IN THE SUPREME COURT OF FLORIDA

NO. 86,180

KAYLE BARRINGTON BATES,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

THOMAS H. DUNN
Florida Bar No. 871753
277 Alexander Street
Suite 900
Rochester, New York 14607
(716) 232-5480

I. PRELIMINARY STATEMENT

KAYLE BARRINGTON BATES is the appellant in this capital appeal. This proceeding involves the direct appeal of the Circuit Court's imposition of a death sentence in Mr. Bates' 1995 resentencing trial. The record on appeal consists of 38 volumes. Citations in this brief to designate record references are to the volume and page number of the record on appeal. For example "R. XV 778." All other citations will be self explanatory or will otherwise be explained.

II. REQUEST FOR ORAL ARGUMENT

Mr. Bates has been sentenced to death. This Court has consistently allowed oral argument in other capital cases on direct appeal. A full opportunity to air the issues through oral argument would be an aid to the Court in resolving the genuine constitutional issues presented in this appeal. Mr. Bates respectfully requests that this Court permit oral argument in this case.

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STATEMENT OF THE CASE

This is the fourth time this case has come before this Honorable Court. This case has troubled this Court each and every time it has been reviewed. Although Mr. Bates was sentenced to death for a third time, the resentencing jury was also troubled by this case and ultimately sentenced Mr. Bates to death not because they believed that death was appropriate but because they were denied a reasonable sentencing alternative to death -- life without the possibilty of parole. During the deliberations, the jury asked the following question:

> 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?"

(R. XV 830). The issues presented in this appeal -- including the issue set forth in the jury's question -- will again trouble this Court. This Court must seize the opportunity to review this case for the last time. The record demands that this Court reverse the sentence of death and impose a sentence of life without the possibility of parole.

A. Original Trial and Capital Sentencing Proceeding

An indictment filed in the Circuit Court for Bay County on July 6, 1982, charged Kayle Bates with first degree murder (by premeditation or during the course of a felony), kidnaping, robbery, and sexual battery. Mr. Bates' attorney filed a motion to suppress a statement taken from him by the police and a motion for change of venue (R-164-167). The court denied the motion to suppress, and it deferred ruling on the motion for change of venue until trial at which time it denied that motion.

Mr. Bates was tried before the Honorable W. Fred Turner from January 17-20, 1983, and found guilty by a jury of premeditated first degree murder, kidnaping, robbery, and attempted

sexual battery.

During the penalty phase of the trial, the State presented no additional evidence. Mr. Bates took the stand as well as his father, and both pleaded that the jury recommend mercy. After the court instructed the jury, they returned a recommendation of death.

The court, following the jury's recommendation, sentenced Bates to death. The court found in aggravation:

> 1. The murder was committed during the course of a kidnaping, robbery, and attempted sexual battery.
>
> 2. The murder was committed for the purpose of preventing or avoiding lawful arrest.
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> 3. The murder was committed for pecuniary gain.
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> 4. The murder was especially heinous, atrocious, and cruel.
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> 5. The murder was committed in a cold, calculated, and premeditated manner without a pretense of moral or legal justification.

In mitigation, the court found that Mr. Bates had no significant history of prior criminal activity.

On appeal, this Court affirmed Mr. Bates' convictions but reversed the death sentence and remanded for resentencing as the trial court had impermissibly found that the murder was committed 1) for the purpose of preventing or avoiding lawful arrest, and 2) in a cold, calculated, and premeditated manner without a pretense of moral or legal justification. Bates v. State, 465 So.2d 490 (Fla. 1985).

B. 1985 Resentencing Proceeding

On remand before the Honorable W. Fred Turner, Mr. Bates presented additional

mitigating evidence. Three character witnesses testified concerning Mr. Bates' childhood and youth. Evidence of his military service was also presented. Finally, a psychologist presented expert opinion testimony concerning Mr. Bates' mental and emotional status as it related to the offense.

The court resentenced Mr. Bates to death. In doing so, it read the same sentencing order it had previously read without the two impermissible aggravating factors.[1] The court made no mention in the order of the mitigating evidence presented at the resentencing hearing. In mitigation, the court found only that Mr. Bates had no significant history of prior criminal activity.

On appeal, Mr. Bates argued that the resentencing court had not considered the newly presented mitigation evidence and that the court failed to perform a proper weighing of the aggravating and mitigating evidence. Specifically, Mr. Bates contended that the resentencing court erred in not finding the two mental health statutory mitigating factors.

This Court, by a bare majority, upheld the sentence of death finding that the resentencing court properly weighed and analyzed the additional mitigating evidence presented. In a dissenting opinion, Justice McDonald wrote:

> I dissent. Unlike the majority, I cannot determine whether the trial judge properly weighed and analyzed the mitigating evidence or whether he just ignored that evidence. As Bates points out, the additional evidence is not mentioned in the sentencing order. While such an omission is not conclusive, Bates also points

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[1]In fact, the sentencing order turned out not to be the court's sentencing order, but the State's sentencing order. In post-conviction, Mr. Bates established that the court abdicated its sentencing fact finding responsibility to an assistant state attorney who had never heard the evidence in the case. Bates v. Dugger, 604 So.2d 457 (Fla. 1992).

> out that the trial judge apparently thought that the expert's opposition to the death penalty colored her testimony. The trial judge may have given the evidence proper consideration, but I simply cannot tell from his order whether that is so. Therefore, I would remand for a proper reconsideration by the trial judge, with a reminder to the judge that his findings must be of unmistakable clarity. Mann v. State, 420 So.2d 578 (Fla. 1982).

Bates v. State, 506 So.2d 1033 (Fla. 1987)(McDonald, C.J., Overton and Barkett, JJ., dissenting).

C. Post-conviction Review

On September 27, 1989, a death warrant was signed on Mr. Bates. On October 6, 1989, Mr. Bates filed a Motion to Vacate Judgment and Sentence pursuant to Rule 3.850. Mr. Bates also filed a Petition for a Writ of Habeas Corpus on November 3, 1989. A stay of execution was granted December 1, 1989 by the circuit court.

On March 12- 13, 1990, the circuit court conducted an evidentiary hearing on Mr. Bates' Rule 3.850 Motion. On July 25, 1990, Chief Judge DeDee S. Costello granted Mr. Bates' Rule 3.850 motion, in part, and vacated his death sentence because he was denied the effective assistance of counsel at the sentencing stage of his capital trial:

> The defendant's claim about ineffective assistance of his trial counsel must be judged under the two-prong Strickland v. Washington, test. First, he must show serious error and secondly, that those serious errors prejudiced the defendant. Evidence regarding the defendant's's mental state was offered through the testimony of Dr. Robert A. Fox, Jr., who examined the defendant's in September 1989. Dr. Fox testified that the defendant has a mild chronic problem with memory, thinking and concentrating (pages 19 & 20 of Vol. 1 of March 12, 1990, transcript), and atypical bipolar disorder (page 22), or mood swing (page 23), and a borderline personality (page 35) and that the defendant suffered from extreme mental disturbance at the time of the offense (page 43).

> Attorney Theodore Bowers testified that he had no knowledge of the defendant suffering from any mental defect (Volume III, pages 128 - 131); and that if he had known, he would have asked the Court to have the defendant examined by a mental health professional (page 131). The question for this Court to decide is whether the failure of Attorney Bowers to ferret out this information is ineffective representation of the defendant. This Court finds that it is. The Defendant's two prior attorneys, one is deceased, were not contacted by Mr. Bowers. A reasonably competent trial attorney is required to make a reasonable investigation into a defendant's background. The question of prejudice must be judged to determine whether there exists a reasonable probability that a jury recommendation would have been different, see Bassett v. State, 541 So.2d 596 (Fla. 1989). Since this Court cannot say conclusively that no such probability exists, a new sentencing proceeding is required.

(Order date July 25, 1990).

This Court upheld Judge Costello's grant of Rule 3.850 relief finding that Mr. Bates' "attorney failed to investigate Bates' background adequately and that, absent that failure, there was a reasonable probability that Bates' sentence would have been different." This Court remanded the case for a resentencing proceeding before a judge and jury. Bates v. Dugger, 604 So. 2d 457 (Fla. 1992).

D. January 1995 Resentencing Trial -- Mistrial Declared.

In January 1995, Mr. Bates filed numerous pretrial motions seeking various forms of relief in preparation for the resentencing trial. One of the motions filed was a Motion for Pretrial Ruling on the Applicability of Life Without Parole Sentencing Option. Mr. Bates contended that the "life without the possibility of parole" sentencing option set forth in Subsection (1) of Section 775.082 Fla. Stat., applied and that Mr. Bates' jury should be so instructed. At the time, Mr. Bates had already served over half of the mandatory minimum. Thus, Mr. Bates feared that the jury would sentence him to death -- not because he was deserving of death -- but because the

jury believed that they had no reasonable alternative to death. Extensive argument was held on the motion on January 27, 1995 and again on January 30, 1995 before jury selection began. On the record and while under oath, Mr. Bates affirmatively elected to have this statute applied to his case and waived any ex post facto rights that he may have, both at trial and on appeal, regarding the legality of the life without parole sentencing option..

The circuit court ruled that the application of the amendment providing for a life without parole sentencing option to Mr. Bates who was convicted in 1983 would violate the ex post facto clauses of the United States and Florida Constitutions.

On January 30, 1995, Mr. Bates filed with this Court a Petition for a Writ of Prohibition, and/or a Writ of Mandamus, and for Stay Pending Review requesting a pretrial ruling on the applicability of the life without parole sentencing option. This Court denied the petition later that week.

On January 30 and 31, 1995 and February 1 and 2, 1995, a resentencing trial was held before a jury. The State and the Defense both presented their cases to the jury. On February 2, 1995, during the State's rebuttal case, a defense motion for a mistrial was granted based upon juror misconduct.[2]

E. May 1995 Resentencing Trial

On May 15-25, 1995, another resentencing trial was held in Mr. Bates' case. Many of the

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[2]During a lunch break, a juror disclosed to several other jurors that his ex-wife had been raped and that she never fully recovered for the trauma. The juror admitted to the others that he had not disclosed this information during voir dire. Two jurors reported this information to the court. All of the jurors were interviewed, including the juror who had withheld the information. Several jurors admitted hearing this information at lunch, but felt that there was no need to inform the court.

hearings, arguments by counsel and rulings by the circuit court during the January resentencing trial governed the resentencing trial conducted in May. Throughout the trial of the May 15-25, 1995 resentencing proceedings, the defense, the State and the circuit court made reference to and relied upon motions, arguments, responses and rulings from the earlier resentencing proceeding which ended in a mistrial on February 2, 1995.

The State presented its case in aggravation through eight witnesses. Eighteen character witnesses testified concerning Mr. Bates' life history and good character. These witnesses were all hardworking, responsible citizens who cared very deeply for Mr. Bates. Their cumulative testimony covered Mr. Bates' entire twenty-four years of life up to the time of this tragic crime. Their testimony went unchallenged. Mr. Bates' school, military and work records were also entered into evidence. Finally, two eminently qualified mental health experts testified concerning Bates' life history and his cognitive and emotional functioning. Both experts provided their expert opinion concerning these matters and how they related to the facts of the offense. The State presented it own mental health expert in rebuttal.

Throughout the proceedings, counsel renewed his argument that Mr. Bates' jury should be given the "life without the possibility of parole" sentencing option. Mr. Bates again made an on the record waiver of any ex post facto right he may have to the mandatory minimum of 25 years to life sentencing option. Mr. Bates again stated that he understood the issue and asked the court to instruct the jury concerning the life without parole sentencing option. He also waived any appellate right he may have if the court instructed the jury on life without parole.

On May 25, 1995, the case was submitted to the jury. After deliberating for almost three hours, the jury returned with a question which reflected the true nature of their deliberations --

could they recommend life without the possibility of parole. This question makes clear that the jury had determined that Mr. Bates was not deserving of death. This question also brought to fruition the very fear that Mr. Bates had throughout the resentencing proceedings -- that the jury would determine that he was not deserving of death but that they would believe that they had no meaningful sentencing alternative given the amount of time Mr. Bates had already served towards the mandatory minimum twenty-five years.

Mr. Bates renewed his request that the jury be told that life without parole was a valid sentencing option. Mr. Bates contended that the question indicated that the jury determined that he was not deserving of death -- that the mitigating circumstances outweighed the aggravating circumstances. At the time they submitted that question, Mr. Bates' jury believed that life, not death, was the appropriate sentence. When told that they 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.

On July 24, 1995, the circuit court conducted an evidentiary hearing prior to the court imposing a sentence. Mr. Bates' presented additional evidence concerning his waiver of parole, his excellent adjustment to incarceration and photographic evidence which rebutted the original circuit court's finding that Mr. Bates "ripped" Ms. White's ring from her finger, "severely tearing the finger." At that time, Mr. Bates also submitted an extensive sentencing memorandum.

On July 25, 1995, the circuit court sentenced Mr. Bates to death. In support of the death sentence, the court found the following aggravating circumstances:

> 1. The murder was committed during the course of a kidnaping, robbery, and attempted sexual battery.

2. The murder was committed for pecuniary gain.

3. The murder was especially heinous, atrocious, and cruel.

The court found the following mitigating circumstances:

1. The Defendant has no significant history of prior criminal activity.

2. The capital felony was committed while the Defendant was; under the influence of emotional disturbance.

3. The capacity of the Defendant to conform his conduct to the requirements of the law was impaired.

4. The age of the Defendant at the time of the crime. The Defendant was 24 years old at the time the murder was committed. . . . He functions academically at a 9 - 10 year old level but his social history revealed an adequate, "get by" performance level.

5. 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.

6. The Defendant volunteered for service in the Florida National Guard.

7. The Defendant was a dedicated soldier and a patriot.

8. The Defendant has a low average IQ.

9. The Defendant loves his wife and children and was a supportive father.

10. The Defendant was a good employee while working for the Knight Paper Company.

This appeal follows.

IV. STATEMENT OF THE FACTS

"[W]hat started as a burglary resulted in
a situation simply getting out of hand."

Bates v. State, 465 So.2d 490 (Fla. 1985).

A. Facts Surrounding the Offense

On the morning of June 14, 1982, Kayle Bates had breakfast with his wife, Renita and their daughter, Aleah. According to his wife, Kayle was, as usual, a loving husband and father that morning. Before going to work, Kayle watered the lawn in front of their new home. (R. IX 177-9).

At the Jim Walter's Paper Company where Kayle worked as a truck driver, fellow employees observed that Kayle was good natured as he and his co-workers discussed the boxing matches of the past weekend. Kayle's eighteen foot delivery truck was clearly marked with the company's name on the sides and the back. Kayle wore a baseball cap with the company name on it and was carrying a folding knife which he used in the course of his work. (R. XII 471-9)

Kayle made deliveries that morning in Panama City Beach. Shortly before noon, he arrived at ABC Printing. He was there approximately 15 minutes unloading the paper and talking with Jack Howell. (R. X 262). According to Mr. Howell, Kayle was friendly and jovial. He noticed nothing unusual about Kayle. (R. X 263). At approximately 12:30, John Boney observed Kayle's truck on Route 39 at Aztec Village traveling towards Lynn Haven just outside of Panama City. (R. X 263). Aztec Village is about a ten minute drive from the State Farm Office in Lynn Haven. (R. X 276). Kayle pulled his truck down the dead-end lane behind the State Farm Insurance Office to eat his lunch.

At 1:00 p.m., Ms. Walden left her home to go back to work. As she drove past the State Farm Office, she saw Janet Renee White arriving at the office. She thought about stopping to see Ms. White, but looked at her watch, saw that it was 1:05 and drove on to work. (R. X 264). At the same time -- 1:05 p.m. -- according to her watch, Ms. Gilchrist phoned the State Farm Office. (R.IX 61). Ms. White answered the phone stating "State Farm." Suddenly, Ms. White started screaming. (R. IX 55). The phone was hung up, but, because of what she had heard, Ms. Gilchrist called the Lynn Haven Police Department. (R. IX 56). Officer Spiedel took Ms. Gilchrist's call and logged the call in at 1:05 p.m. She immediately went to her patrol car and headed for the State Farm Office. (R. X 266).

At 1:07 p.m., Jim Dickerson, the owner of the State Farm Insurance Company, returned from lunch to his office. (R. IX 98). He saw Ms. White's car and noticed that something was wrong as he walked into his office. On the floor, he saw Ms. White's shoes, her keys, a canister of mace, and a cover to a piece of office equipment. (R. IX 75). He walked back to his office and noticed that the drapes covering the sliding glass door had been pulled opened and his calculator unplugged. (R. IX 99-100).

As Mr. Dickerson returned to the front of the store -- approximately 30 seconds to minute from his arrival -- Officer Spiedel entered the office. (R. IX 100). According to her report, Officer Spiedel arrived at 1:08. (R. X 266). She and Mr. Dickerson proceeded back to his office where they realized that the sliding glass door at the back of the building was unlocked and left slightly open. (R. IX 103). They heard and saw nothing behind the building at that time.

At 1:10 -- only two minutes behind Officer Spiedel, Chief Roy and Officer Cieota of the Lynn Haven Police Department arrived. (R. X 266). They immediately began a search for Ms.

White focusing on the rear of the building where they discovered Kayle's truck. (R. X 266). Several other law enforcement officers arrived shortly thereafter and joined the search. Sheriff Lavelle Pitts was one of those officers. He walked forty to fifty steps from the rear sliding glass door to the edge of a wooded area and found Ms. White's body in some bushes just inside the tree line. Blood covered Ms. White's face and clothing and her clothing was in disarray. She had obviously been stabbed in the chest. Kayle's truck was clearly visible from that position. (R.XIII 515-520).

As the police secured the scene, Kayle walked out of the woods carrying some cattails. Officer Cieota confronted Kayle with a shotgun and asked him for some identification and then put him into his police car. According to Officer Cieota, he detained Kayle at 1:20 p.m. Kayle was wet, his clothing muddy, and the left side of his shirt looked like it had blood on it. He said that he wanted to go to his delivery truck which was parked near a tree behind the insurance agency on the opposite side of the building from which Kayle had just walked. (R. IX 113).

Kayle was taken to a police station, read his Miranda rights, then questioned about the murder. Initially, he denied any knowledge of the murder, saying that he had parked his delivery truck far behind the office to avoid being spotted by a supervisor and to eat lunch and pick some cat-tails for his new house. The blood stains he said came from his gums and were due to a gum disease he had. (R. X 218-33).

Officer McKeithen, the interrogator, told Kayle to empty his pockets and Kayle laid a woman's ring on his desk. Janet White's husband identified the ring as belonging to his wife. Kayle then admitted stopping at the agency but only to ask for directions. White could not help him, and as he left, he found the ring in front of the office. He went into the woods to

get the cat-tails, and as he came out he saw White's body. He went to it, panicked when he saw she was dead, and ran. (R. X 256-7).

When confronted with some additional evidence, Kayle changed his story. He said that he saw a white man struggling with White, and when he attempted to help her, the man hit him in the lip. Kayle then ran into the woods. (R. X 254-5).

McKeithen confronted Kayle again and Kayle told his final story. He said that when he went inside the office for information Ms. White initially acted friendly, but for some unknown reason, she began throwing things and getting mad. She squirted some mace on his arm, and he grabbed for the mace, and the two began to struggle. Somehow, she got a pair of scissors and during the struggle, she accidentally stabbed herself. At one point, Kayle admitted trying, but failing, to have sexual intercourse with Ms. White. Kayle, however, denied taking the ring from Ms. White's hand. (R. X 234-52).

Further investigation revealed that Ms. White carried a canister of mace on her key chain and that she kept another canister of mace in her desk drawer. (R. IX 96). The crime scene technician determined that both canisters of mace had been partially expended. (R. IX 140). The phone had been turned around consistent with someone coming into the office and grabbing the phone from in front of the counter to answer it. It was also apparent that there had been a struggle inside the office. No blood was found in the office, although trace amounts of blood were detected on the sliding glass door. (R. IX 121).

The autopsy of Ms. White revealed that she had been stabbed twice in the chest by a single blade knife consistent with the type of knife that Kayle normally carried. (R. X 304). The stab wounds were the cause of death. (R. X 297). As a result of the stab wounds, Ms. White

would have lost consciousness in a minute and would have died within five minutes. On her neck was a ligature contusion and hemorrhaging within her eyes was consistent with this contusion. There were numerous contusions and abrasions on Ms. White's head, arms and legs consistent with a struggle. Absent were any wounds which were consistent with the forcible removal of the ring from Ms. White's finger. There was no trauma to Ms. White's vagina. (R. X 289-309).

B. The Character and Background of Kayle Bates

On February 18, 1958, Kayle Barrington Bates was born. He was the first child in the marriage of his father, Jack Bates and his mother, Inez Williams. Jack and Inez had a second child, a daughter, Susan Bates Thomas. Susan is seven years younger than Kayle.

Life with Jack Bates was very difficult. He was unable to keep a job and provided Inez with little help in raising Kayle and Susan. As Inez explained, "Jack was really a good person in a lot of ways. He just couldn't seem to get it together as far as finding a job, you know, to support us." (R. XIII 668). Thus, the entire burden of providing for and raising a family fell on Inez's shoulder.

She was the strength and bond which kept the family together. Inez's sister, Jewell Thomas, observed that Inez "was upset a lot of times because she was a sole provider of the family and she was trying to keep the family together and she worked very hard." (R. XI 422). Ms. Thomas and Inez's other siblings helped Inez a lot. They all lived in Riviera Beach and observed Inez's struggles on almost a daily basis. (R. XI 422).

Throughout this period, Kayle was a very, very good boy. (R. XIII 667). Because of his mother's love he always felt like he was "a wanted child." Kayle was not only a good son, but

"a wonderful brother." (R. XIII 657). According to his sister Susan, Kayle treated her like "royalty." (R. XIII 657). They were very close while growing up. Susan observed that Kayle was never any trouble for his mom. (R. XIII 656). Ms. Thomas described the young Kayle as "a happy child and an obedient child." (R. XI 420).

In 1967, Inez realized that she could not go on living like that with Jack and they divorced. The family problems and divorce had a significant impact on Kayle -- he was upset by it all. (R. XI 424). Inez explained: "well, it affected all, all of us a great deal. After we divorced . . . It affected Kayle quite, much more than it did Susan because he understood more. We would have long conversations from time to time and I would explain to him, you know, even though the two of us couldn't make it and didn't get along, that both of us still loved him very much." (R. XIII 668). Although Susan was quite young at the time of the divorce, she and Kayle talked about it as they got older. She also talked with her mother about the divorce. According to her mother, Jack "was a good man, but . . . wouldn't work." (R. XIII 658).

After the divorce, life improved for Inez, Kayle and Susan. Inez met, dated and eventually married Cleveland Williams. Susan described life with her step-father, Mr. Williams, as "beautiful." He "was excellent to" her and Kayle. In Susan's eyes, her step-father "is a great man." (R. XIII 660). He never treated them as step-children, but accepted them as his own. (R. XIII 661). Likewise, Ms. Thomas described her sister's new husband as "a very good man." (R. XI 422).

Inez admits that Kayle took some time to accept a new man in the house. Eventually, however, Kayle "learned to love Cleve very much and they got . . . along very well." (R. XIII 669). Mr. Williams spent a lot of time with Kayle and made a real effort to be a father to Kayle.

From Inez's perspective, Cleve and Kayle had an excellent relationship built on mutual love and respect. (R. XIII 669). Cleve and Kayle "did quite a bit together. They fished, they swam, he would take the kids on camping trips. . . . And he was always there when . . . [Kayle] was playing football. He was just a good dad, step-father to Kayle." (R. XIII 670). Inez and Cleve had a strict set of rules and Kayle honored those rules. (R. XIII 670).

Mr. Williams described his relationship with Kayle: "At first . . . , it wasn't too great, because he had to get used to me. Didn't know anything about me an so I had to show him the love, that I wanted to care for him as a father. . . . [E]very Friday when I got paid I used to take the family out to A&W and we have a hamburger and french fries, soda, and I spent a lot of time with him fishing and I take him on camping trips. . . . [A]fter the period of time we become very close." (R. XII 488). Mr. Williams felt that Kayle loved and respected him and that he no problems from Kayle at home, in the school or the community. Mr. Williams taught Kayle to fish and they enjoyed fishing together. (R. XII 489-90). Mr. Williams became the role model that Kayle so needed in his life -- a hard working man who provided for and loved his family.

Kayle's father, Jack, also remarried. There is no doubt that Jack's new wife, Eleanor Walker Bates, had a positive influence on Kayle. Kayle and Susan would spend summers with Eleanor and Jack. Eleanor described the development of her relationship with Kayle: "It was hard in the beginning. He was respectful but you could see some resentment. As I guess any child would resent it. Children have a tendency to feel . . . that as long as their parent has not remarried then there is a chance. . . . I guess he didn't trust me for a while. But as time progressed he began to trust me and my happiest day was when he called me 'Mama Eleanor.'" (R. XI 335). Kayle was a never a disciplinary problem and got along well with Eleanor's

children. She described Kayle as the "literally protective brother" (R. XI 335) and "a warm, loving, non-violent person. He's my son. His mom and I get along fine and we share that." (R. XI 351). Eleanor consider's Kayle her son, believes in him and loves him. (R. XI 350).

Riviera Beach was a close-knit community during the period when Kayle was growing up. People took an interest in the children at school, in the scout program, in the athletic programs and in the church. And Kayle did very well in this nurturing environment. He always strived to make his family proud of him.

Most indicative of his drive to do well in life were his efforts at school. Kayle attended public school in Riviera Beach. Geraldine McCullough, a first cousin to Kayle's mother, was a teacher and an assistant principal at Kayle's school. She has known Kayle since he was a baby and saw him regularly when he was growing up: "At school, I would see him every day at school and then in the neighborhood on the weekends, he came over and played in the neighborhood with my children." (R. XI 354). Mrs. McCullough routinely checked up on Kayle and how he was doing in school. (R. XI 355). She never got any bad reports from his teachers: "I knew all of the teachers and we were real close and . . . [T]hey had no problems at all with Kayle. . . . I had no negative reports on Kayle from the teachers. And had they had reports they would have immediately said something to me." (R. XI 354). Mrs. McCullough described Kayle as "real outgoing, friendly and he got along with all the children, neighborhood kids. (R. XI 357).

Although Kayle was a well behaved student, Dr. James Larson made clear that Kayle "did not do very well in school." (R. XIII 555). A review of Kayles record indicated that his grades were not very good. (R. XVI 1325, Defense Exhibit #2). Kayle's poor grades, however, had nothing to do with a poor attitude or a lack of drive. Kayle attended school regularly and put

forth a real effort. Dr. Larson explains that "he didn't do very well because he's not very bright, to use the common word, and his memory's not very good." (R. XIII 555).

In seventh grade, Kayle was referred for a psychological evaluation. His school records indicate that Kayle was "working below grade level - parents requested testing - suggest possible placement in O[ccupational] E[ducation] Program." (R. XVI 1325, Defense Exhibit #2). The results of that testing gave Kayle a full scale I.Q. score of 83. The narrative summary by the school psychologist stated:

> Kayle was neatly dressed, spoke well and was alert and interested during the testing session. He indicated that his father is employed by the city as a grounds maintenance man and Kayle would like to seek similar employment upon completion of school. His subtest score are widely scattered, somewhat more so in the Verbal than in the Performance area. His responses to the verbal items were of high quality and showed considerable originality of expression. His highest ability in the verbal area was his knowledge of word meanings with his lowest in logical and abstract thinking or the ability to see meaningful relationships among objects or event. In the performance area he showed a high clerical speed and accuracy and a good ability to differentiate essential and nonessential details. In other measures of visual-motor organization, however, his performance was very poor. Both his verbal and nonverbal abstract thinking abilities were very limited. Although his Bender-Gestalt reproductions contained no evidence of perceptual difficulties, his treatment of the designs were indicative of some emotional disturbance, possibly the presence of a strict super-ego and feelings of inadequacy and insecurity. His full scale I.Q. makes him eligible for Occupational Education Program and the adaptive curriculum and individual attention provided therein should enable him to make significantly better progress in his academic work.
>
> Recommendation: Place Kayle in the Occupational Education Program.

(R. XVI 1325, Defense Exhibit #2). Kayle was placed in the Occupational Education Program. Dr. Larson observed that despite Kayle's intellectual limitations, "he stuck it out, and graduated

in the lower part of his class." (R. XIII 555). According to his school records, Kayle's class ranking at graduation was 409 in a class of 458. (R. XVI 1325, Defense Exhibit #2).

Recent academic achievement testing of Kayle showed achievement levels in the areas of reading, writing and arithmetic "were just above the retarded range or [in] the border line range of retardation." (R. XIII 555). In terms of percentile rating, the scores were "between the third and eighth percentile" and in terms of age equivalency the scores would be "at the nine to ten year old level." (R. XIII 551). Dr. Larson also found that Kayle "had some memory impairment, and these were sufficient enough that we would, I would expect that that was one of the reasons he had difficulty in school. We'd expect his memory functions to be about where his I.Q. was, say in the 80's, and a lot of his memory functions were in the low 70's or about where his academic achievement was." (R. XIII 553). Given Kayle's limited intellectual abilities, his academic achievement in the borderline mentally retarded range and his memory impairments, Kayle's drive to "stick it out and graduate" from high school is impressive.

Kayle Bates was a respectful, obedient and well-behaved youth outside of school. His friends and adults in the community all attest to this. Mrs. McCullough observed that Kayle "was always well mannered. . . . [H]e would always call me Aunty or Aunt Gerry and real mannerly, no problems at all. I think he knew better too. . . . [H]e knew that I wouldn't put up with any foolishness, but we never had any problems with him at all. He was just like one of my kids when he was around." (R. XI 358). Mrs. Thomas, Kayle's aunt, described Kayle in terms of his relationship with her kids: "Kayle is a good person. He was a role model for my kids. I had two kids that were maybe six or seven years younger than Kayle. He was a good kid in the neighborhood. He fixed things for them. He looked after them because they were younger than

he was. He was almost like a big brother to my children." (R. XI 423).

Kayle, like all of the children in the neighborhood, understood that there were strict rules and that adults were to be respected. The Cub Scout and Boy Scout program clearly helped instill these values. Alfred Newbold, Kayle's Cub and Boy Scout leader and neighbor, explained that families in the neighborhood were not affluent -- "families were not well off." (R. XI 367). The scout troop was sponsored by the St. James Missionary Church (R. XI 362). The scout program provided the youth of the neighborhood with low cost adventure and excitement along with leadership and guidance. (R. XI 367). Mr. Newbold explained the philosophy of their scouting program: "Boy scouting is designed to build character in young men ready for the world. We do it through giving them the incentive of belonging." (R. XI 363).

Mr. Newbold described Kayle's participation in the scout program: "Kayle was a good scout . . . a model scout. . . . Kayle always pulled his load. He had a good attitude towards the program. He showed the interest of wanting to belong. Type of young man that you would say was average. He was obedient." (R. XI 363-4). James Washington, an assistant scout leader and another neighbor, concurred in Mr. Newbold's observations of Kayle: "[A]t the time that he lived next to me I didn't have any problems with him. He was also a Boy Scout, no problem at all with him. . . . He was an above average scout. He did everything he was told to do." (R. XI 402).

In addition to Boy Scouts, Riviera Beach also had a very active recreational program for the youth of the community. Kayle was very active in the program. The Assistant Recreational Director at that time was Sergeant Daniel W. Calloway. (R. XIII 588). Sergeant Calloway is now employed with the Palm Beach County Sheriff's Office as the Police Athletic Director. (R.

XIII 592). He explained the program as it existed then as "a well rounded program. We had football, basketball, baseball, track and swimming when [Kayle] was there. . . . And he participated in normal things like the little league program, the pee wee football program and the basketball program." (R. XIII 589). The philosophy behind the program was similar to that of the Boy Scout program: "We thought if we got [the kids] off the streets and put them in a controlled environment and teach them discipline and self respect, they would be a productive citizen." (R. XIII 590). Sergeant Calloway knew Kayle's family very well. He went to school with Kayle's mother, Inez and her siblings. (R. XIII 589-90). He described Kayle as a good "run-of-the-mill" kid who never caused any trouble. (R. XIII 590). Sergeant Calloway followed Kayle until his graduation from high school and "thought he would be a productive citizen." (R. XIII 590-1).

Kayle was also active in his church, the True Vine Deliverance Church. Reverend James Dickerson was the minister of the church and taught Kayle at Sunday School for six years. (R. XIII 525). He described Kayle's family as "a church-going family." Kayle regularly attended services until he graduated from high school and moved away. (R. XIII 525, 527). Reverend Dickerson saw Kayle "maybe two, three times a week. On Sunday morning at Sunday School and during prayer meeting or mid-week services we would see him." (R. XIII 525). Reverend Dickerson described Kayle as "a remarkable young man. He didn't get into any trouble or anything. He was very obedient. He was an excellent student in Sunday School." (R. XIII 526).

Kayle Bates had many friends in Riviera Beach who considered him a loyal friend. Kayle's best friend was Reginald Smith. Reginald lived next door to Kayle. They were the same

age, were in the same class throughout school and did everything together. Reginald states that he and Kayle were "very close" and spent a lot of time together at each other's home. Reginald explained that within the neighborhood the parents all had very strict rules and that he and Kayle and their friends obeyed the rules without question. Reginald spoke fondly of their childhood and joked about the "light rule." Under the light rule, everyone had to be home before their parents got home from work and the street lights came on. Reginald described the nightly rush throughout the neighborhood as everyone ran to beat the street lights and their parents home. According to Reginald, Kayle had an excellent reputation in the neighborhood: "Everybody loved [Kayle]." Kayle and Reginald played football and basketball together in high school. They had a winning football team. Kayle was a defensive end and tackle and "played good ball." (R. XI 88 -96).

Forreste and Larry Williams were also good friends with Kayle. They were with Kayle on a daily basis, in school, scouts, sports and neighborhood fun. Neither of them can ever remember Kayle getting into a fight. Larry remembers Kayle as a very friendly guy who always had a smile on his face. According to Larry, Kayle got along with everyone and always respected his parents and his elders. (R. XI 58-75; 75-81).

Respect was something that Kayle showed his girlfriends too. Brenda Blountson dated Kayle during their senior year in high school. During that year she got to know Kayle very well and saw him on a daily basis. He was always a gentleman. Kayle became very close to Brenda's mother and her parents "loved Kayle." "[A] lot of times [her parents] trusted Kayle more than they trusted [her]" to obey their curfew rules. Kayle always respected Brenda's parents and their rules. (R. XI 96 - 100).

During his senior year in high school, Kayle, like many of his neighborhood friends, decided to join the military. In fact, he and Reginald Smith enlisted in the Army before graduation and signed up for the buddy system so they could go through basic training and to their first assignment together. In June 1976, Kayle graduated from high school. He and Reginald took the Army entrance exams together, but Kayle did poorly on the entrance exam and was not able to enter the service with Reginald. Again, Kayle's intellectual limitations got in the way of his drive and desire. In December 1976, Kayle retook the exam and scored the bare minimum on the Army aptitude test allowing him to enlist as an Infantryman. (R. XVI 1326, Defense Exhibit # 3). Forreste Williams observed that "quite a few of us [from the neighborhood] went into the military" because of Mr. Newbold and the scouting program. "[B]asically going through scouting, it kind of steered us towards that military career." Mr. Newbold concurred that many of his boys "volunteered for the service," including Kayle. (R. XI 369).

Cleve, Kayle's step-father, explained that Kayle had always talked about entering the service: "[Kayle] wanted to do something for his country, you know, and to give something back." (R. XII 491). Cleve remembers Kayle's excitement about going away from home for the first time and Inez's apprehension. He observed that Kayle "was growing up." (R. XII 491). In 1977, Kayle spent four months on active duty at the United States Army Infantry Training Center at Fort Benning, Georgia. He successfully completed Basic Training and Advanced Individual Training. (R. XVI 1326, Defense Exhibit # 3). Kayle's family and friends all remember him coming home from basic training in his uniform and spit-shined boots. He brought photos of himself at basic training graduation. He was very proud of this accomplishment and they were

all very proud of him. Forreste remembers Kayle giving him counsel and advice about basic training as Forreste was getting ready to ship out to basic training himself. (R. XI 384).

After graduation from basic training, Kayle entered the National Guard unit in Riviera Beach. (R. XVI 1326, Defense Exhibit # 3). He spent a year in that unit while living at home with his mother and step-father. In 1978, Kayle visited his father and step-mother in Tallahassee, Florida. (R. XI 340). Shortly thereafter, Kayle began talking about moving to Tallahassee. He spoke to his mother and Cleve about the move and talked about entering college. They gave him their blessing and Kayle moved to Tallahassee.

Once in Tallahassee, Kayle lived with his father and step mother, Eleanor for three or four months. Eleanor described Kayle as "[q]uite the young man. He . . . still had what I call the military stance that I just love to see, you know, the straight stature and everything. It was great." (R. XI 340). During his stay with them, Kayle was very respectful and obeyed their rules. He was also close with Eleanor's children, Diedre and Sheldon and his half-sister Yauncy. Jack and Eleanor enjoyed having Kayle in their home.

Kayle then moved into an apartment with Eleanor's daughter, Diedre and her roommate, Renita Bookman. Diedre and Renita were both students at Florida A&M and were working part time. Soon after the move, Kayle began dating Renita. By then, he had transferred to Company A, 3rd Battalion, 124th Infantry of the Florida National Guard in Tallahassee and was working for Jim Walter's Paper Company as a truck driver. Kayle also met up with and rekindled his childhood friendship with Anthony Rollins. (R. XII 436). Anthony had met Renita in a course at Florida A&M and was surprised when Kayle told him they were dating. (R. XII 435). Anthony had weekly contact with Kayle and they would occasionally go out for a beer. (R. XII

436).

Within a year of meeting Renita, they were married. (R. XI 343). Eleanor and Diedre attended the wedding ceremony in the Leon County Courthouse. (R. XI 344). Anthony thought Kayle and Renita were a perfect match: "I knew Kayle, I knew exactly what kind of man he was and I just, by just meeting Renita I thought she was a smart, intelligent, young lady and I just thought the combination would be perfect." (R. XII 437). All who observed Kayle and Renita saw that they had a healthy and happy marriage. Kayle was not only working, but helping with the household chores. (R. XII 436, Anthony Rollins; XI 345, Eleanor Bates). Eleanor remembers telling Kayle one day how impressed she was of him: "if you weren't my son I would marry you." (R. XI 346).

During the first year of their marriage, Kayle and Renita had their first child, a daughter, Aleah. (R. XI 347). Eleanor described Kayle's reaction to Aleah's birth: "He was the first man on earth to ever become a father. His chest was way out here, you know. He was very proud of his baby." (R. XI 347). Kayle was a great father and took an active role in caring for Aleah. (R. XI 346). Anthony thought that Kayle was "a great father" who was very supportive of Renita and Aleah. (R. XII 439). Eleanor and Diedre kept close contact with Kayle and Renita. They attended church together and were a very happy family. (R. XI 348).

Kayle was also doing well at work. He was a truck driver for Jim Walter's Paper Company where he delivered products to customers. (R. XII 472). Raymond O'Brien was a sales representative for the company and worked closely with Kayle. There were never any problems with Kayle and the customers really liked him. (R. XII 472). Eventually, they worked together directly servicing the Panama City area for several years. Kayle would keep Raymond

informed of any problems that customers had and they worked very well together. (R. XII 473). Raymond explained that the delivery person was important to customer satisfaction. Kayle was always polite, proper and friendly and would place the products where the customer wanted them. (R. XII 474). Kayle was happy at his job. His employment records showed that he received four merit raises between 1979 and 1982. His employment evaluations indicated that Kayle was a very dependable employee. (R. XII 475).

Kayle continued to be a dedicated soldier serving honorably in the National Guard. He had just been promoted to Specialist Fourth Class before transferring to Company A in Tallahassee. (R. XVI 1326, Defense Exhibit # 3). His unit met one weekend a month and for two weeks during the summer. Fellow soldier, Specialist Four Class Joseph Johnson described Kayle as a good solider with a "fun-loving attitude." (R. XII 448). Specialist Johnson was impressed with the way that Kayle wore his uniform and the way he acted and carried himself. (R. XII 449). Staff Sergeant George Dennis was a squad leader in Kayle's platoon. (R. XII 457). He observed that Kayle was a good soldier who did what he was told to do and noted that Kayle was always cheerful and got along well with everyone. (R. XII 458). Staff Sergeant Dennis also noticed that if things got tough for Kayle or they didn't go his way, he would freeze up, go off by himself and hardly talk. (R. XII 459).

During one summer camp, the Company deployed to Panama to go through the United States Army's Jungle Training Course. Specialist Dennis said that the training was difficult, but that he and Kayle graduated from the course. (R. XII 450). In 1980, the Company was activated for the riots in Liberty City in Miami. (R. XII 450). They assisted law enforcement by patrolling the streets and enforcing curfew. (R. XII 451). Kayle, like many of the younger soldiers, were

a little afraid of the duty. Staff Sergeant Dennis explained that the soldiers did not know what to expect and that he talked with Kayle about the mission on the way down to Miami. (R. XII 460). According to Staff Sergeant Dennis, Kayle was concerned that they "may have to use [their] guns." (R. XII 460). While on patrol, the soldiers had a flak jacket, night stick, M-16 rifle with ammunition, a riot shield and a gas mask. (R. XII 461). During the mission, Kayle performed well. (R. XII 451, 461).

As the summer of 1982, approached, Kayle and Renita had just purchased a new home. (R. XI 349). According to Anthony Rollins, Kayle told him that a house was more suited to raising a family. (R. XII 440). Renita was also expecting their second child. (R. XII 348, 438). Anthony observed that although Kayle was very excited about the new house and baby, he also sensed that Kayle was a little tense and anxious about the added responsibility. (R. XII 439). On the weekend before the offense, Kayle's tension and anxiety rose when he was told that he would not be promoted to Sergeant in the National Guard. Staff Sergeant Dennis explained: "[I]t really upset Kayle. He was looking forward to it. . . . He told me that it really hurt him that he was not going to get promoted because . . . it was more money . . . and he was looking for the money. He was expecting to a have a kid and everything and he was really upset about it. . . . [H]e said . . . this money was going to help [him] with [his] family." (R. XII 463-4). Kayle was very disappointed. (R. XII 464). Kayle's military records establish that again it was not Kayle's drive or determination that got in the way of his promotion, but his intellectual limitations. Kayle was not promoted because he could not pass the Solider's Qualification Test (SQT). (R. XVI 1326, Defense Exhibit # 3). Kayle now faced a new home and baby without the added income he had planned on from the promotion.

C. Understanding the Offense

Psychologists James Larson and Elizabeth McMahon evaluated Kayle Bates and reviewed extensive background materials concerning Kayle's life history and the facts surrounding the case. Their evaluations of Kayle and their expert opinions provide a basis for understanding this otherwise inexplicable crime. There were a number of findings which both Dr. Larson and Dr. McMahon agreed upon.

As set forth above, Kayle suffers from limited cognitive functioning. Moreover, his intellectual limitations are multi-fold. Kayle's intellectual functioning in terms of I.Q. is within the low average range. (R. XIII 549-50, 606). There is also consistent scattering within his intellectual functioning. (R. XIII 553-4, 607). Cognitive testing has shown that Kayle has problems in areas requiring attention, concentration, new learning and assessment of consequences and outcomes. (R. XIII 553-4, 607). Kayle's academic achievement skills in the areas of reading, writing and arithmetic are in the border line mental retardation range. (R. XIII 559). His memory impairment is much lower than would be expected even for his low I.Q. (R. XIII 553-4, 607). As Dr. Larson explained, Kayle is "not very bright, to use the common word, and his memory's not very good." (R. XIII 555).

Kayle Bates does not have a criminal value system. (R. XIII 556, 619). His social history makes this very clear. He had no significant history of prior criminal activity. Dr. Larson observed that Kayle was "viewed very positively by a lot of people as he grew up . . . There weren't major complaints in his social, psychosocial history about difficulty he had with the law or difficulty he had in not fulfilling a role in society, that he fit in to society, and he married, had children, and finished high school, went in the military, had a job, and was a productive member

of society." (R. XIII 556). Dr. McMahon explained: "He abides by the same values that mainstream America abides by. That is one finishes school, one . . . goes into the military . . ., one works everyday, one earns an honest living at a legal job, one gets married, one has children, one buys a home, one supports his family, one does what is generally considered in our society as being socially expected behavior. And that is basically what he's done. And he attended church, he's been a Boy Scout, . . . all these things indicate a value system which is not criminal in nature." (R. XIII 619).

In terms of personality assessment and diagnosis, Kayle is "not very well wrapped." (R. XIII 561). Dr. Larson found that Kayle was deserving of a personality diagnosis of anxiety disorder: "this is a low level kind of diagnosis, but it takes into account the fact that the person may be a tense person, a nervous person, a high-strung person, a person that can have anxiety attacks or panic attacks, and that diagnosis would seem to account for some of the data I have of anxiety or depression and a little bit of paranoid thinking." (R. XIII 558). Dr. Larson observed that Kayle's prison medical records document that he was evaluated for a panic or anxiety attack while on death row. (R. XIII 558). Dr. McMahon's personality assessment of Kayle was consistent. She found Kayle to be an individual who was tense, anxious, depressed, and under "chronic tension." (R. XIII 610). Dr. McMahon explained that Kayle's anxiety is not like the anxiety that all healthy people may experience from time to time. Kayle is threatened by his anxiety. "His anxiety gets to the level that is disorganizing for him." (R. XIII 612). He usually recovers from this very quickly, but under stress his controls breakdown leading to more disorganized behavior. (R. XIII 613). Dr. Larson explained that people with this problem function well most of the time, however, they "come unglued easily or fall apart under stress."

(R. XIII 561).

Kayle is also not very psychologically minded -- he has no insight into this own dynamics. (R. XIII 561, 615). Dr. McMahon explains that because Mr. Bates is limited cognitively, he does not have the ability to step back and assess his own thoughts and behavior -- why am I responding the way that I am, what is it that am I having problems with. (R. XIII 615). As a result, Kayle manages to get a long on a day to day basis, but he is unable to effectively deal with his own emotional problems. As his social history establishes, Kayle expends virtually all of his energy just to get through life. (R. XIII 556, 615). He has what Dr. Larson called just "an adequate 'get by' kind of functioning ability." (R. XIII 556).

Additionally, Kayle is addled with a very rigid super-ego. (R. XIII 568, 613-4). He sees himself fairly unrealistically. It is extremely important to him to do the right thing, and he sees himself in that role. He sees himself as abiding very stringently by his moral values or his value system. Dr. McMahon explains that healthy individuals are able to cut themselves some slack. They recognize that sometimes they do not measure up to what they would like to be. Individuals with a rigid super ego, like Kayle, are unable to cut themselves any slack. They can not admit that there are times when they will not live up to their beliefs and expectations. Related to his lack of psychological insight and his inability to cut himself any slack, Kayle also minimizes what is wrong with him. (R. XIII 562-4). In fact, during the evaluations, Kayle was trying to appear healthier than he really was. (R. XIII 564).

The State's mental health expert, Dr, McClaren, concurred with most Dr. Larson's and Dr. McMahon's conclusions concerning Mr.Bates' intellectual abilities and emotional assessment. His primary disagreements concerned Mr. Bates' mental and emotional state at the

time of the offense.

Based upon this psychological assessment of Kayle, Dr. Larson and Dr. McMahon were asked the following hypothetical question relating to the offense:

> Assume that Mr. Bates put himself in the State Farm Agency without permission, basically, he burglarized the place on June the 14th, 1982. Assume further that the victim, Mrs. White, returned from her lunch hour and startled him or he startled her, or both, that a struggle immediately ensued and Mace was sprayed. What, if any affect would that have on Mr. Bates and how would he react?

(R. XIII 564-5). Dr. Larson provided his expert opinion: "Bearing in mind that he's a person that's not very psychologically minded and, and not very bright, I think he, to use that lay term, could become unwrapped. He could just lose it. . . . [H]e could be very frightened, freak out. He could engage in the most basic kind of behavior, aggressive behavior, just really resort to a very primitive level of functioning." (R. XIII 565). Similarly, Dr. McMahon opined that Kayle's reaction to a situation this stressful would be one of "emotional over reaction, but it would be a very disorganized reaction." She would anticipate him being extremely angry, feeling very threatened, and reacting in a "shot-gun fashion, just striking out doing whatever he felt he needed to do to, to end this situation." (R. XIII 621). Dr. McMahon observed that in the past Kayle had always managed to walk away from fights or altercations. "But with this level of stress, his behavior, as I would anticipate it to be, given his dynamics, would be very impulsive. . . . [T]here would not be thought, . . . he's not real good at anticipating the outcome or consequences of situations [ ] once they get started anyway, and certainly when he's highly stressed, rather than trying to figure out what is the best thing I can do right now, he would simply . . . react rather than act." (R. XIII 622).

Dr. Larson and Dr. McMahon believed that the two statutory mental health mitigating factors were present in this case. Both opined that to a reasonable degree of psychological certainty that at the time of the offense Mr. Bates' capacity to conform his conduct to the requirements of the law was substantially impaired. (R. XIII 565, 623). Both opined that to a reasonable degree of psychological certainty that at the time of the offense Kayle Bates suffered from an extreme emotional disturbance. (R. XIII 566, 624).

On June 14, 1982, sometime between 12:40 and 1:00 p.m., Kayle Bates entered the State Farm Office with the apparent intent to steal. Kayle was under increased financial pressure due to the imminent birth of a second child, the recent purchase of a new home and the denial of an anticipated promotion in the Florida National Guard which he had only learned of the day or two before. Kayle's unlawful entry into the State Farm Office was contrary to his entire life history and his very rigid belief system in family, church, work and country. He had no prior history of significant criminal activity. Before entering that building, Kayle had spent the entire twenty-four years of his life striving to be a model citizen: he was a loving son and step-son; a caring and sensitive brother; a respectful, obedient and well-behaved youth; a loyal friend; an enthusiastic cub and boy scout; an above average Sunday School student; a high school graduate, despite his below average I.Q., a learning disability, and limited cognitive functioning; a dedicated soldier who served his country honorably; a loving husband and father, who provided for his wife and child; and a hard-working and valued employee. Nothing in Kayle's past would have predicted his unlawful entry into the State Farm Office that day. Yet, inexplicably, he broke into the office.

In light of the information gathered in the criminal investigation, Kayle's life history, and

Dr. Larson's and Dr. McMahon's psychological evaluations of Kayle, the scenario involving Ms. White's murder becomes fairly evident. Ms. White enters the State Farm Office with her keys in her hand. On her key chain is a canister of mace. The phone is ringing. She does not go behind the counter where she works, but turns the phone around to answer it. She answers "State Farm" and then she is startled by Kayle's presence and starts screaming. A struggle ensues and she sprays Kayle with mace from the canister on her key chain. She takes a second canister of mace from her desk drawer and sprays it at Kayle. The struggle escalates, Kayle stabs her with his knife and leaves her for dead behind the office. The entire confrontation and struggle occurs within less than three minutes. The time line established by the State's witnesses in this case leaves no room for doubt about this fact. The confrontation and struggle starts at 1:05 p.m. and by 1:07 or 1:08 p.m. it is over and Ms. White is lying just inside the woodline fatally wounded and unconscious and Kayle has fled the immediate area. The kidnaping, the robbery, the attempted sexual battery and the murder all occurred within this two to three minute time frame.

Since this tragic crime occurred, Kayle Bates has conducted himself in accordance with his previous life history of acceptable behavior. Kayle has adjusted well to incarceration. His institutional record, like his life history before this crime, is unremarkable. He has one disciplinary report for a minor offense during the entire twelve year period of incarceration. Kayle Bates is a model inmate. He causes no problems and he does what he is told to do. (R. XXXIII - XXXV, Defense Exhibit #1, Certified Copies of the State of Florida, Department of Corrections Inmate Records for Kayle B. Bates). He has also waived his right to parole eligibility. (R. XXXVI).

ARGUMENT I

THE SENTENCING COURT'S REFUSAL TO INSTRUCT MR. BATES' CAPITAL JURY THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE WAS A SENTENCING ALTERNATIVE TO DEATH DENIED HIM OF DUE PROCESS OF LAW AND A FUNDAMENTALLY FAIR CAPITAL SENTENCING PROCEEDING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

> **"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?"**
>
> Question from Mr. Bates' jury (R. XV 830).

A. Facts Relevant to the Argument

On July 23, 1992, Chief Judge DeDee S. Costello granted Mr. Bates' Rule 3.850 motion and vacated his death sentence. Judge Costello found that Mr. Bates had been denied the effective assistance of counsel at the sentencing phase of his capital trial. This Court upheld Judge Costello's grant of Rule 3.850 relief and remanded the case for a new sentencing proceeding before a jury. Bates v. Dugger, 604 So.2d 457 (Fla. 1992).

In the interim, Subsection (1) of Section 775.082, Fla. Stat., was amended and added the sentencing option of life imprisonment without the possibility of parole to those defendants convicted of murder in the first degree. On May 25, 1994, this amendment became law. The statute as amended states that:

> (1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and:
>
> (a) If convicted of murder in the first degree or of a capital felony

under s. 790.161, shall be ineligible for parole, or

(b) If convicted of any other capital felony, shall be required to serve no less than 25 years before becoming eligible for parole.

Fla. Stat. § 775.082.

Mr. Bates asserts that he was unsentenced at the time the statute became law and was entitled to the benefit of this change in law. Prior to resentencing, Mr. Bates filed a Motion for Pretrial Ruling on the Applicability of Life Without Parole Sentencing Option. (R. II 273-8). Mr. Bates contended that the life without the possibility of parole sentencing alternative set forth in Subsection (1) of Section 775.082 Fla. Stat., applied and that his jury should be so instructed. At that time, Mr. Bates had already served over half of the mandatory minimum of twenty five years. Mr. Bates feared that the jury would sentence him to death -- not because they believed he was deserving of death -- but because they believed that they had no reasonable alternative to death. Extensive argument was held on the motion. (R. XXVI 1451-63, XXVII, 1497-1516).[3] The State argued that application of the amendment to Mr. Bates would violate the ex post facto provisions of the state and federal constitutions. Because this was a capital case, Mr. Bates contended that the ex post facto provision does not prohibit the application of the amendment to his case under an Eighth Amendment analysis.

Nevertheless, on the record and while under oath, Mr. Bates affirmatively elected to have this statute applied to his case and waived any right to ex post facto protection that he may have, both at trial and on appeal, regarding the legality of the life without parole sentencing option:

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[3]Mr. Bates renewed this motion prior to the May 1995 resentencing trial which resulted in his sentence of death. (R. IV 637-43).

KAYLE B. BATES, being duly sworn, was examined and testified as follows:

EXAMINATION BY MR. DUNN:

Q. Mr. Bates, will you state your full name?

A. Kayle Barrington Bates.

Q. Mr. Bates, you understand that you are before this court on a capital resentencing?

A. Yes, I do.

Q. And do you understand that the possible sentences you now face are death and life with a mandatory minimum of 25 years. Do you understand that?

A. Yes, I do.

Q. Mr. Bates, have you discussed with me the rights that you have under the ex post facto clause of the United States Constitution?

A. Yes, I have.

Q. And you understand that the sentence of life without possibility of parole is a new statutory sentence which would not apply to you without your agreement; do you understand that?

A. I understand that, yes.

Q. And is it your decision at this point in time to request that the jury be instructed that the sentencing alternative should be . . . life without the possibility of parole?

A. I understand fully.

Q. And you request that that instruction be given?

A. Yes, I do.

Q. Do you understand that that basically takes away any right

that you would have to the possibility of parole?

A. Yes, I do.

Q. And you willingly and knowingly give that up at this time?

A. I do, yes.

Q. Do you understand that in doing that you would also waive your right to appeal that issue, to argue that that sentence was illegal. Do you understand that?

A. Yes, I do.

Q. And is it your intention to waive that right to appeal that issue also?

A. Yes, I do.

(R. IV 641-2).[4]

The circuit court ruled that the application of the life without the possibility of parole amendment to Mr. Bates would violate the ex post facto clauses of the United States and Florida Constitutions:

> 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 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.E.D.2d 344 (1977); Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.E.D. 2d 17 (1981). In other words, statutes altering 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

[4]Mr. Bates also made this sworn affirmative election and waiver on the record before the January 1995 resentencing proceeding which ended in a mistrial. (R. XXIX 16-18).

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 affect the persons who committed those crimes in a disadvantageous fashion?

The United States Supreme Court has ruled that a statute making maximum sentence a 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.E.D. 1182 (1937).

In Williams v. Dugger, 566 So.2d 819 (1 DCA 1990) affirmed 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.

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.

(R. II 335-8).[5]

As part of this motion and as an alternative basis for relief, Mr. Bates made two additional requests. First, Mr. Bates requested that the sentencing court allow him to present to the jury a transcript of his affirmative election that the jury be given the life without the possibility of parole sentencing alternative and his waiver of his right to ex post facto protection and his eligibility of parole. Second, Mr. Bates requested that the sentencing court allow him 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. (R. XXIX 19-20). The Court denied these alternative requests for relief. (R. XXIX 19-21). *See* Claim II, *infra.*

Mr. Bates continually renewed this motion throughout the resentencing proceedings and requested that Mr. Bates' jury be properly instructed that the life without the possibility of parole sentencing option was available in this case. (R. IX 3-5; XIV 753, 760; XV 771). The sentencing court denied each and every request. Each and every time, Mr. Bates' raised his fear that the jury would sentence him to death, not because the jury believed he deserved death, but because they jury had no reasonable alternative to death, especially in light of the fact that he had

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[5]On January 30, 1995, Mr. Bates filed with this Court a Petition for a Writ of Prohibition, and/or a Writ of Mandamus, and for Stay Pending Review requesting a pretrial ruling on the applicability of the life without parole sentencing option. This Court denied the petition.

already served over thirteen years of the mandatory minimum sentence of twenty five years. In fact, media reports addressed Mr. Bates' eligibility for release prior to selection of his May 1995 jury. 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).

At the resentencing trial, Mr. Bates presented a compelling case of mitigation concerning his positive character and life history. He also attacked the State's case in aggravation and presented mental health evidence which in the context of the unique facts of this case showed that the crime was not one of the most aggravated and unmitigated crimes deserving of death. The State, in cross-examination of Mr. Bates' character witnesses and in its closing argument, contended that Mr. Bates' true character was shown by the facts of this case. Implicit in this tactic was the message that Mr. Bates was still someone to be feared -- his true character was still in place:

> And [Ms. White] was looking into the eyes of this man who showed you his true character. Vile. Intended to inflict a high degree of pain.
>
> [The State Attorney then stabbed the knife into the wooden bar before the jury][6]
>
> Startled you; didn't I? Made you jump. She was there looking at him as he drove that knife straight in to the hilt. I submit you can eliminate every one of the other aggravating circumstances and you can take the mere fact that this man looked this woman in the eye and Renee sat there suffocating in her own blood, dying, being beaten, struck about the mouth, carried out of the building where she worked, disrobed, where he attempted to sexually assault her and looked him in the eye and he still, he still drove that knife right into her. Evil. Vile. Regardless of human

[6]The record incorrectly states that the State Attorney "slaps hand on table."

life in any form whatsoever. Totally regardless.

> A situation that shows you the real nature of this crime and the true character of this defendant, the true character. Look at it carefully. Analyze it. Analyze it from the situation of how the defendant reacted. What he did do.

(R. XV 778-9). The State then briefly mentioned mitigation and connected Mr. Bates' "true character" to the possibility that he could eventually be released -- with his "true character" still intact. The State pointed out that the mitigating circumstances were to be considered towards "the sentence of life imprisonment with a minimum mandatory of twenty-five years before the defendant is eligible for parole." (R. XV 779-80). By doing so, the State highlighted Mr. Bates' future dangerousness an issue for the jury. *See* Hitchcock v. State, 673 So.2d 859, 860 (Fla. 1996) (finding capital defendant was prejudiced by State argument that defendant would be eligible for parole at expiration of twenty five years given the fact that the resentencing occurred so close to the expiration of that period).

On May 25, 1995, the case was submitted to the jury. After deliberating for almost three hours, Mr. Bates' fear became reality. The jury returned with a question which reflected the true nature of their deliberations:

> 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?

(R. XV 830). The jury's question makes clear that it had determined that Mr. Bates did not deserve death. This question also brought to fruition the very fear that Mr. Bates had throughout the resentencing proceedings -- that the jury would determine that he was not deserving of death but that they would believe that they had no meaningful sentencing alternative given the amount

of time Mr. Bates had already served towards the mandatory minimum twenty-five years.

Mr. Bates renewed his request that the jury be told that life without the possibility of parole was a valid sentencing option. (R. XV 831-2). Mr. Bates contended that the question indicated that the jury determined that he was not deserving of death -- that the mitigating circumstances outweighed the aggravating circumstances. (R. XV 834-5). As indicated by their question, the jury believed that life, not death, was the appropriate sentence. Despite Mr. Bates' objections, the sentencing court provided the following written response to the jury: "the court has advised you what advisory sentences you may recommend. Please refer to our copy of the jury instructions." (R. XV 833). After a little over an hour of additional deliberations, the jury returned with a nine to three recommendation for death. (R. XV 836). Mr. Bates contends that when the jury was improperly told that they 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. Mr. Bates renewed these arguments prior to the sentencing court imposing a sentence of death. (R. III 534-44)(Mr. Bates' Sentencing Memorandum).

B. Life Without the Possibility of Parole was a Legal Sentencing Alternative

The sentencing court erred in not instructing Mr. Bates' jury in accordance with the life without parole sentencing alternative and the resulting sentence of death must be reversed. The sentencing court's analysis is flawed for several principle reasons: 1) the sentencing court's ruling ignores the requirements of the Eighth Amendment; 2) the amendment providing for a sentence of life without the possibility of parole does not violate the ex post facto provisions because it is advantageous to capital defendants, not disadvantageous; 3) even if the amendment

was an ex post facto law, the right to ex post facto protection can be waived by the defendant; and 4) due process and the Eighth Amendment dictates that a capital jury be given accurate instructions concerning the true nature of their sentencing alternatives.

1. The sentencing court's ruling violates the Eighth Amendment

Since this is a capital case, exacting standards must be met to ensure that it is fundamentally fair. The federal constitution requires that this Court take "'extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.'" Caldwell v. Mississippi, 472 U.S. 320, 329 n.2 (1985) (quoting Eddings v. Oklahoma, 455 U.S. 104, 117 (1981) (O'Connor, J., concurring)). *See also* Caspari v. Bohlen, 114 S.Ct. 948, 955 (1994) ("time and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case"). This is because "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death in its finality differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

This Court has also recognized that need for heightened reliability and review in capital cases. State v. Dixon, 283 So.2d 1 (Fla. 1973). In Dixon, this Court pointed out that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." 283 So.2d at 7 (emphasis added). The Dixon court went on to describe that after a capital defendant is convicted he is entitled to five levels of scrutiny before imposition of the death penalty: "each step providing concrete safeguard

beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient." Id. at 16.

The United States Constitution's prohibition against cruel and unusual punishment requires that a state's capital sentencing scheme be structured to assure that a sentencing jury's decision whether a defendant should live or die is a reliable one, based on each jurors' considered views of the defendant and his crime, rather than on arbitrary or impermissible factors. *See* Mills v. Maryland, 486 U.S. 367, 376-77 (1988) ("the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments") (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)). *See also* Andres v. United States, 333 U.S. 740, 752 (1948).

A death verdict may be tainted by arbitrariness and unreliability if the verdict options do not provide jurors with a meaningful alternative to death. In Beck v. Alabama, 447 U.S. 625 (1980), the United States Supreme Court struck down Alabama's rule precluding the submission of lesser included offenses to jurors in a death penalty trial. The Supreme Court reasoned that such a scheme might result in a juror voting to convict the defendant for capital murder, although in his or her considered judgment the defendant actually was not guilty of this offense, "for an impermissible reason" -- because the only other option, outright acquittal, was unpalatable where the juror "belie[ved] that the defendant is guilty of some serious crime and should be punished." Id. at 642.

Because the death penalty was at issue, the Supreme Court concluded that such a risk of "an unwarranted conviction" -- i.e., that jurors would vote for a verdict that they did not really believe to be proper because they feared the consequences of the alternative -- was unacceptable

and violated due process.

> Such a risk cannot be tolerated in a case in which the defendant's life is at stake. . . . To insure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.

Id.

A death verdict may similarly be tainted by unreliability and arbitrariness when a state court refuses to submit to the jury the life without the possibility of parole sentencing alternative. The failure to instruct the jury on the life without the possibility of parole sentencing alternative deprives a capital jury of a meaningful alternative to death. As the United States Supreme Court stated in another context, such a procedure "creates the possibility ... of randomness, by placing a 'thumb [on] death's side of the scale', thus creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty." Sochor v. Florida, 112 S.Ct. 2114, 2119 (1992) (citations omitted) (quoting Stringer v. Black, 112 S.Ct. 1130, 1137 (1992)).

Inexplicably, the sentencing court failed to conduct any Eighth Amendment analysis of this issue. As a result, the sentencing court's analysis of the issue is flawed and its ultimate ruling is wrong. The sentencing court did not consider whether failing to instruct the jurors on life without the possibility of parole would "place a thumb [on] death's side of the scale" in favor of death. Stringer v. Black, 112 S.Ct. at 1137. Nor did the sentencing court determine whether without the life without the possibility of parole instruction jurors had reasonable alternative to death. *See* Hitchcock v. State, 673 So.2d 859, 860 (Fla. 1996). Instead, the sentencing court merely determined that the amendment was an ex post facto law.

2. Life without the possibility of parole was not an ex post facto law[7]

The United States Supreme Court has set forth a two-prong test to determine whether a statute is violative of the federal constitutional prohibition against ex post facto laws: 1) Is it "retrospective," that is, does it "apply to events occurring before its enactment?" and 2) Is it disadvantageous to the offender? Weaver v. Graham, 450 U.S. 24, 29 (1981). This Court has also relied upon this test in resolving ex post facto law questions. State v. Williams, 397 So.2d 663, 664 (Fla. 1981).

The first prong of the Weaver test is properly answered in the affirmative in this case. The application of the 1994 amendment to 775.082(1) to crimes committed in 1982 would be a retrospective application. The amendment "would attach legal consequences to crimes committed before the law took effect." State v. Williams, 397 So.2d 663, 664 (Fla. 1981).

With respect to Mr. Bates' case, the second prong to the Weaver test compels a negative answer. Any analysis of whether the amendment is "disadvantageous" must be done within the context of a death penalty prosecution and under Eighth Amendment jurisprudence.

Mr. Bates requested that his jury be instructed that the sentencing alternative to death was life without the possibility of parole because it was "advantageous" to him -- not disadvantageous. The record below establishes that Mr. Bates made this election because he feared that the jury chosen to hear his case would sentence him to death -- not because the jury believes he is deserving of death -- but because the jury believed he would not spend the rest of

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[7]Mr. Bates does not separately address the ex post facto provisions of the Florida Constitution as this Court has applied the same federal standard in addressing ex post facto issues. *See* State v. Williams, 397 So.2d 663, 664 (Fla. 1981).

his life in prison and would be released back into society sometime in the future. From a capital defendant's perspective, the sentencing alternative of life without the possibility of parole is a safeguard from an arbitrary and otherwise unwarranted sentence of death. Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).

The United States Supreme Court's decision in Simmons compels a finding that the amendment providing for the sentencing alternative of life without the possibility of parole was "not to his detriment" and therefore did not violate Mr. Bates' ex post facto rights. Weaver 450 U.S. at 33. In Simmons, the Supreme Court recognized that informing a jury that, in addition to death, it had the sentencing option of life without the possibility parole -- as opposed to life with the possibility of parole -- was clearly advantageous to a capital defendant:

> Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future non-dangerousness to the public than the fact that he will never be released on parole.

Id. at 141. The Supreme Court also noted that future dangerousness is something that is relevant to a jury determination of punishment, even under capital sentencing schemes that do not treat future dangerousness as a statutory aggravating circumstance. Id. (citing Barclay v. Florida, 463 U.S. 939, 948-951(1983) (plurality opinion)). This is the reason that Mr. Bates sought the sentencing alternative of life without the possibility of parole.

Numerous social science studies have shown that the likelihood and proximity of a defendant's release into society if sentenced to life imprisonment is one of the most important factors in a capital jury's deliberations and ultimate decision whether to impose a death sentence.

See Sandys, Cross-Overs: Capital Jurors Who Change their Minds About the Punishment, 70 Ind. L.J. 1183, 1221(1995); Hoffman, Where's the Buck? Juror Misperception of Sentencing Responsibility in Death Penalty Cases, 70 Ind. L.J. 1137,1146, 1148 (1995); Sarat, Violence, Representation, and Responsibility in Capital Trials, 70 Ind. L.J. 1103,1131-33 (1995); Luginbuhl & Howe, Discretion in Capital Sentencing Instructions: Guided or Misguided?, 70 Ind. L.J. 1161, 1178 (1995); Eisenberg & Wells, Deadly Confusion: Juror Instructions In Capital Cases, 79 Cornell L. Rev. 1, 17 (1993); Lane, 'Is there Life Without Parole?': A Capital Defendant's Right To A Meaningful Alternative Sentence, 26 Loy. L. A. L. Rev. 327, 340 (1993): Bowers, Capital Punishment & Contemporary Values: People's Misgivings and the Court's Misperceptions, 27 Law & Society 157, 169-70 (1993); Hood, the Meaning of 'Life' For Virginia Jurors and Its Effect on Reliability in Capital Sentencing, 75 Va. L. Rev. 1605, 1624 (1989); Paduano & Smith, Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty, 18 Colum. Hum. Rts. L. Rev. 211, 212, 250 (1987). The social science data confirms that the possibility of parole from a life sentence -- or even the mistaken belief in such a possibility -- operates at least as a "silent aggravating circumstance" in capital sentencing proceedings, and often may be the decisive factor underlying a jury's decision to sentence a defendant to death. In fact, it appears likely that in all but the most extraordinarily heinous capital murder case, parole is a factor in a capital jury's deliberations. Life without the possibility of parole as a sentencing alternative to death, accompanied by the appropriate instructions to the jury concerning the true meaning of that sentence, would alleviate this problem in most, if not all, cases. It is this very protection that Mr. Bates sought.

The United States Supreme Court's decision in Simmons and the relevant social science

studies make clear that the second prong of the Weaver test is not met: the amendment does not affect capital defendants in a disadvantageous fashion. The sentencing court's resolution of this question was in total disregard of the uniqueness of a capital sentencing proceeding. *See* Caspari v. Bohlen, 114 S.Ct. 948, 955 (1994) ("time and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case"). The amendment within the context of a capital prosecution does not violate the ex post facto provisions.[8] Like Mr. Simmons, Mr. Bates was entitled to accurate jury instructions which reflected the true meaning of the jury's noncapital sentencing alternative under the law at the time. The law in Florida at the time of Mr. Bates' resentencing proceeding allowed only two sentencing options for defendants convicted of murder in the first-degree -- life imprisonment without the possibility of parole and death. Section 775.082, Fla. Stat. His jury should have been so instructed because such an instruction did not violate the ex post facto provision. *See* Florida Standard Jury Instructions in Criminal Case.

3. Mr. Bates can waive his ex post facto rights

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[8]Outside the context of a death penalty prosecution, a change in a sentence from life with a mandatory minimum of twenty five years before eligibility for parole to life without the possibility of parole is "disadvantageous" to the offender, Weaver at 33, even though this change affects only the minimum range of a sentence and/or the eligibility for parole. *See* Lindsey v. Washington, 301 U.S. 397 (1937); Williams v. Dugger, 566 So.2d 819 (1 DCA 1990) *aff'd*, 593 So.2d 180 (Fla. 1991) (holding 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); Lee v. State, 294 So.2d 305 (Fla. 1974) (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). The sentencing court completely failed to analyze the amendment under the second prong of the Weaver test in the context of a death penalty prosecution. Of course, Mr. Bates' case is a death penalty case and when this question is analyzed within the context of a death penalty prosecution, the analysis must change.

Even if the amendment arguably violated Mr. Bates' ex post facto rights, the sentencing court should have accepted Mr. Bates' sworn affirmative election to have the amendment apply to him and to waive his ex post facto rights. The sentencing court's reluctance to apply the life without the possibility of parole sentencing alternative to Mr. Bates was that it would violate his ex post facto rights, and constitute an illegal sentence. Since a defendant may always make a knowing and intelligent waiver of his constitutional rights, *see* Boykin v. Alabama, 395 U.S. 238 (1969), the sentencing court clearly erred.

Mr. Bates was convicted of first degree murder. At the time of his resentencing proceeding, life without the possibility of parole was a legal sentence for that offense. Fla. Stat. § 775.082. As Mr. Bates knowingly and intelligently waived any possible ex post factor rights he had, such a sentence would have been a legal sentence in his case.

As with other constitutional rights, a defendant can waive his ex post facto rights. *See* In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848, 849 (Fla. 1983)(this Court held that under the sentencing guidelines a defendant whose offense occurred before the effective date of the implementation of the guidelines could "affirmatively select" to be sentenced under the guidelines). The sentencing courts ruling is absurd in light of the other more sacred constitutional rights that Mr. Bates could have waived at his original capital trial and at the capital resentencing proceedings. Mr. Bates could have waived his privilege against self-incrimination and made incriminating statements. Miranda v. Arizona, 384 U.S. 43, 86 S.Ct. 1602 (1966). He could have pled guilty. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969); Hamblen v. State, 527 So.2d 800 (Fla. 1988). He could have waived his right to counsel and represented himself. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525

(1975). Mr. Bates could have waived his right to a capital sentencing trial by jury. Wournos v. State, 676 So.2d 966 (Fla. 1995). He could have waived his right to present mitigating evidence. Farr v. State, 656 So.2d 448, 449 (Fla. 1995). But, according to the sentencing court, he could not waive his ex post facto rights so that he would not be sentenced to death.

The sentencing court's reliance on Williams v. State, 500 So.2d 501 (Fla. 1986) to support the holding that Mr. Bates could not waive his ex post facto rights to agree to an illegal sentence is misplaced. In Williams, the defendant pled guilty pursuant to a plea agreement with the State. At the plea hearing, the trial judge informed Williams that he would be sentenced within the guidelines under three conditions. One of those conditions was that he reappear for sentencing. Williams agreed to these three conditions and was released on his own recognizance. Williams then failed to appear for the resentencing. When he was apprehended and brought to court, the trial court sentenced him outside the guidelines. Under the sentencing guidelines, a trial judge is obligated to sentence within the guidelines unless he gives clear and convincing reasons for departure. Other than his failure to appear for sentencing, there was no reason for a departure. This Court held that departing from the guidelines was not permissible based upon the defendant's failure to appear. The State argued that because Williams had agreed to the condition at the plea hearing departure was permissible. This Court rejected the State's argument:

> A defendant cannot by agreement confer on the court the authority to impose an illegal sentence. If a departure is not supported by clear and convincing reasons, the mere fact that a defendant agrees to it does not make it a legal sentence.

Williams v. State, 500 So.2d 501, 503 (Fla. 1986).

The sentencing court in Williams imposed an illegal sentence. The illegality of the sentence did not involve an ex post facto violation, but a statutorily prohibited sentence under the guidelines. In this case, Mr. Bates was not electing to be subject to an illegal sentence. Life without the possibility of parole was a legal sentence for a capital murder conviction. Rather, Mr, Bates was electing to be subject to a sentence which, for arguments sake, was only violative of the ex post facto clause. Williams provides no support for the principle that a sentence which is illegal solely because it runs afoul of the ex post facto provisions can not be agreed to by the defendant.

The sentencing court acknowledged that a defendant can waive his ex post facto right stating:

> [A]ll the cases finding violations of ex post facto laws did 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 a election.

(R. II 337).

Moreover, this Court has found that a defendant can waive his or her eligibility to parole. Cochran v. State, 476 So.2d 207 (Fla. 1985). In Cochran, this Court held that a defendant who "affirmatively selects" to be sentenced under the sentencing guidelines waives eligibility to parole. This Court reasoned that the record need not show a knowing and intelligent waiver because a defendant has no constitutional right to parole. Id. at 209. "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442

U.S. 1, 7, 99 S.Ct 2100, 60 L.Ed 2d 668 (1979).

There was no legal impediment to Mr. Bates electing to be sentenced under the amendment as long as he was willing to make a knowing and intelligent waiver of his ex post facto rights. Nevertheless, the sentencing court held that because the statute did not expressly provide that a defendant can affirmatively elect to have the amendment applied to his or her case, Mr. Bates could not waiver his right to parole under the ex post facto provisions. There is no legal basis for the sentencing court's is ruling.

Mr. Bates made a knowing and intelligent election to be sentenced under the amendment and knowing and intelligent waiver of his ex post facto rights and his right to eligibility for parole. The sentencing court erred in not accepting the election and waiver.

4. Failure to give the life without parole instruction violated due process

The statute does not in any way prohibit the application of this amendment to capital defendants whose crimes occurred pre-amendment. In fact, subsection (2) of the statute requires that a capital defendant who has his death sentence declared unconstitutional be sentenced to life without parole in accordance with subsection (1). No language was added to the statute to differentiate between pre-amendment and post-amendment cases. The legislature could have made that distinction if that was their intent. The absence of any such language and the absence of any amendment to subsection (2) indicates the lack of any legislative intent to differentiate between pre-amendment and post-amendment cases.

For example, Georgia recently enacted a life without parole statute. O.C.G.A. § 17-10-31.1. The editor's notes to the Georgia Statute explicitly addresses the problem of pre-statute unsentenced capital defendants. The editor's notes indicates the General Assembly

made clear that:

> Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, a defendant whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act provided that: (1) jeopardy for the offense charged has not attached and the state has filed with the trial court notice of its intention to seek the death penalty or (2) the defendant has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking the death penalty after remand.

O.C.G.A. § 17-10-31.1 (editor's notes). Absent any legislative intent to limit the application of the life without parole amendment to post-amendment cases, Mr. Bates asserts that he is constitutionally entitled to this available sentencing option.

The Oklahoma Court of Criminal Appeals recently confronted this very issue. Hain v. State, 852 P.2d 744 (Okla. Crim. App. 1993). In Hain, the defendant requested that the jury be instructed as to the life without parole sentencing option at his capital sentencing proceeding. Hain based his claim on the fact that the life without parole sentencing option became effective prior to this capital sentencing proceeding, although subsequent to the commission of the offense. The appellate court agreed with Hain:

> Due to the extreme nature of the penalty involved in capital murder cases, we have often discussed the need for extremely careful scrutiny of the imposition of the death sentence. See Liles v. State, 702 P.2d 1025, 1036 (Okl.Cr. 1985). This philosophy is also demonstrated by the legislative requirement that this Court examine each and every sentence of death of any evidence that the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and whether the evidence offered at trial supports each of the jury's findings with respect to the aggravating circumstances which support the sentence. 20 O.S.Supp.1987, @ 701.13(C). In short, sentences of death must be absolutely,

unquestionably fair.

> Given the gravity of the death penalty, we find that principals of fundamental fairness compel us to reverse this case for a new second stage trial. As discussed in Allen v State, 821 P. 2d 371 (Okl.Cr. 1991), 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. Quite simply, we cannot justify a decision which would act as a total bar to consideration of a punishment alternative to death merely because the crime giving rise to the trial occurred a short time before the effective date of previously enacted legislation.

Id. at 753.

In Simmons, the Supreme Court confronted a situation in which the trial court had prevented the capital defendant from informing the jury of his statutory ineligibility for parole in order to rebut the prosecutor's assertion that the defendant's future dangerousness should be considered in sentencing. The Supreme Court held that:

> The Due Process Clause does not allow the execution of a person "on the basis of information which he had no opportunity to deny or explain." Gardner v. Florida, 430 U.S. 349, 362 (1977). . . . Three times petitioner asked to inform the jury that in fact he was ineligible for parole under state law; three times his request was denied. The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the jury the true meaning of its noncapital sentencing alternative. . . . We think it is clear that the State denied petitioner due process.

Id. at 141.

Under the rationale set forth in Simmons, Mr. Bates was entitled to an accurate jury instruction which reflects the true meaning of the jury's noncapital sentencing alternative under the law at the time. The law at the time of his capital resentencing allowed only two sentencing options for defendants convicted of murder in the first-degree -- life imprisonment without the

possibility of parole and death. In fact, Mr. Bates' entitlement to the life without the possibility of parole sentencing alternative and instruction is even more compelling than Mr. Simmons. Under South Carolina law, capital juries are not instructed concerning eligibility for parole. Thus, the due process claim in Simmons rested upon his right to rebut the State's arguments concerning his future dangerousness. In this case, Mr. Bates' due process claim rests solely upon his entitlement to accurate jury instructions. Before the amendment of the Section 775.082 and after the amendment, capital juries were given instructions concerning the capital defendant's eligibility for parole under a life sentence. *See* Florida Standard Jury Instructions in Criminal Case.

Due Process, equal protection and the Eighth Amendment requirement of reliability in capital sentencings required that Mr. Bates' jury be accurately informed that their noncapital sentencing option was life without the possibility of parole. Mr. Bates' jury was not accurately informed. He was sentenced to death despite the fact that his jury believed that he was not deserving of death based upon a weighing of the aggravating and mitigating factors. Their question concerning the sentencing alternatives to death establishes that they had rejected death. Nevertheless, his jury sentenced him to death because the jury was deprived of a meaningful sentencing alternative to death -- one which ensures that the defendant remains in prison for the rest of his or her natural life without the possibility of parole.

C. Conclusion

Under the unique facts of this case, the sentencing court's refusal to instruct Mr. Bates' jury on the life without the possibility of parole sentencing alternative deprived Mr. Bates of due process and a fundamentally reliable capital sentencing proceeding. The sentencing court's

refusal, coupled with the State's well crafted arguments, ensured that Mr. Bates was sentenced to death. A fist, not a thumb, was placed on the death side of the scale. This Court must vacate Mr. Bates' death sentence and impose a life without the possibility of parole.

ARGUMENT II

MR. BATES' JURY RENDERED A DEATH VERDICT CONTRARY TO FLORIDA STATUTE § 921.141, THE SENTENCING COURT'S INSTRUCTIONS, THE FLORIDA CONSTITUTION AND EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

The jury's death verdict is constitutionally flawed. The jury's recommendation of death in this case is not entitled to "great weight", Tedder v. State, 322 So.2d 908, 909 (Fla. 1975), and was rendered contrary to the procedures set forth in Florida Statute § 921.141, the sentencing court's instructions and the Eighth and Fourteenth Amendments to the United States Constitution. Mr. Bates' jury rendered a verdict of death despite the fact that they had determined that Mr. Bates was not deserving of death -- that the mitigating circumstances outweighed the aggravating circumstances.

This Court has observed that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1 (Fla. 1973) (emphasis added). The death sentence is properly reserved for "only the most aggravated, the most indefensible of crimes." Id. at 8. Fla. Stat. § 921.141, provides the procedure for determining whether a defendant should be sentenced to death. This Court has held that "[t]he most important safeguard presented in Fla. Stat. § 921.141, is the propounding of aggravating and mitigating circumstances which must be

determinative of the sentence imposed." Id.

Under Fla. Stat. § 921.141(2)(a), the jury must first determine "whether sufficient aggravating circumstances exist." The jury must then determine "whether sufficient mitigating circumstances exist . . . which outweigh aggravating circumstances found to exist." Fla. Stat § 921.141(2)(b). Based upon this weighing process, the jury must determine "whether to the defendant should be sentenced to life or death." Fla. Stat § 921.141(2)(c). The instructions given a capital jury describe the weighing process as follows:

> 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.

Florida Standard Jury Instructions in Criminal Cases, Penalty Proceedings - Capital Cases F.S. 921.141.

Throughout the resentencing proceedings, Mr. Bates contended that he was entitled to have the jury properly instructed concerning a meaningful sentencing alternative to death -- life without the possibility of parole. Life without the possibility of parole was an available sentencing alternative to death for a capital murder conviction. Fla. Stat. § 775.082(1). The sentencing court refused to instruct the jury concerning this sentencing alternative because it would violate the ex post facto clauses of the United States and the Florida Constitution. The sentencing court's refusal to instruct the jury that life without the possibility of parole was a sentencing alternative to death unconstitutionally ensured that Mr. Bates would be sentenced to death -- not because he was deserving of death -- but because the jury would believe that it had no reasonable and meaningful alternative to death.

At the time of Mr. Bates' capital resentencing, he had already served half of the mandatory minimum of twenty five years. The State took advantage of this during its cross examination of Mr. Bates' witnesses and its closing argument. The State contended that Mr. Bates' true character was shown by the facts of this case. Implicit in this tactic was the message that Mr. Bates was still someone to be feared -- his true character was still in place. The State argued that the mitigating circumstances were to be considered towards "the sentence of life imprisonment with a minimum mandatory of twenty-five years before the defendant is eligible for parole." (R. XV 779-80). This argument was improper and tainted Mr. Bates' jury. Hitchcock v. State, 673 So.2d 859 (Fla. 1996) (recognizing as improper an prejudicial the State's argument that if given a life sentence defendant would be eligible for parole after twenty five years when resentencing is so close to expiration of twenty five year sentence). By doing so, the State made Mr. Bates' future dangerousness an issue for the jury. This fact was not lost on the jury. After deliberating for almost three hours, the jury returned with a question which reflected the true nature of their deliberations:

> 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?

(R. XV 830). This question makes clear that the jury had determined that Mr. Bates was not deserving of death -- that the mitigating circumstances outweigh the aggravating circumstances. This question also brought to fruition the very fear that Mr. Bates had throughout the resentencing proceedings -- that the jury would determine that he was not deserving of death but that they would believe that they had no meaningful sentencing alternative given the amount of time Mr. Bates had already served towards the mandatory minimum twenty-five years.

Mr. Bates contends that the jury rendered its sentencing verdict of death despite the fact that the jury had determined that he was not deserving of death. In doing so, the jury relied upon Mr. Bates' eligibility for parole and future dangerousness and not upon a weighing of mitigating verses aggravating circumstances. Or viewed another way, the jury weighed parole eligibility and future dangerousness as "an invalid aggravating circumstance" in violation of the Eighth Amendment. Espinosa v. Florida, ___ U.S. ___ 112 S.Ct. 2926, 2928 (1992). At the time the question was asked, Mr. Bates' jury believed that life, not death, was the appropriate sentence. Otherwise the question makes no sense. When told that they could not recommend a meaningful sentencing alternative to death -- life without the possibility of death -- they rendered a verdict of death contrary to their instructions and the evidence before them.

The answer to the jury's question did not in any way relate to the weighing of mitigating and aggravating circumstances that were properly before the jury. As the United States Supreme Court held in Mills v. Maryland, 486 U.S. 367, (1988), in such situations resentencing is required:

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. The possibility that petitioner's jury conducted its task improperly is great enough to require resentencing.

Id. at 383-4. Under the unique circumstances of this case, the jury's verdict was rendered contrary to Florida Statute 921.141, the Florida Constitution, and the Eighth and Fourteenth Amendments of the United States Constitution and this Court should order that Mr. Bates be sentenced to life imprisonment.

ARGUMENT III

MR. BATES WAS DENIED AN INDIVIDUALIZED AND RELIABLE SENTENCING DETERMINATION WHEN THE SENTENCING COURT VIOLATED THE PRINCIPLES OF LOCKETT v. OHIO, 438 U.S. 586 (1978), AND PRECLUDED MR. BATES FROM PRESENTING, AND THE JURY FROM CONSIDERING RELEVANT MITIGATING EVIDENCE

A. Introduction

In Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court held that "the sentencer [must] not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604. The Supreme Court has consistently reaffirmed Lockett. In Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986), quoting Eddings v. Oklahoma, 455 U.S. 104, 114 (1982), the Supreme Court held that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" In Hitchcock v. Dugger, 107 S.Ct 1821 (1987), the Supreme Court held that a Florida sentencing jury cannot be limited in its consideration of nonstatutory mitigating circumstances. These principles apply with full force to Mr. Bates' case.

During the resentencing proceeding, Mr. Bates was precluded from presenting mitigating evidence on four separate occasions by the sentencing court. Mr. Bates' entitlement to relief is more than obvious: there can be no doubt that the proceedings resulting in Kayle Bates' sentence of death violated the constitutional mandate of Lockett; Hitchcock; and Skipper. Mr. Bates' sentencing jurors were never allowed to hear compelling nonstatutory mitigation which would have demonstrated that a sentence less than death was proper. When counsel sought to present

this relevant evidence, the sentencing court simply ordered that he was not to do so. The sentencing court thus precluded the jury's consideration of mitigating evidence. As this Court has made clear, such judicial actions or instructions, precluding a capital sentencing jury's consideration of evidence in mitigation of sentence, violates the Eighth Amendment. *See* Hall v. State, 541 So.2d 1125 (Fla. 1989); Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988); Combs v. State, 525 So.2d 853 (Fla. 1988); Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988); Foster v. State, 518 So. 2d 901 (Fla. 1988); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Morgan v. State, 515 So. 2d 975 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); McCrae v. State, 510 So. 2d 874 (Fla. 1987).

B. Mr. Bates was Precluded From Presenting Relevant and Compelling Mitigation

The sentencing court precluded Mr. Bates from presenting relevant and compelling mitigation. Mitigation that crucial to understanding Mr. Bates' life and integral to his case for life.

1. Mr. Bates' waiver of parole

The sentencing court improperly rejected as mitigation Mr. Bates' sworn waiver of his eligibility for parole. This Court has previously ruled that a defendant can waive his right to parole eligibility. Cochran v. State, 476 So.2d 207 (Fla. 1985). Moreover, this Court has recognized that parole ineligibility is a mitigating circumstance. Walker v. State, ___ So.2d ___, 1997 Fla. Lexis 1353 (Fla. 1997) The sentencing court provided no basis for this ruling because none exists.

Prior to the January 1995 resentencing proceeding, Mr. Bates made an on the record

sworn affirmative election to be sentenced under the life without the possibility of parole sentencing alternative and waiver of his ex post facto rights and his right to parole eligibility. When the sentencing court denied his motion for the application of the life without parole sentencing option, Mr. Bates requested to have his election and waiver transcribed and presented to Mr. Bates' jury during the penalty phase of this case as mitigating evidence. (R. XXIX 19). The sentencing court denied the request. (R. XXIX 19).

Mr. Bates' waiver of his eligibility for parole was proper mitigation for several reasons. Mr. Bates' waiver is a clear sign of Mr. Bates' remorse and his acceptance of responsibility for the tragic death of Ms. White. *See* Trotter v. State, 576 So.2d 691 (Fla. 1991)(sentencing court finding of remorse as mitigation). This is especially significant in light of the mental health experts testimony that Mr. Bates' rigid super ego prevented him from directly admitting his responsibility for Ms. White's death.

Mr. Bates waiver of parole also supports the fact that he will not be a threat to society in the future and thus, "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death." Skipper, at 4-5, quoting Lockett. A major theme of Mr. Bates' penalty phase defense was that this crime was an aberration brought on by several stressors within his life and a confluence of other factors, i.e. him surprising the victim in the office and her spraying him with mace in response. Prior to this tragic event, Mr. Bates had followed societies rules, worked hard, loved and supported his family and contributed to society. Under the structured environment of prison, Kayle Bates will likewise follow the rules, work hard, love and support his family and contribute to society. Mr. Bates' jury saw this in him. They also knew, however, that he had already served over half of the mandatory minimum sentence of twenty five years. And the State

made sure that the jury focused upon Mr. Bates' future dangerousness. The jury's question about the availability of a life without the possibility of parole sentencing option established that future dangerousness was their only concern. Mr. Bates' waiver of his eligibility for parole would have been the mitigation necessary for the jury to reject death. *See* Simmons v. South Carolina, 512 U.S. __, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994)(recognizing a capital defendant's right to rebut future dangerousness evidence with truthful information concerning the defendant's ineligibility for parole, but not reaching the issue whether a capital defendant's parole ineligibility was "mitigating" under Lockett).

2. Mr. Bates' valid sentences of two life terms plus fifteen years

Like Mr. Bates' waiver of parole, the fact that he was already sentenced to two life terms plus fifteen years and that those sentences were to run consecutive to the sentence for the murder and thus "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death." Skipper, at 4-5, quoting Lockett.

At the original sentencing proceeding, Mr. Bates was sentenced to death on Count I of the indictment. He was also sentenced on the remaining counts II, III, and IV. On Count II, Mr. Bates was sentenced to life in prison for the robbery. On Count III, Mr. Bates was sentenced to a term of fifteen years on attempted sexual battery. On Count IV, Mr. Bates was sentenced to a term of natural life for kidnaping. Each of those sentences were to run consecutive to the sentence on Count I. Judge Costello's grant of Rule 3.850 relief affected only the death sentence as to Count I. The sentences as to the remaining counts were valid and were to run consecutive to any sentence that Mr. Bates received as to Count I. (R. XXIX 19-20).

Mr. Bates requested that the jury be informed of the two life sentences plus fifteen years

and that those sentences would be consecutive to any sentence he would receive on Count I. (R. XXIX 19; IV 637-43). The State argued that the sentences were not proper mitigation. (R. XXIX 20). The sentencing court precluded counsel from presenting the sentencing orders finding: "At this time I will agree with the State that it would not be proper to discuss the sentences involved in the companion offenses that were committed at the time that this offense was committed. And I will deny the defense' request on that basis." In support of that pretrial request, Mr. Bates later made a proffer of a copy of the sentencing order which the State stipulated to as a true copy. (R. XXXII 458). The order was marked as a Court exhibit for the record. (R. XXXII 458). Counsel made a further proffer that if allowed he would "call someone from the Circuit Court Clerks' Office [as a witness], swear them in and ask them to present to the jury a true copy of the sentence that Mr. Bates received on Counts II, III and IV which are respectively natural life term, Count II, to run consecutively with Count I. As to Count III, 15 years imprisonment to run consecutive to Count II. As to Count IV, term of natural life to run consecutive with Count III." (R. XXXII 458-9).

Mr. Bates' sentencing jury was instructed that he had been previously convicted of robbery, attempted sexual battery and kidnaping. The sentencing court, however, precluded Mr. Bates from informing the jury of the valid sentences as to those counts. Although, the State argued that they were not material (R. XXIX 20), ironically, the very last thing said on the record by the State in this case was their request that the record reflect that Mr. Bates' sentences on Counts II, III, and IV were consecutive to his newly imposed sentence of death:

> MR. APPLEMAN: Your Honor, this is consecutive to all other sentences previously imposed is it not?

THE COURT: I believe the other sentences run consecutive to this sentence.

MR. APPLEMAN: Excuse me, I reversed the terminology I wanted to use, I apologize.

THE COURT: Correct.

(NOTHING FURTHER)

(R. VIII 1302).

The State's care in ensuring that this information be clearly stated on the record is in direct contradiction of its arguments that the jury should not be informed of these sentences. Obviously, the State believed that the two life terms plus fifteen years sentences and the fact that these sentences were to run consecutive to the death sentence was relevant and significant to Mr. Bates' continued incarceration. This information was not only relevant to whether Mr. Bates should be sentenced to death, but dispositive to that issue based upon the jury's question regarding parole eligibility. In closing argument, the State argued that Mr. Bates would be eligible for parole after serving the mandatory minimum. Truthful information concerning the other sentences that Mr. Bates was under was essential to a reliable sentencing determination. *See* Brown v. Texas, ___ U.S. ___, 1997 WL 333359 (1997)(Stevens, Souter, Ginsberg and Breyer, JJ.)(discussing the tension between the Court's holding in Simmons and Texas law which precluded the defendant from presenting information that he would have to serve thirty five years before being eligible for parole). *See also* Hitchcock v. State, 673 So.2d 859, 860 (Fla 1996)(finding capital defendant was prejudiced by State argument that defendant would be eligible for parole at expiration of twenty five years given the fact that the resentencing occurred so close to the expiration of that period).

3. The community petition vouching for Mr. Bates' good character

Forreste Williams was a very close friend of Mr. Bates. In 1982, when he learned of Mr. Bates' arrest he "was caught off guard, I was very surprised. I was in a state of shock, couldn't believe it because of Kayle's personality, his character, just didn't believe it." (R. XXX 263). As a result of learning about Kayle's arrest, he decided to put together a petition to get people to sign in Riviera Beach vouching for Mr. Bates' good character. (R. XXX 263). At the January 1995 resentencing proceeding, Mr Bates offered the petition into evidence. The State had no objection and the Court admitted it as Defense Exhibit #1. (R. XXX 266). At the May 1995 resentencing proceeding, the State objected to the admittance of the petition into evidence and the sentencing court sustained the objection. (R. XI 386-8). The petition, Defense exhibit # 1, for identification was received for purposes of the proffer" by the Court. (R. XIII 705).

Evidence of a capital defendant's good character and good reputation within the community is traditional mitigation. The form of the evidence is immaterial. The petition was proper mitigation. *See* Wasko v. State, 505 So.2d 1314 (Fla. 1987)(finding defendant's good character based upon letters, petitions and testimony from family and friends). The petition was signed by over one hundred members of the Riviera Beach community attesting to Mr. Bates' good character and offering their assistance in his defense.

4. Mr. Bates' U.S. Army Basic Training graduation photograph

Mr. Bates volunteered for service in the Florida National Guard. He was a dedicated soldier and a patriot. He successfully completed Basic Training and Advanced Individual Training at the United States Army Infantry Training Center at Fort Benning, Georgia. Kayle Bates wore his military uniform with pride. At the capital resentencing proceeding, however, the

sentencing court precluded Mr. Bates from entering into evidence the U.S. Army Basic Training graduation photograph of Mr. Bates in his military uniform.

At the January 1995 resentencing proceeding, Mr. Bates attempted to move the photograph into evidence through the testimony of Mr. Bates' mother, Inez Williams. (R. XXXII 539-41). The State objected:

> MR. APPLEMAN: I highly object to this. You know, this photograph, Your Honor, this has been blown up to the size of a poster board. It is a picture of an individual in the military, the defendant in the military. Can we bring the picture of him in prison blues for the last twelve years. He was in there for four months active duty and this has absolutely no relevance to mitigating circumstances in any form. The timing, to put in this picture, he has been in the military, has no relevance in any form whatsoever of the photograph of him being in the military period. Nothing more than a sympathy factor.

(R. XXXII 540). Counsel for Mr. Bates disagreed and voiced his concern that it was outrageous that the State would even suggest that someone's service to this country in uniform is not a mitigating factor. (R. XXXII 540). Counsel proffered that the photograph "shows [Mr. Bates] in uniform, shows the pride that he had in serving his country" and argued that such evidence was mitigating under Lockett, Hitchcock and Skipper. (R. XXXII 541). The sentencing court sustained the State's objection finding that the photograph "is not relevant to prove anything."

At the January 1995 resentencing proceeding, Mr. Bates again proffered the graduation photograph of Mr. Bates in his military uniform as Defense Exhibit # 4. (R. XIII 706-8). As was stated on the record, Defense Exhibit # 4 is a color photograph of Mr. Bates after graduation from Basic Training. Mr. Bates is wearing his dress green military uniform. (R. XIII 708).

There is an old adage that a picture is worth a thousand words. The State clearly

understood that adage and feared the affect it would have on Mr. Bates' jury. This picture was worth a thousand words and would have spoken to the jury in a way that no one else could have done. The photograph speaks of Kayle Bates as a simple, yet proud young man. Like Mr. Bates' graduation from high school his graduation from Basic Training was a huge accomplishment for him. Just as the State was allowed to submit photographs to the jury of relevant information and evidence, such as photographs of the victim, the crime scene, and Mr. Bates' truck, Mr. Bates was entitled to submit photographic evidence concerning his character and life. This photograph of Mr. Bates epitomizes everything Mr. Bates believed in and was "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death." Skipper, at 4-5, quoting Lockett. In precluding this photograph of Mr. Bates in military uniform, the sentencing court precluded "a thousand words" of relevant testimony concerning Mr. Bates military service and good character.

C. Preclusion of the Mitigation was not Harmless

The Supreme Court made clear that "[t]he sentencer may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration." Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982). Nevertheless, this is precisely what occurred here: the sentencing court excluded relevant mitigating evidence from the jury's consideration. This violated the Eighth Amendment. The sentencing court precluded Mr. Bates' jury from considering relevant credible nonstatutory mitigation regarding Mr. Bates' remorse and acceptance of responsibility, his eligibility for parole, his reputation of good character throughout the community and his pride and dedication to the Untied States Army.

In Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989), the court found that precluding the

defendant's sister from giving mere hearsay evidence regarding her brother's conduct in jail could not be held harmless. Certainly, in this case, precluding the proffered mitigation cannot be found harmless.

The Supreme Court's decision in Hitchcock requires a reviewing court to determine that the excluded mitigation would have had "no effect" on the jury or sentencing court, Hitchcock at 1824, or that the State "prove beyond a reasonable doubt that the erroneous[ly] [excluded mitigation] did not contribute to the jury's sentencing recommendation." Jones v. Dugger, 867 F.2d 1277, 1279 (11th Cir. 1989). These errors undermined the reliability of the jury's sentencing determination and prevents the jury from assessing the full panoply of mitigation presented by Mr. Bates. For each of the reasons discussed above the Court should vacate Mr. Bates' unconstitutional sentence of death.

ARGUMENT IV

MR. BATES' CASE IS NOT ONE OF THE MOST AGGRAVATED AND LEAST MITIGATED AND HIS DEATH SENTENCE IS DISPROPORTIONATE IN VIOLATION OF THE FLORIDA CONSTITUTION

A. Introduction

Before entering the State Farm Office, Kayle Bates had spent the entire twenty-four years of his life striving to be a model citizen: he was a loving son and step-son; a caring and sensitive brother; a respectful, obedient and well-behaved youth; a loyal friend; an enthusiastic cub and boy scout; an above average Sunday School student; a high school graduate, despite his below average I.Q., a learning disability, and limited cognitive functioning; a dedicated soldier who served his country honorably; a loving husband and father, who provided for his wife and child;

and a hard-working and valued employee. Nothing in Mr. Bates' past would have predicted even his unlawful entry into the State Farm Office that day. He had no prior history of significant criminal activity. Yet, inexplicably, he broke into the office.

Sometime between 12:40 and 1:00 p.m., Kayle Bates entered the State Farm Office with the apparent intent to steal. Mr. Bates was under increased financial pressure due to the imminent birth of a second child, the recent purchase of a new home and the denial of an anticipated promotion in the Florida National Guard which he had only learned of the day or two before. His unlawful entry into the State Farm Office was contrary to his entire life history and his very rigid belief system in family, church, work and country.

In light of the information gathered in the criminal investigation, Mr. Bates' life history, and Dr. Larson's and Dr. McMahon's psychological evaluations of Mr. Bates, the scenario involving Ms. White's murder becomes fairly evident. Ms. White enters the State Farm Office with her keys in her hand. On her key chain is a canister of mace. The phone is ringing. She does not go behind the counter where she works, but turns the phone around to answer it. She answers "State Farm" and then she is startled by his presence and starts screaming. A struggle ensues and she sprays him with mace from the canister on her key chain. She takes a second canister of mace from her desk drawer and sprays it at Mr. Bates. The struggle escalates and Mr. Bates stabs her with his knife and leaves her for dead behind the office. The entire confrontation and struggle occurs within less than three minutes. The time line established by the State's witnesses leaves no room for doubt about this fact. The confrontation and struggle starts at 1:05 p.m. and by 1:07 or 1:08 p.m. it is over and Ms. White is lying just inside the underbrush fatally wounded and unconscious and Mr. Bates has fled the immediate area. The kidnaping, the

robbery, the attempted sexual battery and the murder all occurred within this two to three minute time frame. Ms. White is unconscious within a minute from being stabbed and was most likely dead two minutes later.

Since this tragic crime occurred, Kayle Bates has conducted himself in accordance with his true character. He has adjusted well to incarceration. His institutional record, like his life history before this crime, is unremarkable. He has one disciplinary report for a minor offense during the entire period of his incarceration. Kayle Bates is a model inmate. He causes no problems and he does what he is told to do. (R. XXXIII - XXXV, Defense Exhibit #1, Certified Copies of the State of Florida, Department of Corrections Inmate Records for Kayle B. Bates). He has also waived his right to parole. (R. XXXVI).

B. The Proportionality Standard of Review

This court has taken capital proportionality review more seriously than any other state Supreme Court in the country. It has undertaken detailed factual and comparative analysis in a number of published opinions which set out clear guideposts for the present review.

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

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

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

More recently this Court noted that "our law reserves the death penalty only for the most aggravated and least mitigated murders," Kramer v. State, 619 So.2d 274, 278 (Fla. 1993). Proportionality review is essentially a factual one:

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

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

Mr. Bates' case is clearly not one of "the most aggravated and least mitigated murders," Kramer, 619 So.2d at 278, presented to this Court. The jury's recommendation of death in this case is not entitled to "great weight", Tedder v. State, 322 So.2d 908, 909 (Fla. 1975), and is

constitutionally flawed. *See* Claim II, *supra.*

C. Mr. Bates' Case Represents One of the Most Mitigated Murders

This Court now has a complete and accurate portrait of Kayle Bates' life and character. The records previously reviewed by this Court pale in comparison to the record developed at the resentencing. Eighteen character witnesses testified concerning Mr. Bates' life history and good character. These witnesses were all hardworking, responsible citizens who cared very deeply for Mr. Bates. Their cumulative testimony covered Mr. Bates' entire twenty-four years of life up to the time of this tragic crime. Their testimony went unchallenged. Mr. Bates' school, military, and prison records were also entered into evidence. Finally, two eminently qualified mental health experts testified concerning Kayle's life history and his cognitive and emotional functioning. Both experts provided their expert opinion concerning these matters and how they related to the facts of the offense. Both testified that the two statutory mental health mitigating factors were present in this case. The sentencing court found the presence of significant and compelling statutory and nonstatutory mitigating circumstances.

1. Mr. Bates has no significant history of prior criminal activity

The sentencing court found that Mr. Bates "has no significant history of prior criminal activity"and gave it "significant weight" in the weighing process. (R. III 551). Mr. Bates' case is one of the purest cases involving this compelling statutory mitigating circumstance. Mr. Bates' complete life history is before this Court and there is nothing in his past which would have predicted that Mr. Bates would ever be involved in a crime of this nature. He does not have a criminal value system. (R. XIII 556, 619). As Dr. McMahon observed, prior to this crime, Mr. Bates "abide[d] by the same values that main-stream America abides by." (R. XIII 619). This

Court has rarely seen a showing of "no significant prior history of criminal activity" as compelling as Mr. Bates' case. It is pure, real and without imperfections.

2. Mr. Bates functions academically at a 9 - 10 year old level with a "get by" performance level of functioning

The sentencing court found that Mr. Bates established the "age of the Defendant at the time of the crime" statutory mitigating circumstance. The court found that:

> [Mr. Bates] 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.

(R. III 555). The sentencing court gave this mitigating factor little weight because Mr. Bates was "working, supporting his family and in the military." (R. III 555). Mr. Bates' significant intellectual limitations and his "get by" level of functioning is more mitigating in light of the fact that he was "working, supporting his family and in the military." Despite his cognitive limitations, Mr. Bates has strived to succeed in life. Thus, his "average" life accomplishments are more mitigating because of these limitations, not less.

3. Mr. Bates' was under the influence of an extreme emotional disturbance

Mr. Bates presented a compelling case that he committed the capital murder while under the influence of an extreme emotional disturbance. Dr. Larson and Dr. McMahon testified to the existence of this statutory mitigating circumstance. Mr. McClaren testified on behalf of the State that the statutory mitigating circumstance did not exist. Dr. McClaren concurred with most of the findings of Dr. Larson and Dr. McMahon. His only disagreement involved the existence of the two statutory mental health mitigating factors.

The sentencing court erroneously found that this statutory mitigating factor does not

exist. Nevertheless, the sentencing court found that Mr. Bates "was under the influence of some emotional disturbance at the time of the murder and that this does exist as a non-statutory mitigating factor." The sentencing court gave "it significant weight in the weighing process." (R. III 554).

The sentencing court found persuasive Dr. McClaren's list of thirty factors which he contended supported his conclusion that Mr. Bates was not under the influence of extreme emotional disturbance at the time of the murder. Two points concerning those factors are significant. First, many are compelling matters of nonstatutory mitigation, for example: happily married; high school graduate; served in National Guard; working for same company for several years; and "no other known instances of alleged uncontrollable rage." (R. III 552-4). Second, none of these factors relate to the actual facts of the murder. They all deal with Mr. Bates' activity and behavior before and after the murder of Ms. White and miss the very focal point of the mitigating circumstance -- at the time of the offense. Moreover, these factors ignore the critical facts which support the existence of this statutory mental health mitigating factor: that Mr. Bates' illegally enters the office, both he and she are startled by each other's presence, she screams, sprays him with mace, the struggle ensues, escalates and ends in Ms. White's death. Dr. McClaren's list of factors does not address any of these critical facts. The list also does not deal with the fact that this situation "got out of hand" for a relatively short period of time -- less than three minutes. Dr. Larson and Dr. McMahon relied upon these facts in finding that Mr. Bates was under an extreme emotional disturbance at the time of the murder. They testified that the extreme emotional disturbance began when Mr. Bates and Ms. White confronted each other and ended after Ms. White was killed. They did not believe that this extreme emotional

disturbance was of a long duration. In fact, it was the explosive nature of the crime fueled by surprise, fear and mace that supported their finding. Dr. McClaren does not address these critical facts.

4. Mr. Bates' capacity to conform his conduct to the requirements of the law was substantially impaired

Mr. Bates' capacity to conform his conduct to the requirements of the law was substantially impaired. Again, Dr. Larson and Dr McMahon testified on behalf of the Defendant that this circumstance does exist and Dr. McLaren testified on behalf of the State that this circumstance does not exist. Again, the sentencing court rejected the opinions of Dr. Larson and Dr. McMahon and accepted Dr. McClaren's opinion. For the reasons set forth above, this Court should reject the sentencing court's finding. As the sentencing court discussed, Dr. Larson and Dr. McMahon testified that Mr. Bates' "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." (R. III 555). They addressed this issue in the context of the unique facts and circumstances surrounding this murder -- not in abstract as Dr. McClaren did. The sentencing court did find the existence of a non-statutory mitigating circumstance that Mr. Bates' capacity to conform his conduct to the requirements of the law was impaired to some degree. The sentencing court gave this non-statutory circumstance significant

mitigating circumstances. (R. XIII 701). This concession and many of his factors in support of his conclusion indicate that Dr. McClaren did not understand this Court's legal definition of these mitigating circumstances. State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). "An extreme mental or emotional disturbance is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). The substantial impairment mitigating circumstance is "provided to protect that person who while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state. State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). At the time of the crime, Mr. Bates' emotional and mental state met both of these standards. Mr. Bates has established the existence of these circumstances under the unique facts of this case. Moreover, Judge Costello's grant of Mr. Bates' motion for post-conviction relief was based upon the significant mitigating nature of Mr. Bates's emotional and mental state of mind at the time of the crime. Judge Costello's finding of prejudice on this issue supports the existence of these statutory mitigating circumstances. *See* Bates v. Dugger, 604 So.2d 457 (Fla. 1992).

5. Mr. Bates' life history before this crime and since is compelling mitigation

But for the several minutes during which this tragic crime occurred, Kayle Bates has lived a normal and commendable life. The sentencing court found the existence of this nonstatutory mitigation. This Court must also recognize the significant and compelling nature of these mitigating factors and give them the weight they deserve. Mr. Bates' pre-crime history in the community and his post-crime history in prison alone is a compelling basis for life.

6. This murder is tragic, but it is not one of the most aggravated murders

This Court must not lose sight of the fact that the murder in this case did not involve

"heightened premeditation or evidence of reflective calculation. Instead, it is likely that what started as a burglary resulted in a situation simply getting out of hand." Bates v. State, 465 So.2d 490, 493 (Fla. 1985). The evidence now before this Court and absent from the record when this Court first reviewed this case, establishes that this is a case of a burglary which simply got out of hand and that the whole tragic incident occurred in less than three minutes. It is from this perspective that this Court must review whether the aggravating circumstances were established beyond a reasonable doubt and the weight to be given them.

The State has failed to prove beyond a reasonable doubt that the primary motive for the murder was to attempt sexual battery and commit kidnaping. *See* Argument VIII, *infra.* Physical evidence at the scene and the statements of Mr. Bates suggest that Ms. White had already been stabbed before Mr. Bates carried her out of the office. Moreover, there is absolutely no physical evidence to support a finding of attempted sexual battery. The only evidence that the State can point to is the tentative admission of Mr. Bates -- an admission that he contradicts in previous and subsequent statements. Photographs from the crime scene 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. (R. XVI 1315).

Moreover, there is no evidence that the murder of Ms. White was primarily motived by pecuniary gain. Although Mr. Bates' motive for entering the office was most likely pecuniary gain, his actions after he was confronted by Ms.White and sprayed with mace had nothing to do with pecuniary gain. The record before this Court now establishes that there has never been a shred of evidence in this case that Mr. Bates forcibly removed the ring from Ms. White's finger. *See* Bates v. State, 465 So.2d 490 (Fla. 1985)(finding that "that the victim's finger had been

injured when [her] ring was removed"). Mr. Bates presented a photograph that shows that Ms. White has a small wound on the top of her ring finger above the fingernail, but no wounds which are consistent with the ring being forcibly removed from her finger. (R. XXXVII, Defense Exhibit #3). At Mr. Bates' previous capital sentencing proceedings, the trial court found that Ms. White's "ring was ripped from her finger, severely tearing the finger." Bates v. State, 465 So.2d 490 (Fla. 1985) (quoting the trial court's findings in support of the death sentence). This is simply not true. Absent this evidence, the State has failed to prove the existence of this aggravating circumstance. *See* Argument VIII, *infra.*

Finally, the heinous, atrocious, or cruel aggravating circumstance applies only to tortuous murders -- those that evidence extreme and outrageous depravity as exemplified either, by the desire to inflict a high degree of pain or utter indifference to, or the enjoyment of the suffering of another. The State has failed to prove beyond a reasonable doubt that Mr. Bates intended that the crime be deliberately and extraordinarily painful. *See* Argument VIII, *infra.* The evidence before this Court establishes that the entire incident occurred in less that three minutes and that Mr. Bates "reacted" to the situation -- a situation which simply got out of hand because of the surprise, fear and mace. The State in closing argument conceded that the only thing that makes this crime arguably heinous, atrocious and cruel is the fact that "in the last three minutes of her life Renee White was able to look up [at Mr. Bates]." (R. XV 778). There was no conscience decision to be deliberately and extraordinarily painful.

On a record far less developed and accurate, this Court in the initial direct appeal found that the murder of Ms. White was not committed in a cold, calculated and premeditated manner: "Instead, it is likely that what started as a burglary resulted in a situation simply getting out of

hand." Bates v. State, 465 So.2d 490 (Fla. 1985). On the record developed at the resentencing, it is clear that the murder of Ms. White was the result of a burglary which simply got out of hand. Moreover, the very short duration of the whole incident is now readily apparent which directly affects the weight to be given to any of the aggravating factors established in this case. This Court now has an accurate picture of the facts surrounding Ms. White's murder and a clear picture of the true nature of Mr. Bates' character. In light of these facts, this Court must find Mr. Bates' death sentence to be disproportionate.

D. The Totality of Circumstances Require Imposition of a Life Sentence

"[P]roportionality review is not a comparison between the number of aggravating and mitigating circumstances. . . . Rather, it requires this Court to consider the totality of the circumstances in a case and to compare the case with other capital cases." Voorhees v. State, ___ So.2d ___, 1997 Fla. LEXIS 742 (Fla. 1997). The core of proportionality review is this Court's weighing of the "nature and quality" of the aggravating and mitigating circumstances in a case. Tillman v. State, 591 So.2d 167, 168-9 (Fla. 1991).

This case is a very heavily mitigated case. Substantial mitigation can out weigh even numerous aggravating factors on proportionality review. *See* Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988) (death sentence disproportionate for murder of a police officer involving five aggravators in light of substantial mitigation). Of particular significance to proportionality review is the existence of statutory mitigating circumstances. In this case, four statutory mitigating factors exist: no significant history of prior criminal activity, *see* Smalley v. State, 546 So.2d 720, 723 (Fla. 1989), age of the defendant, *see* Songer v. State, 544 So.2d 1010 (Fla. 1989); and the two statutory mental health mitigating circumstances on extreme disturbance, *see*

Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988). Moreover, substantial "positive" nonstatutory mitigating circumstances exist: Mr. Bates was a loving son and step-son; a caring and sensitive brother; a respectful, obedient and well-behaved youth; a loyal friend; an enthusiastic cub and boy scout; an above average Sunday School student; a high school graduate, despite his below average I.Q., a learning disability, and limited cognitive functioning; a dedicated soldier who served his country honorably; a loving husband and father, who provided for his wife and child; a hard-working and valued employee; and a well adjusted inmate who has waived his right to parole.

The mitigation in this case is comparative to that found in Smalley *supra* at 723. As this Court noted "[a]ny one or two of these factors might not, by themselves or collectively, be sufficient to result in a reversal on proportionality grounds." In this case, as in Smalley, "the entire picture of mitigation and aggravation was that of a case which does not warrant the death penalty." Id.

Like the murder in Smalley, the murder here was found to be heinous, atrocious or cruel. The finding of this aggravating factor, however, does not preclude proportionality relief. Morgan v. State, 639 So.2d 6 (Fla. 1994)(where death was found to be disproportionate even with a finding of heinous, atrocious, or cruel, when the perpetrator had been drinking and huffing gasoline, along with his "marginal intelligence"); Kramer v. State, 619 So.2d 274 (Fla. 1993)(where the victim is beaten to death with a rock but the death sentence is reduced to life on proportionality grounds even with a finding of heinous, atrocious, or cruel, and a prior violent felony that resulted in the death of an earlier victim); Penn v. State, 574 So.2d 1079 (Fla. 1991) (reduced to life by this Court where Penn gets drunk and kills his mother-in-law by beating her to

death with a claw hammer, resulting in a valid finding of heinous, atrocious, or cruel); Ross v. State, 474 So.2d 1170 (Fla. 1985)(an alcoholic who beat his wife to death with a blunt instrument under circumstances that gave rise to a valid finding of heinous, atrocious, or cruel, has his death sentence reduced to life); and Rembert v. State, 445 So.2d 337 (Fla. 1984)(death sentence reduced to life where the victim was clubbed to death during a robbery). Proportionality review requires this Court to "weigh the nature and quality" of the aggravating factors found. Kramer, 619 So.2d at 277.

As in Smalley, Mr. Bates faced increasing financial and family responsibilities leading up to the murder. Moreover the precipitating factors are also similar. In Smalley, it was the crying child. In this case, it was the startled Ms. White who immediately began screaming upon finding Mr. Bates in the office. In both cases, the violence was explosive and the result of extreme emotions and mental impairment. The circumstances surrounding the murder is often a critical factor. *See* Terry v. State, 668 So.2d 954, 965 (Fla. 1996) (finding death sentence disproportionate for murder during a "robbery gone bad"). This Court has already determined that this case involved a burglary which simply got out hand. The explosive nature of the crime and its short duration lessen the nature and quality of the aggravating circumstances.

E. Conclusion

This Record does not support a sentence of death. There is abundant proportionality law from this Court which clearly establishes this crime as one warranting a life sentence. It is not one of "the most aggravated and least mitigated murders," Kramer, 619 So.2d, 278. This Court should impose a life sentence for this murder.

ARGUMENT V

THE SENTENCING COURT NEGLECTED TO EVALUATE NON-STATUTORY MITIGATION IN VIOLATION OF SKIPPER V. SOUTH CAROLINA AND CAMPBELL V. STATE AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

At a presentence evidentiary hearing, Mr. Bates presented additional mitigation to the sentencing court. (R. VIII 1279-84). This mitigation was accepted into evidence but not considered nor weighed by the sentencing court, contrary to well-established law. The law is clear that the sentencing court must both examine and weigh mitigation presented by the defense -- it may not simply ignore it:

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

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

The State did not offer any evidence in rebuttal to this mitigating evidence. "Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence," Santos v. State, 591 So.2d 160, 164 (Fla. 1991). Since the evidence offered by Mr. Bates was not contested by the State, this Court is not bound by sentencing court's finding that ignored this

nonstatutory mitigation. *See* Santos, 591 So.2d at 164, relying on Parker v. Dugger, 498 U.S. 308 (1991).

The sentencing court discussed fully the extensive mitigating evidence that Mr. Bates presented at the resentencing trial. At the evidentiary hearing, Mr. Bates presented additional nonstatutory mitigating evidence. Mr. Bates also addressed this mitigating evidence in his Sentencing Memorandum. (R. III 542). Nevertheless, the sentencing court said nothing about this nonstatutory mitigation.

Mr. Bates presented as Defense Exhibit 1, certified copies of the State of Florida, Department of Corrections inmate records for Mr. Bates. These records were accepted into evidence by the sentencing court. (R. XXXIII - XXXV, Defense Exhibit #1, Certified Copies of the State of Florida, Department of Corrections Inmate Records for Kayle B. Bates). The records establish that Mr. Bates has adjusted well to incarceration. His institutional record, like his life history before this crime, is unremarkable. He has one disciplinary report for a minor offense during the entire period of his incarceration. Kayle Bates has been a model inmate -- he causes no problems and he does what he is told to do. Such evidence has been held to be compelling mitigation. Skipper v. South Carolina, 106 S.Ct. 1669 (1986).

Additionally, Mr. Bates presented a sworn affidavit from himself dated July 24, 1995. The sentencing court accepted the affidavit into evidence. In this affidavit Mr. Bates waives his right to parole:

> I hereby make a knowing and intelligent waiver in perpetuity of my eligibility for parole. I will not seek or accept parole. I choose to spend the remainder of my natural life in prison.

> I would request that the Board of Pardon and Parole file this affidavit in my parole file. I understand that by filing this affidavit that I will never be interviewed by a parole commissioner hearing examiner about parole consideration.

(R. XXXVI, Defense Exhibit #2).

Mr. Bates' waiver of his eligibility for parole was proper mitigation for several reasons. Mr. Bates' waiver is a clear sign of Mr. Bates' remorse and his acceptance of responsibility for the tragic death of Ms. White. *See* Trotter v. State, 576 So.2d 691 (Fla. 1991)(sentencing court finding of remorse as mitigation). This is especially significant in light of the mental health experts testimony that Mr. Bates' rigid super ego prevented him from directly admitting his responsibility for Ms. White's death.

Mr. Bates' waiver of parole is mitigation. *See* Walker v. State, ___ So.2d ___, 1997 Fla. Lexis 1353 (Fla. 1997) (recognizing parole ineligibility as a mitigating factor). Prior to this tragic event, Mr. Bates had followed societies rules, worked hard, loved and supported his family and contributed to society. Under the structured environment of prison, Kayle Bates will likewise follow the rules, work hard, love and support his family and contribute to society. Mr. Bates' jury saw this in him. They also knew, however, that he had already served over half of the mandatory minimum sentence of twenty five years. And the State made sure that the jury focused upon Mr. Bates' future dangerousness. The jury's question about the availability of a life without the possibility of parole sentencing option established that future dangerousness was their only concern. Mr. Bates' waiver of his eligibility for parole was an additional basis for the sentencing court to reject death. *See* Simmons v. South Carolina, 512 U.S. __, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994)(recognizing a capital defendant's right to rebut future dangerousness

evidence with truthful information concerning the defendant's ineligibility for parole, but not reaching the issue whether a capital defendant's parole ineligibility was "mitigating" under Lockett).

The sentencing court, in this order, made no mention of this significant and unrefuted non-statutory mitigation.. This non-statutory mitigation is particularly relevant in this case, where the jury obviously wrestled with the issue of future dangerousness and Mr. Bates' eligibility for parole. The sentencing court erred when it failed to credit the substantial non-statutory mitigation presented by Mr. Bates at the presentence evidentiary hearing. Lockett; Campbell. As this Court has repeatedly stated, the sentencing court must find as a mitigator each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of evidence. Campbell, 571 So. 2d at 419. The State offered no evidence to counter this mitigation. Mr. Bates has presented a "reasonable quantum of competent, uncontroverted evidence" of these mitigating circumstances. Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993), quoting Nibert v. State, So. 2d 1059, 1062 (Fla. 1990); Morgan v. State, 639 So. 2d 6, 13 (Fla. 1994). The trial court should have found that the mitigating circumstances discussed above existed.

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

ARGUMENT VI

THE SENTENCING COURT VIOLATED THIS COURT'S ORDER STAYING MR. BATES' RESENTENCING HEARING WHEN JURORS WERE EXCUSED OUTSIDE THE PRESENCE OF MR. BATES AND HIS COUNSEL AND OFF THE RECORD IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A capital defendant is absolutely guaranteed the right to be present at all critical stages of judicial proceedings. This right is guaranteed by the federal constitution, *see, e.g.,* Drope v. Missouri, 420 U.S. 162 (1975); Illinois v. Allen, 397 U.S. 337 (1970); and Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), by Florida constitutional and statutory standards, Francis v. State, 413 So. 2d 1175 (Fla. 1982), and by Rule 3.180 of the Florida Rules of Criminal Procedure.

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

The federal constitution defines those stages where presence is required as any proceeding at which the defendant's presence has a "reasonably substantial relationship to his ability to conduct his defense." Proffitt, 685 F.2d at 1256. The determination of whether the defendant's presence is required should focus on the function of the proceeding and its significance to trial. Proffitt, 685 F.2d at 1257. In the resentencing proceeding below, the sentencing court violated the order of this Court and violated Mr. Bates "constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence."

Francis, 413 So. 2d at 1177. Compounding this error is the fact that undersigned counsel was also not present and there is no record of the proceedings in question.

After the mistrial was declared in the January 1995 resentencing proceeding, a second resentencing was set for trial on May 15, 1995. On May 3, 1995, a Motion to Continue was filed by undersigned counsel based upon an execution date being set for one of counsel's clients on the same day that Mr. Bates' trial was to commence. (R. III 437-43). At the time, undersigned counsel was the Executive Director of the Georgia Appellate Practice and Educational Resource Center and was representing Darrell Devier, a Georgia death-sentenced inmate with an execution date set for May 15, 1995 at 7:00 p.m. Undersigned counsel requested from the sentencing court a twenty four hour continuance of Mr. Bates' capital resentencing hearing to allow counsel to represent Mr. Devier and Mr. Bates. On May 5, 1995, the sentencing court held a hearing on the motion to continue. Undersigned counsel participated via telephone. The hearing was recorded by a court reporter. (R. XXVIII 1658-77). The Circuit Court denied counsel's request for a one day continuance and presented counsel with the Hobson's choice of having to decide which client to represent -- Mr. Devier facing imminent execution or Mr. Bates facing his third capital sentencing hearing.

Unable to ethically make that choice, undersigned counsel turned to this Court for relief. On May 11, 1995, undersigned counsel filed with this Court a Petition for a Writ of Prohibition and/or for a Writ of Mandamus requesting a twenty-four (24) hour emergency stay of Mr. Bates' capital resentencing trial scheduled to commence on May 15, 1995 at 9:00 a.m. On May 12, 1995, this Court granted the requested relief and stayed the resentencing proceeding for twenty four hours. (R. III 459, Supreme Court of Florida [Order]- Resentencing Proceeding is Stayed

for 24-Hour Period).

Later that same day, undersigned counsel was contacted telephonically by the sentencing court and a telephonic hearing was set to discuss this Court's order staying the resentencing proceeding and what would be done with and told to the jury panel which was scheduled to show up for duty on May 15, 1995. At that hearing, undersigned counsel requested the following procedure be used on May 15 when the jury panel reported: 1) no one from the panel to be used to select a jury for Mr. Bates' case would be excused until the next day, May 16, 1995 -- that the jury panel would be simply told to report back the next day; 2) if the panel was also going to be used for the regular criminal trial calendar, that the number needed would be randomly selected from the larger panel and the remainder told to return the next day; and 3) that Mr. Bates' presence was waived with the understanding that the procedure set forth above would be followed. *See* (R. IV 660-2). The sentencing court agreed to this procedure and the State offered no objection. Of course, undersigned counsel believed that this was all being transcribed and that a record was being made. (R. IV 660).

On May 15, 1995, those procedures were not followed -- jurors were excused despite assurances from the sentencing court that no excusals would be made. Moreover, no record of what actually transpired on May 15 during this excusal process was ever made despite co-counsel's request that the court reporter present make a record of the proceedings. (R. IV 669-70).

On May 16, 1995, upon learning that the agreed upon procedure had not been followed, undersigned counsel moved for a mistrial which was denied. (R. IV 660-2). The sentencing court failed to follow the procedure agreed upon during the May 12 telephonic hearing in

violation of Mr. Bates' constitutional rights, including his right to be present, his right to due process, his right to a trial by a jury of his peers and his right to counsel, and that the sentencing court's actions on May 15 were in contravention of this Court's order staying the resentencing proceeding. Moreover, undersigned counsel proffered that excusals were granted in a discriminatory manner which resulted in African-American jurors being improperly excused from the panel of jurors to be used to select Mr. Bates' capital sentencing jury. (R IV 661). In short, the sentencing court's actions on May 15th were outrageous in light of this Court's order staying the resentencing and the procedures agreed upon by counsel and the sentencing court on May 12th.

Mr. Bates has only recently learned that no record of the May 12th telephonic hearing can be found. (R. XXXIII 620). Mr. Bates does not concede that a transcript of the May 12th proceeding does not exist. A review of the May 16, 1995, transcript makes clear that a court reporter was present during the May 12th hearing. Undersigned counsel stated on the record that:

> With all due respect, Your Honor, on Friday we had a telephonic conference, based upon the Florida Supreme Court's grant of my writ of prohibition staying these proceedings until today. I believe a court reporter was present and I believe the record will establish what I'm saying.

(R. IV 660). Neither the sentencing court nor the State disagreed with counsel's assertion that a court reporter was present. In fact, at the same proceedings, the sentencing court acknowledged that there was a court reporter present to transcribe the May 12 hearing:

> And I think that the record will establish that 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 . . .

(R. IV 669)(emphasis added). Mr. Bates contends that a record was made and that he has done everything he can to have the transcripts made a part of the record. (R. XXXV).

Finally, a review of the record as it is now constituted establishes that a record of the May 12th proceeding is relevant and necessary to Mr. Bates' appeal. *See* Transcript of May 16, 1995 proceedings (R. 657-70)(discussion of the May 12, 1995 hearing). The record of this proceeding will establish that the sentencing court misled counsel and as a result violated this Court's order and Mr. Bates' constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and his corresponding rights under state law. Because the transcripts can not be located, this Court must accept counsel's representations or the case must be remanded so that the record can be reconstructed.

A defendant's constitutional right to presence at his criminal trial is a cornerstone of the American justice system. This right grows out of the Confrontation Clause of the Sixth Amendment, but has been expanded by the Due Process Clause to cover many situations where the defendant is not confronting witnesses or evidence. United States v. Gagnon, 470 U.S. 524 (1985); *see* United States v. Chrisco, 493 F.2d 232 (8th Cir. 1974) (voir dire); Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984) (communications between judge and jury); Lee v. State, 509 P.2d 1088 (Alaska 1973) (rendering of the verdict).

Mr. Bates was denied this basic right and his right to counsel when the sentencing court excused potential jurors from his panel without his presence and in the absence of undersigned counsel. This was in direct contravention of Kentucky v. Stincer, 482 U.S. 730 (1987), in which the Supreme Court held that "a defendant is entitled to be present at any stage of a criminal

proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." 482 U.S. at 745. The Court recognized that a defendant had no right to be present at a proceeding "when presence would be useless, or the benefit would be just a shadow." Stincer, 482 U.S. at 745, *quoting* Snyder v. Massachusetts, 291 U.S. 97, 106-107 (1934). In this case, not only was Mr. Bates' not present, but his counsel was absent also.

Following Stincer, several courts have held that if a defendant could contribute to the fairness of the particular hearing or assist in the decision making process, he has a right to be present at that hearing. State v. Seaberry, 388 S.E.2d 184 (N.C.App. 1990); State v. Caldwell, 388 S.E.2d 816 (S.C. 1990); United States v. Shukitis, 877 F.2d 1322 (7th Cir. 1989). In Mr. Bates case, his presence was essential to the fairness of the hearings as he had the most to contribute to the decision making process. Under the rule of Stincer, Mr. Bates was clearly entitled to attend this session at which jurors were excused in a potentially racially discriminatory manner. His presence and the presence of his counsel would have significantly affected the outcome and the fairness of the proceeding. This involuntary absence constitutes fundamental error, *see*, Salcedo v. State, 497 So. 2d 1294 (Fla. 1st DCA 1986), and Mr. Bates is entitled to relief on this claim.

ARGUMENT VII

MR. BATES WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE SENTENCING COURT DENIED HIS REQUEST FOR EXPERT ASSISTANCE NECESSARY TO PRESENT HIS PENALTY PHASE DEFENSE THAT HE SUFFERED FROM ORGANIC BRAIN DAMAGE

A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind: Blake v. Kemp, 758 F.2d at 529. In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her clients mental health background, see O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel, supra; Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The mental health expert also must protect the client's rights, and violates these rights when he or she fails to provide adequate assistance. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); Mason v. State, supra. The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37.

Florida law made Mr. Bates' mental condition relevant to sentencing in many ways: (a)

specific intent to commit first degree murder; (b) diminished capacity; © statutory mitigating factors; (d) aggravating factors; and (e) a myriad of nonstatutory mitigating factors contained in Fla. Stat. Secs. 921.141(5) (a)-(I). Mr. Bates was entitled to professionally competent mental health assistance on these issues.

Mr. Bates was evaluated pretrial by Dr. McMahon and Dr. Larson. Prior to trial, Dr. Larson informed counsel that a reasonable standard of care dictated that a neuropsychological examination should be conducted on Mr. Bates. Dr. Larson opined that Mr. Bates' cognitive test results were very atypical indicating a high probability of neuropsychological impairment. Counsel moved for appointment of Dr, Barry Crown, a clinical psychologist and neuropsychologist, so that he could evaluate Mr. Bates. (R. III 433-4). On May 5, 1995, the sentencing court appointed Dr. Crown to evaluate Mr. Bates. (R. XXVIII). Dr. Crown evaluated Mr. Bates and opined that he suffered from organic brain impairment.

During opening statement, counsel for Mr. Bates told the jury that they would hear from Dr. Crown concerning Mr. Bates' mental impairments. (R. IX 48-9). During the resentencing proceeding, the State deposed Dr. Crown and determined that he opined that Mr. Bates had organic brain impairment. (R. XI 322). The State then filed a motion for diagnostic testing. (R. III 479- 81). Mr. Bates objected to further testing in the middle of the trial because this was not new information and additional testing at this stage of proceedings would unfairly disadvantage Mr. Bates. Mr. Bates pointed out that Dr. Larson testified in a February 1995 deposition that Mr. Bates suffers from mild organic brain damage. (R. XI 323-6). The sentencing court granted the State's motion. The next day, Mr. Bates was subject to an MRI during the lunch hour. (R. XII 431). Later that day, Mr. Bates was given a report from Dr. Gregory Presser relating to the MRI

conducted on Mr. Bates earlier that day. (R. XII 497).

The next morning, Mr. Bates moved for appointment of a neuroradiologist to consult with the defense concerning the test results and how to respond to the MRI examination. Mr. Bates also asked to be allowed to subject Mr. Bates to further testing. (R. XIII 506-9). Mr. Bates explained that Dr. Crown was not a neurologist nor a neuroradiologist and that he was not qualified to read the MRI results. (R. XIII 509). The sentencing court denied Mr. Bates' motion for appointment of expert assistance and further testing. (R. XIII 508-9). In support of his motion, Mr. Bates proffered the deposition of Dr Crown. (R. XIII 509).

Later that day, Mr. Bates renewed his motion for additional expert assistance and testing citing Ake v. Oklahoma, 470 U.S. 68 (1985). Counsel for Mr. Bates then proffered that:

> based upon my inability to have experts to help me rebut this MRI, I am abandoning that line of defense because I do not have the money nor the expertise nor the testing to take it any further than this, Your Honor. And I will not be proffering any evidence concerning organic brain damage despite the fact that I believe Mr. Bates suffers from it and despite the fact that I believe that was a contributing factor as to what happened on June the 14th, 1982 at approximately 1:05 p.m.

(R. XIII 531). Because of the sentencing court's actions, Mr. Bates was forced to abandon a significant mental health defense involving organic brain damage. *See* State v. Sereci, 502 So.2d 1221, 1224 (Fla. 1987); Mason v. State, 489 So.2d 734 (Fla. 1986).

In sum, as addressed herein, Mr. Bates was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Mr. Bates was sentenced to death in violation of his due process and equal protection rights, see Ake v. Oklahoma, supra, as the professional inadequacies discussed herein resulted in the violation of Mr. Bates' rights to present viable penalty phase

defenses. At sentencing, evidence which would have made a significant difference went unpresented: evidence that could have affected whether substantial statutory and nonstatutory mitigation was established and whether aggravating factors would have been undermined. Mr. Bates was deprived of his most essential rights -- i.e., important, necessary, and truthful information was withheld from the tribunal charged with deciding whether he should live or die. The inadequacies discussed herein "precluded the development of true facts,: and "severe[d] to pervert the jury's deliberations concerning the ultimate question whether in fact [Mr. Bates should live or die]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986) (emphasis in original). The resulting sentence of death must be vacated.

ARGUMENT VIII

MR. BATES' SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE AGGRAVATING CIRCUMSTANCES, AND THE AGGRAVATING CIRCUMSTANCES WERE IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF THIS COURT'S PRECEDENT AND THE EIGHTH AND FOURTEENTH AMENDMENTS

The sentencing court instructed the jury on three aggravating circumstances: 1) the capital murder was committed while the was engaged in the commission of or attempt to commit Kidnaping or Attempted Sexual Battery; 2) the capital felony was committed for pecuniary gain; and 3) the capital felony was especially heinous, atrocious or cruel. The sentencing court ultimately found that the State had proven these circumstances beyond a reasonable doubt. As to each of the aggravating circumstances, the sentencing erroneously instructed the jury on the aggravating circumstances and improperly found the found the aggravating circumstances to apply.

A death penalty statute is unconstitutional if it has "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing" could occur. Godfrey v. Georgia, 446 U.S. 420, 428 (1980). The Eighth Amendment requires great care in defining aggravating factors, Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988), especially in "weighing" states such as Florida. Stringer v. Black, 112 S.Ct. 1130 (1992). Because of the jury's important role in Florida capital sentencing proceedings, an unconstitutional jury instruction renders a resulting death sentence unconstitutional, notwithstanding that the judge is the "ultimate sentencer." Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926 (1992).

The three aggravating factors involved in this case are facially vague and over broad. *See* Godfrey, 446 U.S. at 422; Maynard v. Cartwright, 486 U.S. at 361-62; Clemons v. Mississippi, 494 U.S. 738 (1990); Espinosa v. Florida, 120 L.Ed.2d 854 (1992); Richmond v. Lewis, 113 S.Ct. 528 (1992). As written, these aggravating circumstances: fail to narrow the class of persons eligible for the death penalty, Godfrey, 446 U.S. at 422; fail to guide the discretion of the sentencers, Maynard, 486 U.S. at 361-62; or undermine the meaningfulness of appellate review, Godfrey, 446 U.S. at 432-33. The plain statutory language of these three aggravating factors do not adequately inform a jury "what they must find" in order to determine whether the aggravating factor has been established and leave the jury with "open-ended discretion" about the true meaning and intent of the statutory language. Maynard, 486 U.S. at 362.

Mr. Bates requested jury instructions which included this Court's narrowing construction for each aggravating circumstance. (R. III 488-9). The sentencing court refused to give the proposed instructions. Instead, the sentencing court gave the standard instructions on each

aggravator. The instructions given are unconstitutional under Espinosa and failed to give the jury adequate guidance under the Eighth Amendment.

Moreover, the sentencing court erroneously determined that the aggravating circumstances had been properly proven beyond a reasonable doubt.

The State has failed to prove beyond a reasonable doubt that the primary motive for the murder was to attempt sexual battery and commit kidnaping. Physical evidence at the scene and the statements of Mr. Bates suggest that Ms. White had already been stabbed before Mr. Bates carried her out of the office. Moreover, there is absolutely no physical evidence to support a finding of attempted sexual battery. The only evidence that the State can point to is the tentative admission of Mr. Bates -- an admission that he contradicts in previous and subsequent statements. Photographs from the crime scene 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. (R. XVI 1315).

Moreover, there is no evidence that the murder of Ms. White was primarily motived by pecuniary gain. Although Mr. Bates' motive for entering the office was most likely pecuniary gain, his actions after he was confronted by Ms. White and sprayed with mace had nothing to do with pecuniary gain. The record before this Court now establishes that there has never been a shred of evidence in this case that Mr. Bates forcibly removed the ring from Ms. White's finger. *See* Bates v. State, 465 So.2d 490 (Fla. 1985)(finding that "that the victim's finger had been injured when [her] ring was removed"). Mr. Bates presented a photograph that shows that Ms. White has a small wound on the top of her ring finger above the fingernail, but no wounds which are consistent with the ring being forcibly removed from her finger. (R. XXXVII, Defense

Exhibit #3). At Mr. Bates' previous capital sentencing proceedings, the trial court found that Ms. White's "ring was ripped from her finger, severely tearing the finger." Bates v. State, 465 So.2d 490 (Fla. 1985) (quoting the trial court's findings in support of the death sentence). This is simply not true. Absent this evidence, the State has failed to prove the existence of this aggravating circumstance.

Finally, the heinous, atrocious, or cruel aggravating circumstance applies only to tortuous murders -- those that evidence extreme and outrageous depravity as exemplified either, by the desire to inflict a high degree of pain or utter indifference to, or the enjoyment of the suffering of another. The State has failed to prove beyond a reasonable doubt that Mr. Bates intended that the crime be deliberately and extraordinarily painful. The evidence before this Court establishes that the entire incident occurred in less that three minutes and that Mr. Bates "reacted" to the situation -- a situation which simply got out of hand because of the surprise, fear and mace. The State in closing argument conceded that the only thing that makes this crime arguably heinous, atrocious and cruel is the fact that "in the last three minutes of her life Renee White was able to look up [at Mr. Bates]." (R. XV 778). There was no conscience decision to be deliberately and extraordinarily painful.

Since the aggravating circumstances were clearly erroneous, the jury recommendation was unreliable. Had the jury been instructed properly concerning aggravating circumstances, the result could have been very different. In this instance, the application of Section 921.141, Fla. Stat., was unconstitutional. Rather than "genuinely narrow[ing] the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742 (1983), here the statute's application broadened the class and enhanced the likelihood of a death recommendation

because of the instruction on invalid aggravating circumstances. What occurred was fundamental error. The fundamental unfairness in this instance rendered Mr. Bates' capital sentencing proceeding unreliable. This Court should vacate the death sentence and remand the for resentencing.

ARGUMENT IX

MR. BATES WAS DENIED AN INDIVIDUALIZED AND RELIABLE SENTENCING DETERMINATION WHEN THE SENTENCING COURT PRECLUDED MR. BATES FROM INVESTIGATING, DEVELOPING AND PRESENTING EVIDENCE TO HIS CAPITAL RESENTENCING JURY THAT HE WAS INNOCENT OF THE OFFENSES

In Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court held that "the sentencer [must] not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604. The Supreme Court has consistently reaffirmed Lockett. In Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986), quoting Eddings v. Oklahoma, 455 U.S. 104, 114 (1982), the Supreme Court held that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" In Hitchcock v. Dugger, 107 S.Ct 1821 (1987), the Supreme Court held that a Florida sentencing jury cannot be limited in its consideration of nonstatutory mitigating circumstances. These principles apply with full force to Mr. Bates' case.

During the resentencing proceeding, Mr. Bates was precluded from investigating, developing and presenting evidence of Mr. Bates' innocence of the offenses. Mr. Bates moved for funds to investigate issues relating to whether Mr. Bates was actually innocent of the

offenses. (R. XXI 1372). The sentencing court denied the motion and further precluded Mr. Bates' from presenting lingering doubt evidence as mitigation. The court informed Mr. Bates that is was inappropriate to attempt to offer what appears to be evidence creating a doubt as to whether or not he is, in fact, guilty of the charges at the resentencing hearing. (R. XXI 1377).

The Supreme Court made clear that "[t]he sentencer may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration." Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982). Nevertheless, this is precisely what occurred here: the sentencing court excluded relevant mitigating evidence -- lingering doubt evidence -- from the jury's consideration. *See* Smith v. Wainwright, 741 F.2d 1248, 1255 (11th Cir. 1984); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981). This violated the Eighth Amendment. For each of the reasons discussed above the Court should vacate Mr. Bates' unconstitutional sentence of death.

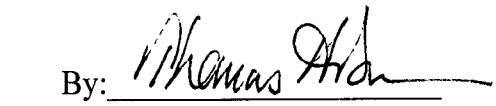
CONCLUSION

Appellant, Kayle Barrington Bates, based on the foregoing, respectfully urges that this Court vacate his unconstitutional death sentence, impose a sentence of life without the possibility of parole and grant all other relief which the Court deems just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing document has been furnished by United States Mail, first class postage prepaid, to all counsel of record on the 29th day of October, 1997.

Respectfully submitted,

THOMAS H. DUNN
Florida Bar No. 871753
277 Alexander Street, Suite 900
Rochester, New York 14607
(716) 232-5480

By: 
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by United States Mail, first class postage prepaid, to Assistant Attorney General Carolyn M. Snurkowski, on this the 29th day of October, 1997.

THOMAS H. DUNN