***".***

Yet, this Court has repeatedly recognized that ***"[f]ear and emotional strain***" may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." *See Preston v. State*, 607 So. 2d 404 (Fla. 1992), *cert. denied*, 507 U.S. 999 (1993); *See also, James v. State,* 695 So.2d 1229 (Fla.), *cert. denied,* Case No. 97-6104 (U.S. December 1, 1997*); Henyard v. State,* 689 So.2d 239 (Fla. 1996)*, cert. denied,*

Case No. 96-9391 (U.S. October 6, 1997); *Hitchcock v. State,* 578 So. 2d 685, 693 (Fla.), *cert. denied*, 112 S.Ct. 311 (1990); *Rivera v. State*, 561 So. 2d 536, 540 (Fla. 1990); *Chandler v. State,* 534 So. 2d 701, 704 (Fla. 1988), *cert. denied*, 490 U.S. 1075 (1989); *Phillips v. State, supra*; *Mason v. State*, 438 So. 2d 374 (Fla. 1983), *cert. denied* 104 S.Ct. 1330 (1984); *Adams v. State*, 412 So. 2d 850 (Fla.), *cert denied*, 103 S.Ct. 182 (1982). "The ***mindset or mental anguish*** of the victim is an important factor in determining whether this aggravating circumstance applies." *Phillips v. State*, 476 So. 2d 194, 196 (Fla. 1985). "Moreover, ***the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances.***" *See Swafford v. State,* 533 So.2d 270, 277 (1988), *cert. denied* 489 U.S. 1100 (1989); *See also Preston v. State, supra,* at 946 ("victim ***must have*** felt terror and fear as these events unfolded" [emphasis this court's]).

The trial court correctly found:

> The ***terror and fear experienced by the victim*** at that point is ***best evidenced by her scream*** as vividly described by the phone caller, Geraldine Flynn, who placed the phone call at precisely the time Janet Renee White first encountered the Defendant. (III/550)

It also found that Renee was "severely beaten, ... partially strangled," and stabbed (III/550). Each of these factors taken individually, and most certainly in their totality, demonstrates

this murder was HAC. *See e.g., Kimbrough v. State,* 694 So.2d 889 (Fla. 1997)(Victim brutally beaten and raped)*; Orme v. State,* 677 So.2d 258 (Fla. 1996)(Strangulation murder designed to further both sexual assault and robbery), *cert. denied*, 117 S.Ct. 742 (1997); *Gilliam v. State*, 582 So.2d 610 (Fla. 1991)(Victim brutally beaten, bitten, raped, and strangled); *Brown v. State*, 473 So.2d 1260 (Fla.)(81-year-old victim was beaten, raped, and killed by asphyxiation), *cert. denied*. 474 U.S. 1038 (1985); *Tompkins v. State*, 502 So.2d 415 (1986)(Victim strangled after refusing defendant's sexual advances), *cert. denied*, 483 U.S. 1033 (1987); *Johnston v. State*, 497 so.2d 863 (1986)(84-year-old victim, who had retired to bed for the evening, strangled and stabbed three times completely through the neck and twice in the upper chest; took her three to five minutes to die after being stabbed). In this case, the trial court "applied the right rule of law, and competent substantial evidence supports its finding." *Raleigh v. State, supra*.

Bates insists that the heinous, atrocious and cruel (HAC) acts inflicted upon Renee prior to her demise occurred, at most, within three minutes. The trial court found the time frame to be "between five to ten minutes." The State argues that the trial court's time frame is very conservative given the following testimony. Geraldine Flynn testified that on the day of the murder she called the Dickerson State Farm Agency at 1:05 p.m., but her watch ran 5

minutes fast all the time (IX/60). When Renee answered the phone, she immediately started screaming (IX/53-55). After handing the phone to a fellow employee, during which time the line went dead while he was listening, Ms. Flynn called the Lynn Haven Police, waited 5 minutes, and then called the Bay County Sheriff's Office (IX/56).

At approximately l:07 p.m., Jim Dickerson returned from lunch (IX/76). He stepped inside, observed a small canister of Mace, high heels in the middle of the floor, and checked the bathroom (IX/76). As he exited the front door, he was met by a Lynn Haven policewoman, and he informed her something was wrong (IX/76). She drew her weapon and began searching the premises (IX/76). He further testified that Bates was apprehended somewhere between 1:45 to 1:55 p.m. (IX/98). He placed Investigator Tunnell's crime scene investigation as commencing at approximately 1:30 p.m., and that took approximately 20 minutes before Bates came walking out of the woods, muddy, wet, blood-soaked and carrying cattails in his hand (IX/98, 101, 109)

Officer Cioeta, who first encountered Bates, testified he was on the scene 20 to 30 minutes before Investigator Tunnell arrived (IX/113). Sheriff Tunnell testified that 10 minutes after he cordoned off the area, Officer Cioeta announced over the radio that Bates came out of the woods (IX/160-61). Sheriff McKeithen, who interviewed Bates, testified that Sheriff Tunnell was the first

investigator on the scene at 1:21 p.m. (X/277). Bates was apprehended at approximately 1:30 to 1:31 p.m (X/277-78). From 12:40 p.m. until 1:31 p.m. Bates secreted his truck, broke into the back of the agency, confronted Renee, ***subdued her***, drug her out the back door, carried her from the back door to the woodline, where he ejaculated, stabbed her twice, defecated, and picked cattails (IX/130; X/277-78).

Given this testimony, it is the State's position that Bates was alone with Renee at least 25 minutes, actually 30 minutes if you take into account that Ms. Page's watch always ran 5 minutes fast -- 1:00 to 1:30 p.m. He carried her off to the woods, which was 90 to 100 feet from her office (IX/126-28). One could not see her body from the sliding glass door at the back, which Bates used to break in (IX/119). The woods were so thick in this area that Renee was discovered only because someone literally stumbled over her (IX/102). Bates had parked his truck in the woods away from where he carried Renee, so the police began searching away from them (IX/111).

The point is, Renee could well have been alive while the police were searching for her. It appears both Bates and the trial court based the time frame surrounding Renee's murder on the arrival of Officer Spidel, the Lynn Haven policewoman. Yet, Renee

was beaten at least 30 times, partially strangled, raped[15] and then mortally stabbed twice. Realistically, three minutes is insufficient time to do all that. A possible factual scenario of what transpired follows.[16] Initially, when Bates first accosted Renee she screamed and struggled with her assailant. However, by the time the police arrived Bates had overpowered her, and she had been intimidated into submission and silence. Perhaps, she hoped if she cooperated with him she would survive.

At page 79 of his brief, Bates argues there was "absolutely no physical evidence to support a finding of attempted sexual battery." Besides his own admission, the crime scene photos show Renee almost totally naked, save for a blouse up near her neck. Bates assertion that the crime scene photos "support the finding that the condition of Ms. White's clothing could have been caused by the struggle and her being dragged into the underbrush." This hardly explains the absence of Renee's panties, which points to obvious sexual exploitation. Besides, semen was found on both Renee's blue panties, and Bates' briefs, although it could not be positively identified (X/207-08). *See Tompkins v. State, supra*. The trial court "applied the right rule of law, and competent

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[15]With the understanding that Bates was only convicted of attempted rape, merely because he experienced a premature ejaculation does not mean she was not sexually assaulted.

[16]Of course, the only one who really knows what happened is Bates, and he gave the police at least 10 different accounts of what transpired (X/259).

substantial evidence supports its finding." *Raleigh v. State, supra*.

He also argues at p.79 that there was no proof that Renee was kidnaped, allegedly because there was evidence that she had been stabbed before the attempted rape and kidnaping. However, Bobby Knowle testified there was no human blood found in the office Renee was abducted from. Besides, Bates admitted he carried Renee into the woods, and the evidence demonstrated Renee answered the phone inside the agency, and her high heels were left behind in the middle of the floor when Bates abducted her to a densely wooded area 90 to 100 feet from the office. *See Swafford v. State, supra*. The trial court "applied the right rule of law, and competent substantial evidence supports its finding." *Raleigh v. State, supra*.

At pp.79-80 he argues pecuniary gain was not applicable, although conceding that his "motive for entering the office was most likely pecuniary gain." The trial court's findings in this regard are factually correct. *See Preston v. State, supra*; *Foster v. State*, 679 So.2d 747 (Fla. 1996), *cert. denied*, 117 S.Ct. 1259 (1997). The trial court "applied the right rule of law, and competent substantial evidence supports its finding." *Raleigh v. State, supra*.

B. **<u>The Trial Court's Findings on Mitigation</u>**

In *Blanco v. State*, 22 Fla. L. Weekly S575, S576 (Fla.1997)

this Court stated that "whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard." *Accord, Raleigh v. State, supra*.

As statutory mitigation, the trial court found Bates had "no significant history of prior criminal activity," and gave it "significant weight" (X/551). Its finding regarding "extreme emotional disturbance" was as follows:

> The evidence of this mitigating circumstance is in dispute. The Defendant has presented the testimony of two doctors, Dr. Larson and Dr. McMahon, that this statutory mitigating circumstance does apply and the State has presented the testimony of one doctor, Dr. McClaren,[17] that this statutory circumstance does not apply. Both of the Defendant's doctors indicated that the Defendant did not suffer from a major mental illness. Dr. Larson testified the Defendant suffers from a low level anxiety disorder with a low range IQ of 88. Dr. McMahon concurs in this finding. Both of the Defendant's doctors testified the Defendant was emotionally over-reacting and was extremely angry, threatened, disorganized and impulsive and not thinking when this murder occurred. Dr. McClaren disagreed with the conclusions of the other two doctors. ***In reaching his opinion, Dr. McClaren talked to the persons who had contact with the Defendant immediately after the murder as well as others who knew or worked with the Defendant***.[18] Dr. McClaren listed a number of reasons to support his opinion that the Defendant was not under the influence of extreme emotional disturbance at the time of the murder. Those reasons are:

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[17]In the sentencing order, Dr. McClaren's name is incorrectly spelled as McLaren. The correct spelling of his name will be used.

[18]Neither of Bates' mental experts did (XIII/582, 600-01).

1. The Defendant has no prior history of mental illness before the offenses.

2. The Defendant has received no subsequent treatment for mental illness.

3. The Defendant denied being under any unusual pressure during the time of the alleged offense.

4. No signs of mental illness were reported by arresting Officer Cioeta.

5. No signs of mental illness were noted by then Investigator Guy Tunnell.

6. No signs of mental illness were noted by interrogating Investigator Frank McKeithen.

7. No unusual behavior was noted on the day of the offenses by Jack Howell, Sr.

8. No signs of mental illness were reported by the Defendant's ex-wife.

9. The Defendant reports being happily married at the time of the offenses.

10. The Defendant reports being rather happy at the time of the offense reporting having just bought a new home and expecting a second child.

11. No signs of mental illness were noted during a 1983 psychological evaluation.

12. No signs of mental illness were reported by Bay County Jail security staff.

13. No signs of mental illness were reported by the jail nurses.

14. No signs of mental illness were reported by his original defense counsel.

15. The Defendant is not mentally retarded.

16. The Defendant is a high school graduate.

17. The Defendant served in the Florida National Guard for about five years before the offenses with no signs of mental illness.

18. The Defendant worked for the same company for about two years prior to the time of the offense without showing signs of mental illness.

19. The Defendant served actively in the National Guard during the two days prior to the homicide showing no signs of mental illness.

20. The Defendant was working on the day of the homicide.

21. The Defendant concealed the victim's body out of plain view prior to the arrival at the crime scene by law enforcement officers.

22. The Defendant disposed of the murder weapon after killing the victim.

23. The Defendant fled the immediate crime scene.

24. The Defendant gathered cattails as a cover story for being in the area of the crime scene.

25. The Defendant lied about the origin of blood on his clothing initially.

26. The Defendant's initial statement showed no disorganized speech.

27. The Defendant initially lied about the victim's ring belonging to his own wife.

28. The Defendant lied about breaking his watch at a location other than the crime scene.

29. There were no other known instances of alleged uncontrolled rage in the Defendant's history.

30. The company truck driven by the Defendant was concealed from plain view near the crime scene.

In weighing this conflict in the evidence, ***the***

> ***Court finds Dr. McClaren's opinion to be compelling***.
>
> Under the totality of the facts in this case, the Defendant's statements, and the testimony of Dr. McClaren, this Court is ***not*** reasonably convinced that the Defendant was under the influence of extreme (Court's emphasis) emotional disturbance at the time of the murder. The Court therefore finds that this statutory mitigating factor ***does not exist***. However, this Court will consider Dr. Larson's and Dr. McMahon's testimony in finding that the Defendant was under the influence of **some** (emphasis supplied by Court) ***emotional disturbance*** at the time of the murder and that this does exist as a ***non-statutory mitigating factor***. The Court will give it significant weight in the weighing process. (III/551-54)

As regards Bates' capacity to conform his conduct to the requirements of the law the trial court found as follows:

> Again, Dr. Larson and Dr. McMahon testified on behalf of the Defendant that this circumstance does exist and Dr. McClaren testified on behalf of the State that this circumstance does not exist. There is no evidence to suggest the Defendant was under the influence of any drugs or alcohol at the time this murder occurred. The Defendant's doctors testified the Defendant's anxiety would become so disorganizing that it would overwhelm all of his cognitive functions. In a confrontation they stated he would become unwrapped and revert to aggressive behavior. However, Dr. Larson's MMPI results show the Defendant with a mild-moderate level of anxiety with unremarkable results. His social history was adequate with a "get by" performance level. ***Both of the Defendant's doctors testified the Defendant knew what he was doing was wrong and he could appreciate the criminality of his conduct*** but that he would not conform to what he knew was wrong. Dr. McClaren disagreed using the same factors that show the Defendant was not acting under extreme emotional disturbance. Again, the testimony and findings of Dr. McClaren and the facts of the crime, together with the Defendant's

> statements, cause this Court to be reasonably convinced that the Defendant's capacity to conform his conduct to the requirements of the law was **not substantially** (emphasis the Court's) impaired. However, the Court will consider the testimony of Dr. Larson and Dr. McMahon in finding the existence of a ***non-statutory mitigating circumstance*** that the Defendant's capacity to conform his conduct to the requirements of the law was ***impaired to some degree***. The Court will give this non-statutory circumstance significant weight in the weighing process. (III/554-55)

The trial court's finding regarding Bates' age follows:

> The Defendant was 24 years old at the time the murder was committed. His IQ was in the low average range. He is ***not*** retarded. He functions academically at a 9-10 year old level but his social history revealed an adequate, "get by" performance level. He was also working, supporting his family and serving in the military. The Defendant's age at the time of the crime does exist as a mitigating factor and the Court will give it little weight in the weighing process. (III/555-56)

As to its finding regarding non-statutory mitigation, besides that which was previously presented, the State will address such as it relates to Bates' next issue on appeal.

There is no need to discuss the trial court's finding of "no significant history of prior criminal activity," because it gave this factor significant weight and Bates accepts as much on pp.74-75 of his brief. However, he does not accept the fact that the court gave "little weight" to the "age" factor. "Mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence." *Quince v. State*, 414 So.2d 185, 187 (Fla. 1982); *Accord, Echols v. State*, 484 So.2d 568, 576

(Fla.), cert. denied, 479 U.S. 871 (1986). "The record contains competent substantial evidence to support the trial court's conclusion" regarding the age factor. *Raleigh v. State, supra*.

At pp. 75-78, Bates disputes the trial court's findings regarding the extreme emotional disturbance and capacity to conform factors. This Court has delineated the trial court's function in this regard as follows:

> The trial court, in considering allegedly mitigating evidence, must determine whether the facts alleged in mitigation are supported by the evidence. *See Rogers v. State*, 511 So. 2d 526, 534 (Fla. 1987), *cert. denied*, 484 U.S. 1020, ... (1988). After making this factual determination, the trial court must then determine whether the established facts are of a kind capable of mitigating the defendant's punishment. (Footnote omitted.) The decision as to whether a mitigating circumstance has been established is within the trial court's discretion. *See Preston v. State*, 607 So. 2d 404 (Fla. 1992), *cert. denied*, 507 U.S. 999, ... (1993); *Lucas v. State*, 568 So. 2d 18 (Fla. 1990).

Bonifay v. State, 680 So.2d 413, 416 (Fla. 1996); *See also, Foster v. State, supra*.

Further, the trial court's decisions on mitigation will not be reversed merely because an appellant reaches a different conclusion. *See, James v. State, supra*; *Hall v. State*, 614 So.2d 473 (Fla. 1993); *Preston v. State*, *supra*, 409-10; *Sireci v. State*, 587 So.2d 450 (1991), *cert. denied*, 112 S.Ct. 1500 (1992). Moreover, whether a mitigator has been established is a question of fact, and a court's findings are presumed correct and will be

upheld if supported. *Campbell v. State*, 571 So.2d 415 (Fla. 1990).

As regards emotional disturbance, the trial court did find "***some***" and assigned it as a non-statutory mitigator, which it afforded "significant weight" (III/554). There are 30 reasons why "extreme" emotional disturbance did not apply to Bates (III/552). These factors, compiled in a list by Dr. McClaren, when viewed in their totality, do indeed provide a compelling negation of the "extreme" component of emotional disturbance. The record contains competent substantial evidence to support the trial court's conclusion there was "some" emotional disturbance and assigning it "significant weight". *See, James v. State, supra; Kilgore v. State*, 688 so.2d 895 (1996).

Similarly, the trial court found that Bates' capacity to conform his conduct to the requirements of the law was "impaired to ***some degree***" but "***not substantially*** impaired" (III/555). It too, became a non-statutory mitigator assigned "significant weight" (III/555). Again, the trial court found Dr. McClaren's 30 factors were compelling in reaching this conclusion (III/555). It also found: ***"Both of the Defendant's doctors testified the Defendant knew what he was doing was wrong and he could appreciate the criminality of his conduct*** but that he would not conform to what he knew was wrong." (III/555) A mental expert's opinion that a defendant could differentiate between right and wrong, as well as consider the consequences of his actions, was relevant to both

extreme emotional disturbance and capacity to conform mitigation, and a trial court was correct in rejecting the latter mitigator in view of that opinion. *Ponticelli v. State*, 593 So.2d 483 (1991), *vacated on other grounds*, 113 S.Ct. 32, *remand*, 618 So.2d 154, *cert. denied*, 114 S.Ct. 352. Again, the record contains competent substantial evidence to support the trial court's conclusion concerning Bates' capacity to conform. *See, James v. State, supra*; *Kilgore v. State, supra*.

Bates' challenge to the trial court's findings as to his life history is nothing more than mere disagreement with the force to be given this non-statutory mitigation. *Quince v. State, supra; Echols v. State, supra*. The trial court independently reviewed and weighed these factors as the State will demonstrate in its argument to Bates' next claim. It correctly exercised its discretion.

C. **Compared to Similar Cases, Death is Proportionate**.

Bates alleges at p.78 of his brief that although "this murder is tragic, ... it is not one of the most aggravated murders." The State respectfully submits that not only was Renee White's murder tragic, it was heinous, atrocious and cruel. This cause is one of the most aggravated murders once that factor is coupled with pecuniary gain, as well as during the course of an attempted rape and a kidnaping as demonstrated by the following authorities. *Kimbrough v. State, supra* (Burglary of a dwelling, brutal beating and sexual battery of victim)*; Orme v. State, supra* (Strangulation

murder designed to further both sexual assault and a robbery); *Preston v. State, supra* (Capital murder committed during kidnaping, to avoid arrest and to obtain pecuniary gain); *Gilliam v. State, supra* (Victim brutally beaten, bitten, raped, and strangled); *Swafford v. State, supra* (Victim abducted, sexually abused, and shot nine times) *Brown v. State, supra* (81-year-old victim was beaten, raped, and killed by asphyxiation); *Tompkins v. State, supra* (Victim strangled after refusing defendant's sexual advances); *Johnston v. State, supra* (84-year-old victim, who had retired to bed for the evening, strangled and stabbed three times completely through the neck and twice in the upper chest; took her three to five minutes to die after being stabbed). Bates' sentence of death is proportionate, as found by Chief Justice Ehrlich 13 years ago, and the trial court upon remand, and the jury and trial court upon resentencing. *Bates I, supra*, at 493-496; *Bates II, supra*, *Bates III, supra*; Bates IV.

ISSUE V

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION REGARDING NON-STATUTORY MITIGATION.

"As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion." *Foster v. State, supra*, at 755. "Moreover, whether a mitigator has been established is a question of fact, and a court's findings are presumed correct and will be

upheld if supported by the record. *Lucas v. State*, 613 So.2d 408, 410 (Fla. 1992), *cert. denied*, 510 U.S. 845 (1993), *citing, Campbell v. State, supra*. Bates' sentencing order, filed the day before his sentencing, presented 18 "Mitigating Circumstances", which were a combination of statutory and non-statutory mitigation (III/541-43). The trial court's findings regarding statutory mitigation, and derivatives thereof as non-statutory mitigation, were discussed in the preceding argument as to proportionality. On p. 85 of his brief, Bates concedes: "The sentencing court discussed fully the extensive mitigating evidence that Mr. Bates presented at the resentencing trial."

However, he claims he submitted two additional matters at his sentencing hearing [paragraphs 17 and 18 of his "Sentencing Memorandum" III/542] which the trial court "ignored". "That they are not included in the sentencing order is more indicative of the judge's conclusion that they did not require revising the order rather than that the judge ignored them." *Lucas v. State, supra*, *citing Palmes v. State*, 397 so.2d 648 (Fla.), *cert. denied*, 454 U.S. 882 (1981). Further, "[a]ny failure to consider these items, however, would be harmless error." *Id*.

The trial court's findings as to non-statutory mitigation were as follows:

> 1. The Defendant's family background. The evidence establishes the Defendant was a loving son and stepson and a caring brother. The evidence also establishes the Defendant was taught to be

respectful, obedient and well behaved during childhood and he demonstrated those traits as a youth by participating in school, athletics, church and Boy Scout activities in Riviera Beach, Florida. The Defendant was a loyal friend. The Court finds these circumstances do exist, but in light of the passage of time between the Defendant leaving this environment and the occurrence of the crime, the Court will give these mitigating circumstances some weight.[19]

2. The Defendant volunteered for service in the Florida National Guard. The Defendant did volunteer for this service and the Court finds this circumstance does exist and gives it little weight in the weighing process.

3. The Defendant was a dedicated soldier and was a patriot. This circumstance does exist and the Court will give it little weight.

4. The Defendant has a low average IQ. All the doctors agree on the Defendant's IQ and this circumstance does exist. The Court has earlier indicated it has considered as non-statutory mitigating factors the Defendant's capacity to conform his conduct was somewhat impaired and that he was acting under some emotional disturbance. A component of each of those circumstance included a consideration of the Defendant's IQ. Therefore, this Court will give this circumstance little weight in the weighing process.

5. The Defendant loves his wife and children and was a supportive father. This fact does exist, and the Court gives it some weight.

6. The Defendant was a good employee while working for the Knight Paper Company. This fact does exist and the Court gives it little weight.

The Court has considered the evidence presented in support of each of these statutory and non-statutory mitigating circumstances and, in weighing all of the mitigating factors found by the court to

[19]*See Mungin v. State*, 689 So.2d 1026 (1995).

> exist against the aggravating factors that exist, the Court finds, as did the advisory jury, that the aggravating factors outweigh all of the mitigating factors. (III/557)

First, on a matter which has been repeatedly addressed in this brief, "life without parole" was not a sentence available to Bates owing to the *ex post facto* clauses of the Florida and United States Constitutions. Therefore, there was no reason for the trial court to consider his waiver of parole, because this option was not available to him, and was, therefore, irrelevant to his character, record, or the circumstances of the offense. It was in essence a nonsequitor. Besides, the trial court did address this matter in depth in its order denying his request to instruct the jury or argue the same (II/335-338). The trial court correctly exercised its discretion in not finding this to be non-statutory mitigation. *Foster v. State, supra*. Even if it erred, which the State does not concede, it would be harmless given the fact that his waiver was meaningless in light of *ex post facto* law. *Lucas v. State, supra*.

As regards Bates' inmate records, in addition to his statement in his sentencing memorandum that he "has adjusted to incarceration and has a good institutional record," certified copies of the same were submitted to the trial court on the day of his sentencing as follows:

> MR. DUNN: Yes, Your Honor. I provided the Court with a sentencing memoranda. I provided a copy to the State and filed a copy with the Clerk's Office.
>
> I do have a couple of documents that I would like

> for Your Honor to consider. I'm providing a copy to the State, it's been marked as Volume 6, 6-A and 7, Your Honor, which are certified State of Florida Department of Corrections inmate record from Florida State Prison concerning Mr. Bates. (VIII/1279-80)

That is the extent of his evidence about this matter. Bates asserts on p.85: "His institutional record, like his life history before this crime, is ***unremarkable***." Without any indication of what demonstrated that Bates had "adjusted well to incarceration," other than simply saying such in his memoranda, he argues the trial court erred in failing to find "compelling mitigation". He further argues his record was not contested by the State, therefore it was uncontroverted and could not be rejected by the trial court.

However, "[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. See Campbell." *Nibert v. State*, 574 So.2d 1059 (Fla. 1990). The State respectfully submits Bates failed to provide "a reasonable quantum of competent proof" as to this factor. Simply because he stated he had adjusted to prison and submitted his inmate record to the trial court, does not mean the trial court had to accept as much as non-statutory mitigation, particularly when it admittedly is "unremarkable". *Foster v. State, supra*, at 755; *Lucas v. State, supra*.

The trial court correctly exercised its discretion. *Foster v. State, supra; Mungin v. State, supra*; *See also, Sochor v. State*,

619 So.2d 285 (Fla.)(Evidence that defendant was physically abused by his father, financially supported his family when his father was unable to work, had alcohol problems, and had violent temper and was mentally unstable was insufficient to establish nonstatutory mitigating circumstance.), *cert. denied*, 510 U.S. 1025 (1993). Even if it were error to not find his confinement adjustment as non-statutory mitigation, it would be harmless beyond a reasonable doubt given compelling aggravation, including HAC, which overwhelmed mitigation found by the trial court. *Lucas v. State, supra; Bogle v. State*, 655 So.2d 1103 (Fla.)(Fact that trial judge did not specifically list defendant's artistic talent and capacity for employment in mitigation was insufficient to overrule death where HAC, avoid arrest, sexual battery, and prior violent felony were supported by strong evidence.), *cert. denied*, 116 S.Ct. 483 (1995).

ISSUE VI

GENERAL QUALIFICATION OF A JURY DOES NOT CONSTITUTE A "CRITICAL STAGE" OF THE PROCEEDINGS, AND THE TRIAL COURT COMPLIED WITH THIS COURT'S ORDER STAYING PROCEEDINGS FOR 24 HOURS.

This Court has held:

> We do not reach the question of whether appellant validly waived his presence during the prior ***general qualification process*** because we ***do not find that process to be a critical stage*** of the proceedings requiring the defendant's presence. We see no reason why fundamental fairness might be thwarted by defendant's absence during this routine procedure. Thus, we find no merit to appellant's contention regarding this absence.

Robinson v. State, 520 So.2d 1, 4 (1988); *Accord, Remeta v. State*, 522 So.2d 825, 827 (Fla.), *cert. denied*, 488 U.S. 871 (1988); *See also, North v. State*, 65 So.2d 77 (Fla. 1952), *affirmed*, 346 U.S. 932 (1954). Bates' sixth claim is a nonsequitor.

Bates' sixth issue found on pp.88-93 inaccurately portrays the record. A correct rendition of the case and facts demonstrates "[c]learly, defendant was present from the beginning of ***his*** [emphasis this Court's] trial." *Robinson v. State, supra*. Before voir dire for Bates' resentencing commenced, his ***co-counsel***, Mr. Dunn, raised various motions including a motion for mistrial because he alleged "that jurors were excused yesterday."[20]

The State responded as follows:

> MR. APPLEMAN: Your Honor, no jurors were excused in this case yesterday. It is the policy of this court pursuant to the administrative orders as I believe issued by yourself and prior chief judges that the jury panel be brought into the courthouse and that they have the orientation program and that one of the judge's then qualify those jurors and then take excuses for the particular week, or the time period that they are summonsed for if it is more than a week. That's the only thing that took place by Judge Hess concerning jurors who wished to be excused.
>
> ***Mr. Richmond participated fully in that particular aspect of that, never voiced an objection at any time to any of those individuals***

[20]This Court issued an emergency stay for 24 hours for that day owing to Mr. Dunn's representation of Georgia death-sentenced Darrell Devier, who was scheduled to be executed at 7:00 p.m., May 15, 1995, the date scheduled for Bates' resentencing to commence. (Judicial notice own files; p.89 of his brief.)

> ***being excused. Never voiced an objection to the procedures that were used in that at any time and I feel it is thereby waived and even so, it didn't pertain to this particular case at all***.
>
> Any individual who did bring up the fact that they were unavailable for a long, extended period of time were still required to stay. There were those individuals who were excused for doctor's appointments, surgical appointments, et cetera. I also believe Ms. Diltz was present as the court reporter during the, all that time period --- She's nodding. Just during the time that Judge Sirmons was in there. My mistake. You were there when Judge Sirmons advised them about what case they would be hearing and not to read anything --
>
> COURT REPORTER: Right. (IV/657-58)

The trial court clarified for the record the events transpiring on the day before, which the State accepts as a true rendition of the facts:

> THE COURT: For the record, our jury selection process will begin today and that's in compliance with the Supreme Court in this particular case. Yesterday we had the jury panel[21] come in for all of the trials in the court system that were scheduled for trial this week. And that jury panel is not, was subject to trials --- I think Judge Hess had trials scheduled that were supposed to be tried this week. As it turned out on Monday morning his trials scheduled turned out not to have all of the trials available so Judge Hess is also the judge assigned to hear juror excuses to the panel itself of all the jurors coming in to serve for all of the various courts that would choose juries from that panel. ***So, there is nothing that violates the Supreme Court stay because we have not gone through the jury selection process. Or began the jury selection process***. The only thing I did yesterday was to go down, as we talked about on the phone, and advised the jurors that we would be selecting a

[21]The trial court meant jury ***pool*** (IV/666-67; VII/1269).

> jury, not beginning yesterday but beginning today and advising them that, not to read or listen or watch any reports about the case. Primarily because of the concern that expressed by counsel that possible pretrial publicity in this case and gave them that simple instruction to all of the perspective jurors. And I'll deny the defendant's request for motion for mistrial and we can proceed. (IV/659-60)

Mr. Dunn, who did not attend the administrative jury pool excusals, then proceeded to present a hearsay account of what allegedly transpired as related to him by his co-counsel, Mr. Richardson, who was present (IV/660-62). The State, which was present, rejoined:

> MR. APPLEMAN: May I, Your Honor? So, the record is not devoid of the actual things that went on in this particular proceeding let's go through a few things first. Number one, since defense counsel has decided to put into the record all the aspects of what ***co-counsel*** saw at that proceeding yesterday let me put into the record what the state saw at that proceeding.
>
> Sixteen white males appeared and requested to be excused by Judge Hess. Six of those individuals for various reasons were done so. Two black males requested to be excused. Neither of which were excused. Twenty-eight white females requested to be excused and thirteen were given excuses by Judge Hess and excused. Four black females did so, only one was excused because her daughter was graduating from a preparatory school for the Air Force Academy this week and she did not want to miss that graduation and already had airline tickets purchased and she would be leaving sometime during the week and would be inconvenient for her to stay through Friday on this particular case.
>
> The other things I would like for the court to kindly clarify for us if we could possibly, is Mr. Richmond's role in this particular proceeding. It is my understanding that at this point in time the

> county is paying Mr. Richmond as counsel for Mr. Bates. It is my understanding in reading some of the petitions filed by Mr. Dunn that he has indicated to the Florida Supreme Court that he is lead counsel in this case. And that without his representation Mr. Bates would not have effective assistance of counsel and that's why the Florida Supreme Court continued this matter for twenty-four hours.
>
> ***Mr. Richmond was there at the proceeding. He did not object to any of these things***. This is the identical procedure that we have used for as long as I can remember. It is the same procedure that was used the last time we impaneled a jury in this particular manner. Mr. Bates was not present when we did the prior jury impaneling and requested for those individuals who had excuses, either statutory or otherwise, and wanted to be delayed in their jury service. These people were postponed. Not totally excused. They were not postponed or excused because of this case in any form whatsoever. ... (IV/662-664)

Mr. Richmond commented for the record that his role at the jury pool "was as an observer" (IV/664). However, he later remarked: "Mr. Dunn will be, quote, lead counsel at this time at the request of Mr. Bates and ***I will do whatever I can to assist this court and assist Mr. Bates***." (IV/665) The trial court noted that it had "appointed Mr. Richmond to represent Mr. Bates on the record" (IV/666). It further noted that Mr. Dunn had "stepped in as co-counsel and, of course between the two counsel they can agree how they wish to handle the case" (IV/666). The trial court next explained exactly what transpired the day before:

> THE COURT: ... But as to the question concerning the jury, again the court notes this is the jury pool concept is what we operate out of. ***We pull our jurors from a pool of jurors and we have not***

yet pulled the pool or pulled the panel, so to speak, from the jury pool.

If we had summonsed these jurors specifically for this particular case and put them in the courtroom and the defendant was present and we had the jurors, which is what we're going to do today, that may be another matter. But we have a pool concept from that where we select jurors out of that pool for all the trials scheduled for this trial week of court and as part of that pool concept the judge that handles the pool does listen to and excuses jurors who are not able to serve and that's been a practice of the court for many years.

In this particular case we had followed that practice again, for example, jurors that Judge Hess picked the four or five cases that he thought he had to try on Friday, the one case he thought he had to try on Monday morning as it turned out we would not have had all the jurors available because they would have been selected on other juries. And the only concern that we really have to make sure we have sufficient people to pick a jury from.

You [Mr. Dunn] mentioned three hundred something people. I think we have a hundred, I'm not sure exactly how many we have.

MR. APPLEMAN: According to my records we had 116 that appeared yesterday.

THE COURT: That appeared yesterday so ***we have a hundred something people available at this point in time to select the jurors from***.

MR. DUNN: I believe my representation of three hundred jurors came from either this court's representation or the state's on our telephonic conference.

THE COURT: We summonsed that many. We didn't have that many show up. We summonsed a number of people and we have no shows and people that appear and are excused and what we end up with is the actual group of people we have. But I'll note the defendant's challenge. I'll deny the defendant's request for mistrial and we can proceed. (IV/666-67)

The discussion turned to the trial court's request at the telephonic conference that Mr. Richmond be present at the general qualification of the jury pool (IV/668-69). Mr. Dunn agreed the record would "establish that" (IV/669). The Court specifically addressed Mr. Richmond's presence as follows:

> THE COURT: And I think the record will establish that and the reason for that is to make sure that we wouldn't have a question about what may have happened or what I may have said in the presence of the jury panel[22] because of some concerns Mr. Dunn expressed about what we did the last time about raising hands and pre-trial knowledge of the case. But I'll note also that ***there was no specific objection made yesterday at the time too that***, that needs to be place on the record and -- (IV/669)

Mr. Richmond interrupted the trial court alleging he "had requested and was not able to secure court reporting of that" (IV/669). He further alleged there was no time or way to make an objection (IV/669). "This was the judge doing what he thought was right with me as merely an observer. I observed, I recorded and I reported to Mr. Dunn." (IV/669) As regards the alleged request for a court reporter, neither the trial court or the State were aware of such a request, to which Mr. Richmond replied: "I speak slowly and softly, Mr. Appleman."[23] (IV/670)

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[22]Again, the trial court meant jury pool as demonstrated from its previous discussion (IV/666-67)

[23]A court reporter was present, if he had made his request known to the trial court, it would have acted accordingly. However, the matter is moot because general qualification is not a critical stage.

Bates renewed his motion for mistrial on this basis subsequent to the jury being chosen, but before it was sworn (VII/1264-68). The State correctly argued jury qualifications did not constitute a critical stage (VII/1266). The trial court denied the motion as follows:

> THE COURT: I will also note for the record the State or case the State's, or the Defense is providing to the Court, Robinson case, '88 case, references Florida Statute in a footnote on Page 3, footnote Number 1. They reference 40.01 but also reference 40.013 which is the statute that says persons disqualified or excused from jury service and in that is 40.013, paren 6 which is a person may be excused from jury service upon showing of hardship, extreme inconvenience or public necessity. And the State's correct that the procedure that this court employs in selecting jurors is to bring jurors down to a jury pool, they go through the qualifications, excusal process under the statute of 40.013 process and then the jurors that are qualified and not excused are available for service in a particular trial so I will note the Defendant's objection and deny the motion for mistrial. (VII/1269)

The general qualification process Bates refers to in his sixth claim did not constitute a critical stage of ***his*** trial. Jury selection from ***Bates' panel*** commenced the following day, subsequent to his motion for mistrial. Therefore, there could be no constitutional violation. Similarly, there was no violation of this Court's order.

Even if there was error, which there wasn't, Mr. Richmond, Bates' co-counsel, was present at the general qualification of the jury pool, and raised ***no objection***. Therefore, any alleged error

would be ***invited*** by Mr. Richmond's silence. *Pope v. State*, 441 So.2d 1073 (Fla. 1983). Such invited error, would be harmless given the fact that the general qualification process is not a critical stage. *DiGuilio*. Bates' sixth claim is devoid of merit.

ISSUE VII

WHEN DR. BARRY CROWN'S ANALYSIS OF BATES AS HAVING ORGANIC BRAIN DAMAGE WAS REFUTED BY A CAT SCAN, HE ELECTED TO NOT USE HIM AS A WITNESS.

Bates was not denied a request for expert assistance. He used two mental experts, Dr. Larson and Dr. McMahon. His potential third mental expert, Dr. Barry Crown, a neuropsychologist, alleged Bates had organic brain damage.[24] When the trial court granted the State's motion for diagnostic testing, and Bates was tested, the results indicated no organic brain damage. Given the State's rebuttal evidence, Bates' defense team strategically elected not to use Dr. Crown as a witness. *See Smith v. State*, 457 So.2d 1380, 1383 (Fla. 1984). In so doing, he waived his "organic brain damage" claim. *See Orme v. State, supra* (Defendant's express waiver of a mitigating factor to foreclose rebuttal precluded claim of error in trial court's failure to weigh it.).

Factually, this matter arose as follows. The State first received notice that Bates was going to use a third mental expert,

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[24]This brief is accompanied by a motion to supplement the record with Dr. Crown's deposition, which Mr. Dunn proffered to the trial court (XV/771). At p.97 of the same, Dr. Crown testified: "His memory deficit is simply a manifestation of ***his brain damage***."

Dr. Barry Crown, during his Opening Statement given by Mr. Dunn on Thursday, May 18, 1995 (IX/48-49). At the conclusion of his presentation, the State brought this discovery violation to the trial court's attention (IX/51). After Ms. Flynn testified, at sidebar, Mr. Dunn admitted his failure to notice the State as to Dr. Crown, alleging he did not realize as much until Mr. Appleman brought it up, and blaming this oversight on his representation of a Georgia death-sentenced inmate (IX/63). Assistant State Attorney Meadows noted for the record that the same tactic had been used at the mistrial with Dr. Larson (IX/65). The Court did not impose sanctions; rather it ordered Dr. Crown to be deposed (IX/66).

Dr. Crown was finally deposed by Mr. Meadows on Sunday evening, May 21, 1995 (XI/322). In that deposition, as previously delineated, Dr. Crown alleged Bates had "brain damage" (May 21, 1995, deposition, p.97). The next morning, May 22nd, Mr. Appleman announced to the trial court that Dr. Crown had been deposed and opined Bates had organic brain damage (XI/322). Given this new evidence, the State moved to have Bates diagnostically tested for rebuttal purposes (III/479-80; XI/322). After hearing argument on the matter the trial court ruled accordingly:

> THE COURT: We're here in a penalty phase so we're in a different scenario than we would be if we were here in the guilt phase of the trial because Mr. Bates has previously been found guilty of the charges against him. And also we now know the defense intends to call the psychologist and has asked for a neuropsychologist to examine Mr. Bates. And I agree that was done, I think, a couple of

> weeks before the trial was to begin. The court allowed the defense to call Dr. Crown and due to the late timing or the timing of the request the court expressed its concern that Dr. Crown's appointment and testimony would not be used as a delay in the proceedings. And the defense assured the court that Dr. Crown would be available to testify during the trial and that would not be a delay. And Dr. Crown apparently has fulfilled that function and has gone ahead and tested Mr. Bates and formed his opinion and is ready to testify. We then had the problem as Mr. Dunn acknowledged that because of the pressure of some other things that were taking place Dr. Crown was not placed on the witness list and the state was [sic] found that out Tuesday or Wednesday, I believe, of this week, but Dr. Crown did make himself available for his deposition on Sunday. I think the state's motion at this point in time is well taken. That they should be allowed to provide or have Mr. Bates available for testing. That should not operate as a delay in the proceedings and any results of the testing would also be available to the defense. In terms of -- so we're not actually talking about any kind of delay from either standpoint. And I think Mr. Dunn has already anticipated some of what is involved because I think you indicated in your argument that Dr. Crown had suggested these were functional deficits and would not show up on an MRI. So, there is that aspect of it. That you've already anticipated, so to speak, if the MRI were to come out with no showing of organic brain -- So, I don't feel there would be prejudice to the defense. It is not something new that if it came out negative with no signs on the CAT scan or whatever, of organic brain impairment that would still be able to be answered by Dr. Crown's testimony. So I think the defense has anticipated that. I think the state has a right to, at this point in time have the testing done.
>
> So, I'll grant the state's request for diagnostic testing of Mr. Bates. and I'll let your offices coordinate that. (XI/327-29)

The potential consequences of this testing was readily apparent to Mr. Dunn when he informed the trial court: "I don't want my mental

experts to testify until I know what the results show." (XI/330)

Bates was tested during the lunch hour, and the results were available that afternoon (XII/431, 485). Mr. Appleman provided a copy for the court file,[25] and one to Dr. Crown, although Mr. Richmond commented: "Dr. Crown doesn't need that." (XII/485). After the jury had been excused for the day, Mr. Meadows noted for the record as follows:

> ...the report is pretty self explanatory on its face, that there is nothing abnormal about any of the findings from the CAT scan or the defendant's brain. (XII/498-99)

Overnight, Mr. Dunn decided upon his strategy, which he announced the next morning as a request for a "neuroradiologist" and an order to allow special testing which he hoped would show what Dr. Crown had guessed was the case, organic brain damage (XIII/506-07). The trial court observed that there only 2 or 3 places in the entire United States that provided those testing procedures (XIII/507-08). It ruled as follows:

> THE COURT: Okay, the Court notes the Defense's argument, and here are, Dr. Larson is still involved in this case and Dr. McMahon is still involved in this case, and the Court's allowed the Defense to, to have a neuropsychologist, Dr. Crown, available to, to the Defense. So the Court will deny the Defendant's request for additional experts and also deny the Defense's request for the additional testing. (XIII/508)

Dr. Crown's deposition was proffered for the record, and the

[25]The State will also move to supplement with the results.

trial court so accepted it (XIII/509-10). Later, he announced that he would not call Dr. Crown as an expert witness or submit evidence as to organic brain damage (XIII/531). In response to Mr. Dunn's argument that Bates was being denied a constitutional right by not being allowed to hire more experts and do more testing the trial court found:

> THE COURT: I will note yesterday the, the Defense, in response to the State's request for additional testing on Mr. Bates for their purposes, the Defense acknowledged or made a statement that certain things that Dr. Crown would testify to such as functional deficits would not show up on an MRI or a CAT Scan and they were functional matters as opposed to something that would show up on tangible testing, alone, and noting that on the record, that was part of the agreement.
>
> But I agree with the State's position in this situation. The Court has appointed the requested Defense experts up until now. The, the, obviously, this is not the first time that we've gone this far into the trial process; the first case resulted in a mistrial back in January, the first part of February. Defense has to make a decision relative to presenting evidence in this case. I do not feel that the Court's denial of the motion in and of itself is dispositive of the matter, but that's the decision the Defense has to make. But I will deny the Defendant's motion for the additional testing and deny the motion for an additional expert to be appointed. (XIII/533-34)

The trial court was entirely correct. It did not deprive Bates of a constitutional right. He already had two mental experts to testify as to mental mitigation. Rather, his lead counsel strategically determined that pursuing one specific type of mental mitigation, "organic brain damage", was not an option given the CAT

scan results. These decisions are made all the time in capital cases. *See, Smith v. State, supra*. In this instance, it was a wise choice because Dr. Crown, a neuropsychologist, not a medical doctor, had speculated Bates had organic brain damage, without conducting any physical diagnostic tests.

ISSUE VIII

THE TRIAL COURT APPLIED THE RIGHT RULE OF LAW AND COMPETENT, SUBSTANTIAL EVIDENCE SUPPORTS ITS FINDINGS ON AGGRAVATION, THEREFORE, IT CORRECTLY EXERCISED ITS DISCRETION.

In the interest of judicial economy, the State would refer this Court to its argument as to Bates' fourth claim concerning the trial court's findings on aggravation. The trial court applied the right rule of law and competent, substantial evidence supports each of its findings as to the murder of Renee White occurring during a kidnaping and an attempted sexual battery, or flight therefrom; that it was committed for pecuniary gain; and that it was heinous, atrocious or cruel. *Willacy v. State, supra; Raleigh v. State, supra*.

Bates argues at p.98 of his brief that "[t]he three aggravating factors involved in this case are facially vague and overbroad, and therefore, so to are the instructions thereon. In *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974), this Court held:

> Fla.Stat. § 921.141(6)(d), F.S.A., provides that the commission of a capital felony as part of another dangerous and violent felony constitutes

> not only a capital felony under Fla.Stat. § 782.04(1), F.S.A., but also an aggravated capital felony. Such a determination is, in opinion of this Court, ***reasonable***.

Id. *Accord, Mills v. State*, 476 So.2d 172 (1985)("The legislative determination that a first-degree murder that occurs in the course of another dangerous felony is an aggravated capital felony is reasonable."), *cert. denied*, 475 U.S. 1031 (1986). As regards pecuniary gain, this Court determined:

> Capital felonies committed with the motive of avoiding arrest, escape, monetary gain, or the disruption or hindrance of the lawful exercise of government or law enforcement have also been designated as aggravated capital felonies pursuant to Fla.Stat. § 921.141, F.S.A., subsections (e), (f) and (g), F.S.A., and we again feel that ***the definitions of the crimes intended to be included are reasonable and easily understood by the average man.***

State v. Dixon, supra, at 9.

Vagueness challenges to the heinous factor and instruction have repeatedly failed, and this case is no exception:

> As his second claim, James challenges the standard jury instruction on the heinous, atrocious or cruel aggravator because it is unconstitutionally vague and overbroad and relieves the State of its burden of proving the elements of this aggravating factor. We reject James' challenge to the HAC instruction because the standard instruction given in this case is the same instruction this Court previously approved in *Hall v. State*, 614 So.2d 473, 478 (Fla. 1993), and found sufficient to overcome vagueness challenges to both the instruction and the aggravator. *Id*.

James v. State, supra, at 1235.

The trial court correctly applied the right rule of law to each of

the aggravating factors it found, and competent, substantial evidence supports its findings.

Bates accepted the instructions as given, so any complaint thereon is procedurally barred. *Fotopolous v. State*, 608 So.2d 784 (Fla. 1992), *cert. denied*, 113 S.Ct. 2377 (1993). On the merits, the trial court correctly exercised its discretion in providing constitutional instructions on each factor it found in aggravation. Error, if any, would be harmless as to any instruction, given each factor existed under any definition. *Foster v. State, supra*. Even if a factor was found not to exist, the jury is presumed to disregard factors not supported by the evidence. *Fotopolous v. State, supra, citing Sochor v. Florida*, 504 U.S. 527 (1992).

ISSUE IX

RESIDUAL OR LINGERING DOUBT OF GUILT IS NOT AN APPROPRIATE MITIGATING CIRCUMSTANCE IN THE SENTENCING PHASE OF A CAPITAL CASE.

The substance of Bates' final claim is found on ***p.102*** of his brief: "... the sentencing court excluded relevant mitigating evidence--lingering doubt evidence--from the jury's consideration." There is ***no*** constitutional right to have lingering doubt about a defendant's guilt considered as a mitigating factor. *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988). This Court has consistently "held that residual or lingering doubt of guilt is not an appropriate mitigating circumstance." *Sims v. State*, 681 So. 2d 1112 (Fla. 1996), *cert. denied*, 117 S.Ct. 1558

(1997); *Bogle v. State, supra*; *Downs v. State*, 572 So.2d 895, 900 (Fla. 1990), *cert. denied*, 502 U.S. 829 (1991); *Aldridge v. State*, 503 So.2d 1257, 1259 (Fla. 1987). Bates' final claim is devoid of merit.

CONCLUSION

_____Based upon the foregoing facts, authorities and reasoning, the State respectfully requests this Honorable Court to affirm, again, Kayle Barrington Bates conviction and sentence of death.

Respectfully submitted,

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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief has been furnished by U.S. Mail to, Thomas H. Dunn, 277 Alexander Street, Ste. 900, Rochester, New York, 14607, this _____ day of February, 1998.

_____

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