SUPREME COURT OF FLORIDA

CASE NO. 87,469

Lower Case No. 93-2357CF A02
(Palm Beach Co.)

NICHOLAS LYNN HARDY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM
THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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Case No. 87,469
Nicholas L. Hardy v. State of Florida

CERTIFICATE OF INTERESTED PERSONS

Counsel for Appellant NICHOLAS L. HARDY certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. The Honorable Virginia Gay Broome
   Circuit Court Judge
   15th Judicial Circuit of Florida
   (trial judge)

2. Assistant State Attorney Daniel Galo
   (trial counsel for State of Florida)

3. Carey Haughwout
   (counsel for Appellant Nicholas Hardy)

4. Nicholas L. Hardy
   (Defendant/Appellant)

5. State Attorney Barry Krischer
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6. Office of the Attorney General
   (counsel for Appellee State of Florida)

7. Dean L. Willbur, Jr.
   (trial counsel for Defendant Nicholas Hardy)

8. Evelyn Ziegler
   (trial counsel for Defendant Nicholas Hardy)

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PRELIMINARY STATEMENT

The Appellant, NICHOLAS L. HARDY, is the Defendant in the trial court and shall be referred to as "HARDY" , "NICHOLAS" or "Defendant" in this brief. The Appellee is the State of Florida and shall be referred to as "State" in this brief.

Citations to the record for pleadings will be R ___ and for all transcripts will be TR ___ followed by the appropriate page number.

STATEMENT OF THE CASE

On February 25, 1993 Sgt. Rocky Hunt was killed. On February 26, 1993 NICHOLAS HARDY was arrested for the homicide of Sgt. Rocky Hunt while he was at the hospital. (R 97). On March 17, 1993 the State moved to have HARDY released on his own recognizance. The State represented that HARDY was not competent for first appearance. (R 117-119). The Court entered the order (R 120).

On March 24, 1993 the State moved to have HARDY'S mother appointed as his guardian since he was still not competent. (R 123-125). On March 25, 1993 the Court appointed counsel for HARDY and also appointed Roger Colton as an attorney ad litem to report to the Court on the Defendant's progress. HARDY was still in the hospital at this time. The Court further revoked his recognizance release and placed him on in-house arrest at the hospital. (R 126-129).

On March 30, 1993 defense counsel moved to stay proceedings and determine competency. (R 133-137). On April 14, 1993 a grand jury returned an Indictment against NICHOLAS HARDY for first degree murder of Sgt. Hunt, grand theft of a firearm and unlawful taking of a firearm of a law enforcement officer. (R 145-147).

On April 15, 1993 a hearing was conducted concerning the Defendant's release from the hospital. The Court entered an order continuing the Defendant's status of house arrest but permitting him to be at his mother's home. (R 152-154).

On April 20, 1993 the State moved to toll speedy trial as a result of the Defendant's continued incompetence and incapability of communicating. (R 158-160). The Court granted the motion. (R 162).

The Defendant remained at his mother's home with regular reports to the Court from the mother and Attorney Ad Litem Colton. (R 161, 163, 173, 175, 179, 195, 197, 199, 221, 223, 225). On August 13, 1993 the Court held a competency hearing. The Court declared the Defendant incompetent. (TR 397). The Court appointed the diagnostic team of HRS to evaluate placement for the Defendant in the Mentally Retarded Defendant's Program at Florida State Hospital. (R 263-265). On December 2, 1993 a hearing was held concerning the Defendant's placement given his incompetence. The Court entered an order involuntarily hospitalizing the Defendant at the Mentally Retarded Defendant's Program at Florida State Hospital. (R 378-379).

The Court received six month status reports indicating the Defendant remained incompetent until November 21, 1994 when the Court was informed that the Mentally Retarded Defendant's Program determined that the Defendant was no longer incompetent. (TR 595). A competency hearing was held on February 23, 1995. After hearing testimony the Court declared the Defendant competent to stand trial and set a trial date. (R 459-462).

Motions challenging the constitutionality of the death penalty were filed October 19, 1995. (R 600-693). A Motion to Dismiss Count II or III of the Indictment was granted by the Court

on October 20, 1995. The State opted to go forward on Count III of the Indictment. (TR 887).

On October 23, 1995 jury selection began. During jury selection the defense moved for an additional competency hearing because of the express concern that the Defendant was unable to understand the jury selection proceedings. (TR 1544). On October 26, 1995 a competency hearing was held wherein the Court heard testimony from two doctors. The Court found the Defendant competent to proceed. (TR 1666-1668). On October 30, 1995 jury selection concluded and a jury of twelve persons was sworn in. (TR 2204). The jury returned a verdict of guilty as charged on November 3, 1995. (R 740-741). Penalty proceedings were scheduled to begin November 27, 1995.

A Motion for New Trial was filed. (R 887-891). The Court denied the Motion for New Trial. (TR 3160). Motions concerning the constitutionality of victim impact evidence and death penalty statute were heard and denied. (TR 3132-3134). Testimony was presented to the jury in the penalty phase. The jury returned a recommendation of death on November 30, 1995 by a vote of 9 to 3. (R 941).

STATEMENT OF THE FACTS

Guilt Phase

On February 25, 1993 Sgt. Rocky Hunt communicated to dispatch that he was with four juveniles. (TR 2252). Several minutes later backup officer Fox arrived to find Sgt. Hunt mortally wounded. (TR 2253). Shortly thereafter another gunshot was heard in the area. (TR 2441). Several hours later NICHOLAS HARDY was found in a holly hedge by a canal with a gunshot wound to his head. (TR 2592). HARDY was airlifted to the hospital where he remained in a coma like state for several weeks. (TR 5-60, 2317).

An attorney ad litem was appointed to report to the Court on the Defendant's progress. (R 126). On April 15, 1993 the Court was notified that the hospital intended to release the Defendant. (TR 78). The Defendant was unable to walk, talk or feed himself. (TR 88-94). The Court released the Defendant to his mother, Julia Shell, a certified RN, on house arrest. (TR 111). Competency reports were ordered. (R 73).

Throughout April, May, June and July the mother and attorney ad litem submitted regular reports to the Court as to the Defendant's progress. In May the attorney ad litem reported that HARDY was still paralyzed on the right side, unable to walk or talk, incontinent, and had a "childlike" perpetual smile. (R 169-172). By June the mother reported that the Defendant was being potty-trained although he was still often incontinent. He was regaining some ability to walk and was speaking one to two words repeating what was said to him. He had very little use of his

right side. (R 198, 200). On July 7, 1993 the Defendant was remanded to the county jail based upon his improved physical condition. (TR 194).

A competency hearing was held in August. Dr. Salmansohn, a neuropsychologist who was treating HARDY, testified that he was incompetent as a result of the significant brain injury he had suffered. Basically, the Defendant was missing a significant part of his brain. (TR 218). The doctor reported that the Defendant could say a few words, particularly often repeated phrases. (TR 230). The doctor testified that the Defendant's language impairment was too severe to participate in any meaningful manner in the Court process. However, the doctor believed that given the dramatic improvements the Defendant had made that the prognosis was good that at some point he would become competent. (TR 242). The doctor indicated that 50% of the Defendant's left frontal lobe area was destroyed and that this area of the brain plays a significant role in all cognitive functioning. (TR 248). Additionally, there were structural changes to the Defendant's right and middle frontal lobe. (TR 246). The doctor was confident that the Defendant was not malingering. (TR 249).

Dr. Alexander, a psychologist appointed by the Court to perform a competency evaluation, testified that he initially met HARDY at his mother's home and then again at the jail. The first time he met the Defendant he was completely non-communicative. The second time, the week prior to the hearing, the Defendant could answer with single words or short phrases. (TR 269). The doctor

opined the Defendant was incompetent to stand trial. (TR 273).

Dr. Sternthal, a defense expert, testified to his meetings with the Defendant over the course of several months. Dr. Sternthal testified that the Defendant performed on various tests like a four to six year old child and that his ability to interact with others was like a very young child. (TR 286-287). Dr. Sternthal opined that the Defendant's IQ was 49, that he processed information and recalled information like a severely retarded person. (TR 287, 296-297). He further indicated that HARDY was euphoric, happy, with no fear or anxiety and that he did not comprehend the serious situation that he was facing given the State's intention to seek the death penalty if there was a conviction on the capital charge. (TR 323-324).

Several deputies from the jail testified that the Defendant was able to take showers, obtain his own soap, sweep out his room, and knew that his mother worked at the hospital. (TR 351-372). The deputies indicated that the Defendant did not really speak in conversation but could make one to three word requests. (TR 365-369).

The Court declared the Defendant incompetent based upon the unanimous agreement of the doctors. (TR 397). Because of the testimony indicating HARDY was retarded the Diagnostic Team of HRS was appointed to conduct an evaluation for determining proper placement. (R 259-262). On December 2, 1993 the Court held a hearing to determine where the Defendant should be placed while incompetent. Reports were obtained from a number of doctors and

HRS. (TR 430). Steve Stoltz, Program Supervisor for Developmental Services, testified that the Mentally Retarded Defendant Program at Florida State Hospital in Chattahoochee, Florida was the appropriate placement given the diagnosis of mental retardation. (TR 437). Mr. Stoltz indicated that HARDY had an IQ in the mildly retarded range and had severely delayed adaptive functioning as a result of his brain damage. (TR 442).

Dr. James Barnard, a psychologist who contracts with HRS Developmental Services, testified that he performed a number of tests on the Defendant. Specifically, the Defendant's full-scale IQ was 69 with a verbal IQ of 60 and a performance IQ of 83. (TR 466). HARDY'S adaptive functioning was profoundly delayed. (TR 470). Another words, the Defendant had very limited daily living skills. The doctor opined that HARDY was mentally retarded as a result of his neurological injury. (TR 475). The doctor also noted that the Defendant had an inappropriate affect when discussing the offense and other matters in that he was smiling and happy. (TR 484-485). Apparently, the portion of the brain that the Defendant injured is the same area that people in the past had been given lobotomies under the belief that it took away violent tendencies. (TR 501).

The State argued that the Defendant met the criteria for mental retardation and as such should be sent to the Mentally Retarded Defendant Program. (TR 522-526). The Court agreed and entered an order committing him to HRS. (R 378-379).

The Defendant remained at the Mentally Retarded Defendant

Program for approximately 14 months. In the interim the Court received several six month reports indicating the Defendant remained incompetent. (R 411). In November, 1994 Dr. McKenzie of the Mentally Retarded Defendant Program sent a report indicating that HARDY was competent to stand trial. (TR 595).

On February 23, 1995 a competency hearing was held. The Court considered the reports of Dr. Sternthal, Barnard, and McKenzie. (TR 615). Dr. McKenzie testified at the hearing. He is the senior psychologist at the Mentally Retarded Defendant Program. He testified that the Defendant received training on trial procedure, crimes and consequences as well as self-management skills and language skills. (TR 619). He believed the Defendant's full-scale IQ was now 81 with a 74 verbal and a 96 performance IQ. (TR 621). The doctor testified that HARDY denied any memory of events but otherwise was competent for trial as long as questions and statements were kept simple and to the point. (TR 626-627). The doctor did not believe that the Defendant was malingering and that he was cooperative in his participation in the program. (TR 630).

Dr. Barnard testified to seeing the Defendant on a number of occasions prior to the hearing. He readministered IQ tests and concluded that the Defendant was functioning on a borderline intellectual range with a verbal IQ of 72, a performance IQ of 89 and a full-scale IQ of 77. (TR 659). The doctor testified that the Defendant continues to have delays in adaptive behavior most pronounced in communication. (TR 664). He believed that HARDY was

a bit more appropriately distressed about his situation although he was still silly and giddy at times. (TR 676). The doctor opined that the Defendant was competent in most areas to stand trial but continued to have difficulty communicating, could not read or write, and had problems with concentration, memory, verbalizing, and comprehension. (TR 686, 690, 696). HARDY'S adaptive behavior was still in the severely mentally retarded range. (R 698).

Dr. Sternthal testified that HARDY was incompetent, that he could not understand or process information in a courtroom, that he could not withstand cross-examination, and continued to have memory problems. (TR 762-767). Dr. Sternthal also commented that the Defendant did not appreciate the seriousness of the offense and continued to be euphoric. (TR 754).

The Court ruled that the Defendant was competent to stand trial. (TR 806-807). Thereafter, the State requested that the Defendant be returned to Chattahoochee pending trial in order to insure that he maintains competency. (TR 807-808). Defense counsel objected to sending him back to Chattahoochee given the need to have him present for proceedings. (TR 817). The Court agreed that the Defendant should remain in Palm Beach County pending trial. (TR 810).

Trial began in this matter on October 23, 1995. Because of the issue of the death penalty and the publicity surrounding this case, 150 jurors were questioned, 48 of whom remained after initial challenges for cause. (TR 1196, 1392, 1881). During jury selection, the defense requested another competency hearing. (TR

1544). The Court ordered competency evaluations and held a competency hearing in the middle of jury selection. (TR 1565).

Dr. Heiken, a clinical psychologist, testified for the defense that he believed the Defendant was not competent in that he was unable to process information. Dr. Heiken testified that HARDY could repeat what had been said but could not explain what had occurred. (TR 1588). He believed the Defendant was well trained to give back responses but did not have an understanding of the process. (TR 1592).

Dr. Barnard testified that he believed the Defendant was competent but that proceedings should be slowed down in order to ensure that he could follow the proceedings. (TR 1654-1655). Dr. Barnard also testified that a third person would be helpful to explain to HARDY things that were occurring in Court. (TR 1644). Based upon the testimony of Dr. Barnard, the Court found the Defendant was competent. (TR 1666-1668).

At the conclusion of voir dire, the parties exercised their peremptory challenges. Over the defense objection, the State excused three black females. The State proffered that one juror, Ms. Gibson, was being excused because of her age and that she was a teacher's aid. (TR 2196). The State explained it was excusing Ms. Magee, a black female, because of her son's unsuccessful efforts to obtain employment with the Sheriff's Office. (TR 2199). Finally, the State explained its peremptory challenge of Ms. Billy Sanders, a black female, on her views of the death penalty. (TR 2204). The Court found the State's reasons were neutral and

permitted the peremptory challenges.

The evidence at trial revealed that on February 25, 1993 at 11:00 p.m. Sgt. Rocky Hunt, Palm Beach Sheriff Office, put out a radio transmission that he was investigating an alarm at a bank. The next transmission was that it was a malfunctioning alarm and that he was going back in service. At 11:04 Hunt transmitted to dispatch that he was out with four juveniles. (TR 2264-2267). Deputy Dale Fox responded as a backup within three minutes. Fox found Hunt on the ground by the driver's side of his patrol car, apparently shot in the head. (TR 2255). Sgt. Hunt's firearm was missing. (TR 2260).

Ernest Scott testified that he was in the area of the shopping center around 11:00 p.m. when he saw a Sheriff Officer with four juveniles in front of the patrol car. Mr. Scott went into a store and got cigarettes and when he came out he saw another Sheriff vehicle there. Mr. Scott assumed the juveniles had run and that the officers were chasing them. (TR 2283-2284).

Kenneth Gallon testified that he was in the intersection of Lantana and Jog Road when he saw a deputy's car and individuals standing around the car. As he was crossing through the intersection he saw a muzzle flash and saw something fall to the ground. Mr. Gallon testified he saw four individuals run and then saw one come back, bend down, and run off again. (TR 2287). He then saw the officer on the ground. He reported to the clerk at a

gas station what he had seen so that they could call 911. (TR 2288).

Deputy Glenn Maxwell, a helicopter pilot, testified that he conducted a search in the surrounding area with an infrared light on a helicopter. (TR 2306). Maxwell testified to seeing a person under some heavy bushes. (TR 2308).

Deputy John Navaro testified that he was one of the first officers responding to the area. He was at Plantation Mobile Home Park setting up a perimeter. (TR 2441). At 11:17 p.m. he came into contact with Scott Allen at the mobile home park. Scott indicated he was looking for a friend's house. (TR 2442). While speaking with Scott, Navaro heard a gunshot at 11:19 p.m. (TR 2443). Navaro took Scott's address and released him. (TR 2444).

Deputy Fred Rifflard was also in the Plantation Mobile Home Park setting up a perimeter after receiving the call concerning the shooting. (TR 2434). As he was standing by a trailer he was told by dispatch that a resident had called in reporting a black male hiding by her trailer. (TR 2436). Rifflard came into contact with Glenn Wilson as he was coming out of a carport. Glenn was detained and turned over to Detective Poje at approximately 12:50 a.m. (TR 2437).

Canine officers Bechtel and Rogers testified to searching a canal area near where Hunt's vehicle was parked. The canine officers crossed the canal and were searching along a holly thicket which lined the canal. One canine unit apprehended Ricky Rodriguez who was hiding in the bushes. (TR 2592). The helicopter unit

which was searching overhead indicated that a body was seen 50 to 75 feet from where Ricky was found. Bechtel entered the bushes and let his dog loose. (TR 2592). He then heard the dog struggling and tearing at something. He could see the dog pulling at an individual later identified as NICHOLAS HARDY. (TR 2593). Bechtel got his dog off HARDY, handcuffed and patted him down. He was not moving or responding. (TR 2593). Officer Rogers believed he was dead. (TR 2614). The officers then checked and found he was still breathing. HARDY was drug out by the ankles from the bushes. (TR 2615). As he was being drug out, several officers saw a gun emerge from under his body. (TR 2596, 2616). The gun was taken into evidence. (TR 2582). The gun was later identified as the 9 mm firearm taken from Sgt. Hunt. (TR 2258-2259).

NICHOLAS HARDY was airlifted to Delray Community Hospital. Detective Gehring had contact with HARDY at the hospital and testified to seeing a hole in the top of his head with brain matter and blood oozing out. (TR 2320). Dr. Sachs, a neurosurgeon at Delray Community Hospital, treated HARDY. Dr. Sachs testified he had a gunshot wound which entered the roof of his mouth and exited through the top of his head. Brain matter was coming out of the top of his head when he examined him. (TR 2471). A bullet fragment was removed from HARDY'S head. (TR 2472). Later during surgery further brain matter was removed from HARDY. (TR 2476).

Ricky Rodriguez testified that he was with Glenn Wilson and Scott Allen on the night of this incident in Glenn's car. The three young men went to the Defendant's home. The Defendant got in

the car with them. Ricky said he saw HARDY with a .38 which he put in the car. (TR 2333). As the youths were driving, their car broke down and they had to push it into the Winn Dixie parking lot. (TR 2334). They then left the car and were walking through the parking lot. HARDY at that time showed Ricky and the others the .38 and attempted to hand it to them. The gun was handed back to HARDY. (TR 2335).

As they were walking on the street a Deputy Sheriff pulled up in front of them. Ricky testified the deputy told them to stand in front of the car and began patting them down. The deputy patted Glenn down first. He was coming up to Ricky to begin patting him down when Ricky saw a flash and the deputy fell to the ground. (TR 2336). Ricky said his ears were ringing from the noise when he heard a second shot. (TR 2339). Glenn and Scott began running. Ricky followed them. (TR 2340). All four boys met up at a fence which was behind the shopping center and began climbing the fence. (TR 2340). Ricky said HARDY had two guns before climbing the fence: a .38 in one hand and a 9 mm in another. (TR 2341).

Ricky testified that everyone went over the fence and ended up in the trailer park. (TR 2343). At that point, the four boys split up and HARDY and Ricky ran behind some trailers. They ended up by a canal going through some bushes. (TR 2344). HARDY still had the 9 mm but did not appear to have the .38 in his hand. (TR 2345). HARDY and Ricky crossed the canal and went through a thick hedge. At that point they saw a helicopter and ran back into

the bushes. (TR 2347). Ricky then heard a gunshot. He called HARDY'S name but received no response. (TR 2348). Shortly thereafter Ricky was found by dogs and arrested. (TR 2349). Ricky gave a complete statement at the hospital and again later at the Sheriff's Office. He participated in a reenactment which was videotaped and introduced into evidence. (TR 2350-2351).

Ricky testified that there had been no discussion about anyone getting hurt that night. (TR 2358). He was not charged with any crime as a result of what had occurred. (TR 2356). The boys weren't doing anything wrong when the deputy approached them. (TR 2364).

Scott Allen testified that he was with the other boys when the car broke down. (TR 2379-2380). As they were walking across the parking lot HARDY pulled out a .38, showed it to them, and put it back in his jacket or waistband. (TR 2380). Thereafter a patrol car pulled up in front of them. Scott walked up and put his hands on the hood. The officer told him to get off his car. (TR 2381). The officer then went over to Glenn and patted him down. As he started to go to Ricky to search him, HARDY came up from behind and shot the officer two times. (TR 2381). Scott testified that he and Glenn ran first, Ricky was behind him and HARDY was over by the police officer. (TR 2382). HARDY caught up with them later saying "we're going to die, we're going to die". At that time he saw him with the officer's 9 mm. (TR 2383).

Scott ran to the trailer park and shortly thereafter was met by a deputy sheriff. As he was speaking with the deputy

sheriff he heard a gunshot. (TR 2385). He went home and "passed out" because of the drugs and alcohol he had that day. (TR 2389). Several hours later the police came and woke him up and took him to the Sheriff's Office. Over the defense objection, the State elicited testimony from Scott that HARDY also had a .22 rifle with a scope which he put in the car that evening. (TR 2397).

Glenn Wilson testified that prior to the incident he had known HARDY several months. (TR 2404). All the boys were in his car when the car broke down. They began walking when the police car stopped. Glenn testified that prior to being stopped HARDY had shown them a gun and tried to pass it to the others. HARDY had asked Glenn to take the gun but he refused. Glenn had seen HARDY with the gun before that evening. (TR 2405).

The officer stopped them and began patting them down and running their names over the radio. (TR 2407). Glenn testified the three boys were lined up at the front of the car and HARDY was in the background. The officer patted down Glenn first then patted down Scott. (TR 2408). HARDY then reached over and fired a shot. Glenn only recalled hearing one shot. All of the boys started to run. HARDY turned back and got the officer's gun and then caught up with the others. (TR 2409). HARDY was saying "we dead man we dead". They all jumped the fence behind the Winn Dixie. (TR 2410). The four boys ran to the trailer park and decided to split up. Glenn went to a girl's house and was later arrested. He gave a statement and participated in a reenactment at the Sheriff's Office. (TR 2411-2412).

Over the defense objection, the State was permitted to elicit testimony on redirect that several weeks before the incident Glenn and HARDY were discussing race issues. HARDY was talking about being "mixed".[1] (TR 2430). Glenn testified that HARDY said the only thing about race that ever made him mad was what happened to Rodney King. He then said that "if it ever came down to him or a cop it would be the cop." (TR 2431). The statement was made in reference to the Rodney King beating at the hands of police officers. (TR 2431-2432).

George Pultea, a property manager for a storage facility near the area in question, testified that on April 20, 1993 he was walking along the fence behind the shopping center when he found a .38 firearm. (TR 2714). He picked up the firearm with a stick and put it in a bag and called the Sheriff's Office. (TR 2715). He testified he basically stumbled over the firearm approximately one foot from the fence. (TR 2717).

Joe Ybarra testified that he owned a .38 and two .22 rifles in February of 1993. He testified someone broke into his home and stole the firearms. (TR 2724). Mr. Ybarra identified the .38 in evidence as the firearm taken from him. (TR 2725). He also testified, over objection, that a rifle with a scope was stolen from him. (TR 2728).

Jose Nieves, an inmate at Glades Correctional Institution, testified that he broke into Mr. Ybarra's home and

[1] The Defendant's mother is caucasian and his father is African-American. (TR 1001).

stole the firearms. (TR 2745-2746). After burglarizing the home he met up with HARDY and gave him the .38 in exchange for a .25 firearm. (TR 2747).

Dr. James Benz, Medical Examiner for Palm Beach County, testified to performing the autopsy on Hunt. He testified that the victim suffered two gunshot wounds to the head: one entered the left side of the head at the hairline and one entered the left eye and exited on the right side of his neck. (TR 2642). Dr. Benz testified the path of both gunshots was downward. (TR 2654-2655). A bullet was recovered from the wound in the left side of his head. (TR 2655). Dr. Benz observed gunshot residue and scorching around the entrance wound at the eye. (TR 2644).

John O'Rourke, a forensic firearm examiner for the Palm Beach County Sheriff's Office, testified to examining the .38 revolver discovered by Pultea. O'Rourke examined Ricky Rodriguez for gunshot residue while Ricky was at the Sheriff's Office. O'Rourke testified that Ricky's right side of his face had small abrasions and debris and particles of lead in his hair consistent with a firearm being discharged within inches of his face. (TR 2537).

O'Rourke also observed the autopsy performed by Dr. Benz and observed the marks around the eye wound. After performing tests on the .38 he concluded that the eye wound was inflicted within one to six inches. (TR 2532). O'Rourke tested the bullet recovered from the autopsy and concluded that the .38 revolver in evidence was the same firearm that fired the bullet that was

recovered from the victim at the time of autopsy. (TR 2521). O'Rourke also examined a spent casing which was recovered from the area of the holly bushes where HARDY was found and concluded that the casing had been fired from Hunt's 9 mm gun. (TR 2542).

Deputy Ralph Beach, a corrections officer at the Palm Beach County Jail, testified that he worked the day room area where HARDY was incarcerated. He had been instructed to write down anything HARDY said and maintain a log. (TR 2773; 2778) Beach testified to overhearing a conversation between the Defendant and another inmate, Lientz. Lientz asked HARDY if he was charged with first degree murder. HARDY shook his head yes. Lientz stated just like "Snoop Doggy Dog". HARDY shook his head yes. Lientz asked what kind of gun was used and HARDY responded a .38 Special. Lientz asked where was he shot and HARDY pointed to the side of his head by his temple. Four minutes later HARDY said "the cop searched me down" while rubbing his legs. (TR 2776). Beach testified that when he heard this conversation he was 8 to 10 feet away and was easily visible to HARDY. HARDY looked at him and smiled during the conversation. (TR 2782).

The defense called two private investigators, William Miller and Michael Ernst, who testified that on April 19th they searched the very area where the .38 was eventually recovered along the fence. Both testified that they did not see a firearm at any time during their search. (TR 2795-2799; TR 2853). James Warnke testified that he was involved with a hobby club, Gold Coast Treasure Club, which was a group of people who enjoyed searching

for coins and other metal objects with metal detectors. (TR 2843). His club assisted the Sheriff's Office in February and March, 1993 searching for the weapon in the fence area but did not see a firearm. (TR 2847).

Joseph Vestute testified that he was a resident of the Plantation Mobile Home Park in February of 1993. On April 11, 1993 he noticed three individuals in the area behind the mobile home park at 11:00 p.m. He watched them walk back to the area of the fence. They appeared to be hiding or crouched down. (TR 2867). Jessica Whitney testified that she was living in the Plantation Mobile Home Park and was a neighbor of Mr. Vestute. On April 11 at 10:00 p.m. Scott Allen and two other boys came to her door. She spoke with them and they left. (TR 2870).

The defense called Robert Wiggin who testified that he knew a fellow named Kenneth Hyde for several years. (TR 2922). At the end of 1993, early 1994 he was at a party with Hyde when Hyde said that he was the one who pulled the trigger on the officer and then shot HARDY. (TR 2923). Hyde told Wiggin the officer approached HARDY and the others and began patting them down. Hyde said he was in the area and went over and yelled at the officer. When the officer turned around he shot him in the head and all of the boys ran. Hyde told Wiggin that HARDY said he would snitch on Hyde. Hyde said that he and the other boys held him down and Hyde shot him in the mouth so he wouldn't snitch. (TR 2923).

Carl Parks testified he knew Hyde from jail. Parks testified that Hyde said he was glad someone else was taking the rap for shooting the officer. (TR 2932).

Kristy Scott testified that she had known Hyde for several years. (TR 2941). She was at a party when Hyde was talking to her and a group of people about being involved in the shooting of an officer. Hyde said that he shot the cop and the boy was going to tell so he shot the boy and ran. (TR 2942).

Jacqueline Skeen testified that in December of 1993 and again many times thereafter Hyde made admissions to her about involvement in this incident. (TR 2947). Specifically, Hyde told Ms. Skeen that he was with HARDY riding around when they stopped at the bank. They were walking away when a police officer started asking questions. Hyde said he was standing behind HARDY, had a gun, and pulled it up over HARDY'S shoulder and shot the officer. Hyde also said he shot HARDY afterwards. (TR 2947). Skeen called the Sheriff's Office and reported these statements several weeks later. (TR 2947-2948).

Kenneth Hyde was called as a defense witness and he denied killing the officer and denied telling anyone that he had killed the officer or that he had shot HARDY. (TR 2912-2913).

Penalty Phase

On November 27, 1995 the Court reconvened for the penalty phase. Both parties made opening statements. The State called as their first witness Judith Hunt, the widow of Sgt. Hunt. Ms. Hunt testified to meeting the victim in 1979 and marrying in 1982. She told the jury they have two sons age 10 and 11. (TR 3246). She described Hunt as a devoted police officer who loved law enforcement and believed in justice and law and order. (TR 2347). She described him as the "best father" and that his death was the worst loss of her life. (TR 3248).

The State called Catherine Smith, the sister of the victim. Ms. Smith testified that Hunt was the oldest sibling who took care of the younger children. She described him as a hard worker and responsible person who loved people and animals. (TR 3251). She testified that he wanted to be a police officer in order to help people. (TR 3252).

Under-Sheriff Joseph Bradshaw testified as to his review of Sgt. Hunt's personnel files. Hunt had been hired in 1980 by the Palm Beach County Sheriff's Office and had progressed through several assignments. In 1989 he was promoted to Sergeant. (TR 3258). During the course of his employment he received 25 to 27 letters of commendation and received a lifesaving award and a special community service award. (TR 3256). Over objection, Under-Sheriff Bradshaw described the letters of commendation as referring to his concern for the community, his ability as a

communicator, his efforts to solve crime problems, and his community relations. He further indicated that all his evaluations described Hunt as an outstanding and exceptional officer. (TR 3257).

Sgt. Eisenberg testified that he was a fellow officer and a very close friend of Sgt. Hunt. He described Hunt as very conscientious, hard worker, a leader who did an outstanding job. (TR 3295). He described Hunt's death as a great loss. (TR 3260).

Over objection, the State was permitted to introduce evidence as to the Defendant's involvement in several crimes in the days preceding the homicide. Kenneth Speranza testified that on February 24 at 2:00 a.m. he was in a truck driving along a street when a car passed him from behind at a high rate of speed. He described the car as a four-door silver Cadillac. (TR 3263). The car stopped, then pulled across the road blocking the street. (TR 3265). Speranza testified that a passenger jumped out of the rear passenger door with a rifle. (TR 3266). He pointed the rifle at Speranza's truck and shot at him several times. (TR 3268). The car then drove off. (TR 3269). On cross-examination Speranza said he was informed that Jose Nieves received prison time for shooting at the car. (TR 3271). Speranza indicated he did not know who the individual was who shot at the car. (TR 3270).

Robert Forbis testified that he owned a four-door Cadillac which was stolen from the mall several days prior to the homicide. The car was found two days later. (TR 3279).

David Cook testified that on February 24 at 3:00 a.m. he was riding a bicycle home from the doughnut shop with a bag of doughnuts. (TR 3282). He testified two cars pulled up to him, one was a silver Cadillac. (TR 3283). The driver of the silver car told him to give him his doughnuts or he would shoot him. (TR 3284). Cook handed the individual the doughnuts. He identified the Defendant as the individual who demanded the doughnuts. (TR 3285). Cook testified that as he handed HARDY the doughnuts he saw a revolver between his legs. He turned around to walk away and was shot three times. (TR 3285). Cook said he saw someone else in the car. Cook got on his bicycle and rode to a bar from which the police were called. (TR 3286). Twenty-two caliber bullets were removed from his body. (TR 3288). Prior to his identification in Court he had never been able to identify the Defendant before as the individual involved in this incident. (TR 3289).

Ryan Sexton was called as a witness by the State. Sexton was a classmate of the Defendant. (TR 3291). He testified that on February 25 he talked with HARDY about the shootings and asked whether he did it. The Defendant said he did. (TR 3292). The Defendant told Sexton that he was involved in stealing the car and took him to where the Cadillac had been left. (TR 3293). Sexton said he didn't remember whether HARDY said he was "involved" or whether he actually did the shootings. (TR 3294). Sexton also testified he had seen the Defendant with a .38 and a .22 rifle. (TR 3295). Later in the day on February 25 Sexton called and reported what he knew to the police. He went looking for the

Defendant with the detectives on the evening of February 25. (TR 3296). Detective Backherms testified that he met with Brian Sexton at 9:00 p.m. on February 25 and went looking for HARDY. (TR 3300). A BOLO was issued to other law enforcement agencies. While they were in the process of looking for HARDY he received the call of the shooting of Hunt. (TR 3302).

The defense presented a number of witnesses in the penalty phase. Julia Shell, the Defendant's mother testified to his family background. At the time of the trial she was 42 years of age and a registered nurse. (TR 3307). She described her family background. Her father was an alcoholic who was very physically abusive to her mother. He died when Ms. Shell was 15 years of age of alcoholism. He was a physician. (TR 3308). When she was 16 she became pregnant with her daughter Alexandra. The father of her daughter did not assist in any way. (TR 3308). When she was 20 years of age she met Gary Hardy who was working at the same hospital as her. He was a janitor. She moved in with him and six months later they got married. She became pregnant with NICHOLAS shortly thereafter. (TR 3309-3311).

Mr. Hardy became physically abusive during their relationship and beat the Defendant's mother on many occasions during her pregnancy. He would choke, hit and slap her, one time breaking her eardrum. They were both smoking marijuana daily while she was pregnant. (TR 3313). She stayed married to him four years. (TR 3314). His parents also had a dysfunctional relationship with his father being very abusive. (TR 3315). Mr.

Hardy kept her and the children away from her family members. (TR 3315-3316). During this time they had another child, Christopher. (TR 3316). Ms. Shell described one occasion when Mr. Hardy raped her in their home with the children in the other room. NICHOLAS was two and a half years of age at this time. (TR 3317-3318). She later learned that Mr. Hardy had been molesting Alexandra from the time she was five to six years of age. (TR 3320).

In July, 1978 Ms. Shell left her husband. NICHOLAS was three and a half years of age. Mr. Hardy then began stalking her and harassing her. (TR 3321). She described her efforts at raising her children on her own. They were extremely poor surviving on rice for most meals. Eventually her brother moved in to assist but he was also an alcoholic and very difficult to live with. (TR 3328-3331).

When NICHOLAS was in the second grade he was held back. (TR 3332). During this time she also attempted to reconcile with Mr. Hardy. However, she eventually learned that he was molesting her daughter again, at one time when NICHOLAS was present. (TR 3333-3334).

In 1982 Mr. Hardy was arrested for attempted murder. (TR 3337). Ms. Shell then moved to Nevada. NICHOLAS was diagnosed with a learning disability in Nevada. (TR 3339). Their home life continued to be very unstable, approximately every six months they would find a new town and a new home. (TR 3340).

In 1987 Ms. Shell met Clifford Butts. As with her past relationships, Mr. Butts was an alcoholic and who was abusive

towards her and her children. She described his abusive actions towards NICHOLAS. (TR 3348-3349). They moved to Florida in 1989. After moving to Florida NICHOLAS was forced to call the police because of being hit in the face with a telephone by Mr. Butts. (TR 3353). They continued to move on a regular basis around Florida. (TR 3355).

Ms. Shell next described the injury suffered by NICHOLAS from the gunshot on February 25, 1993. She testified that she initially did not give permission for surgery because she was told his chance of survival was minimal and if he did survive there would be no quality of life. (TR 3361). She permitted a "do not resuscitate order" to be in effect. (TR 3363). After one week she gave permission for surgery to remove dead tissue and clean up the brain injury and close it. (TR 3364). After his surgery NICHOLAS' eyes could open but they couldn't focus. He could feel with his hand and kick one leg. (TR 3364). After several weeks he underwent further surgery because of abscesses which developed in his brain. (TR 3366).

In April she was able to bring him home on house arrest. Her regular reports of his progress were introduced. (TR 3367). When she first brought NICHOLAS home he could not walk, talk, or eat. He was being fed through a tube in his stomach. He could sit in a wheelchair but could not be left alone because he would fall out of the wheelchair. (TR 3369). Eventually he began to eat pureed foods. (TR 3370). His right side didn't move at all. He was incontinent. He was "like a baby". (TR 3371). She began

teaching him to say yes or no by pointing to the words on a paper. Eventually he said his first word: water. He would continuously have a smile on his face. (TR 3373).

Ms. Shell testified that NICHOLAS stayed home for three months. They taught him to walk with a walker and to eat. She said she would give him coloring books but he would eat the crayons. (TR 3374). He could not eat unsupervised because he would stuff his face with food and choke. (TR 3375). He enjoyed watching cartoons and was always smiling. (TR 3377). Ms. Shell testified that his brother Christopher hated NICHOLAS for what he was doing to them. Christopher would say mean things and push him. NICK would laugh and smile. He would never get angry at his brother. Throughout the time he was with her NICHOLAS was very obedient and would simply do what he was told. (TR 3379). He would visit with her ex-husband whom he used to hate and now loved. (TR 3380). Ms. Shell described that when the Court ordered that he be placed in the jail her family was very upset and crying. NICHOLAS simply smiled and went with the deputies to the jail. (TR 3381).

Ms. Shell visited him regularly in jail and described that he continued his pleasant affect despite beginning to have seizures. (TR 3384). He eventually was transferred to Chattahoochee. He seemed to like it in Chattahoochee. He learned to play cards and games and when she would visit with him they would play games. (TR 3386). NICHOLAS would never get upset about

losing simply would continue his smile. He could not read or write. (TR 3387).

When NICHOLAS returned to the county jail after being found competent he was able to talk better although had poor recall. (TR 3389). He continued to be smiling and happy. During the trial she related that he was quite pleased with the jacket he was able to wear because it had pockets both inside and outside. (TR 3390).

Ms. Shell described her son as a childish, happy, obedient little boy. She has not seen him angry since this incident occurred. She indicated that he was not the same person as he was prior to the homicide. (TR 3391).

Alexandra Shell, NICHOLAS' sister, testified to the family disfunction growing up in their household. She is several years older than NICHOLAS. She described the molestation by NICHOLAS' father and his brutality towards their mother. (TR 3402-3411). She also described the physical abuse NICHOLAS suffered by Ms. Shell's second ex-husband. (TR 3414-3415).

Alexandra said that after the shooting NICHOLAS didn't know who she was. (TR 3417). She helped her mother take care of him at home feeding him, teaching him to walk, and changing his diapers. (TR 3417-3418). Throughout the time he was at home he was never angry or upset and was compliant with their efforts at toilet training. (TR 3419). However, she described that NICHOLAS would act like a child coloring books and giggling uncontrollably when he would have bathroom accidents. (TR 3419-3420). She

described NICHOLAS as being "like in another world", never showing any emotion, never angry, sad or aggressive. (TR 3423).

A number of witnesses testified from the Mentally Retarded Defendant Program at Florida State Hospital in Chattahoochee, ("MRDP"). Dr. McKenzie, the individual in charge of the program, described the program as being designed to teach incompetent individuals about court, proper behavior, and life skills. (TR 3430). The program is set up on a behavior model where "maladaptive" behaviors are punished in order to train mentally retarded individuals to act appropriately. (TR 3431). Dr. McKenzie described NICHOLAS' progress as very fast because of his lack of maladaptive behaviors. (TR 3442). He testified that NICHOLAS made steady progress in his verbal abilities and his interaction with others. He attended all classes for fourteen months. (TR 3443). Throughout the time NICHOLAS was at Chattahoochee, he only received discipline two times: once for staying in bed after being told to get up and once for not cleaning his room. He was never aggressive or angry. (TR 3444).

Dr. McKenzie testified that NICHOLAS' constant smile, as a result of the frontal lobe damage, reminded him of the movie "One Flew Over the Coocoo's Nest" after Jack Nicholson received a lobotomy. (TR 3446). NICHOLAS continued to have difficulty expressing himself and requires time to correct his responses. (TR 3448). Dr. McKenzie testified he never observed any dangerous behavior, no rebelliousness or destructive behavior. (TR 3452-3453). Dr. McKenzie opined that he functioned well in the

structured environment and would be very compliant in such an environment. (TR 3449).

Donna Coley, a psychological specialist at MRDP, described her daily contact with NICHOLAS. She testified that the residential program is a stressful environment with individuals with all sorts of varying levels of functioning. (TR 3475). NICHOLAS was consistently appropriate with all of them, never angry or aggressive. (TR 3476). Throughout the fourteen months he was at the program she only observed the two instances of non-compliance that Dr. McKenzie observed. (TR 3472). She testified this is extremely rare given the limitations of the individuals in the program. (TR 3473). She described NICHOLAS as respectful and mannerly. (TR 3477).

Gene Laverity, a Human Services Administrator at MRDP, testified that he was responsible for the safety and security of the mentally retarded inmates. He described NICHOLAS as quiet, keeping to himself, and causing no problems to others. (TR 3482). He indicated that NICHOLAS would only interact if someone else initiated the contact and that he was always polite. (TR 3483). He described the environment as chaotic and hectic. (TR 3484-3485). Nonetheless, NICHOLAS functioned well throughout his time in their program. Mr. Laverity believed that NICHOLAS would function well in a structured environment. (TR 3486).

Mary Jeffery, a clinical social worker at MRDP, testified to her regular contact with NICHOLAS. She reiterated his lack of any non-compliant behavior other than the two instances noted in

fourteen months. (TR 3491). She described NICHOLAS as calm and quiet, never complaining, and never causing problems. (TR 3492).

Lamar Clark ran the educational program at Chattahoochee. He worked with NICHOLAS from January of 1994 to February of 1995 one time per week on a one-on-one basis. (TR 3495-3496). He described NICHOLAS as always coming to class and always in a good mood. He believed that in his opinion NICHOLAS' reading was at a kindergarten level and his math skills were approximately at the level of a third grader. (TR 3497). When working on problems with NICHOLAS he would have a great deal of difficultly but would simply smile and say "let's do something else". (TR 3499). Because of NICHOLAS' limitations they could only do reading lessons ten to fifteen minutes per session. He described NICHOLAS as always easygoing, good natured, and never angry. (TR 3500). His educational skills didn't make much progress during his time in the program although his verbal abilities improved. Upon discharge he still was unable to read a paragraph or lengthy sentence and understand it. (TR 3502).

Melvin Williams, behavior program supervisor at MRDP, supervised NICHOLAS' ward. He described NICHOLAS as quiet, never aggressive or angry. He would watch him play cards and noted his constant smile. (TR 3519-3520).

Patricia Drayton was a nurse at the program. She had three hours per week of contact with NICHOLAS and described him as compliant, cooperative, and quiet. (TR 3523-3524). She said he would agree to do anything asked of him. (TR 3524). She said he

never antagonized other residents and rarely initiated contact. (TR 3525).

Eddie Farlin, Ted Gaymon, David Harper, Victor Clark, and Matt Kemp all were involved with supervising the Defendant at MRDP. They all described NICHOLAS as cooperative, cheerful, and quiet. They described that he would help in the ward with cleaning and washing and would offer to do extra work. Throughout the fourteen months that NICHOLAS was in the program none of them ever saw any aggressive behavior or anger. He was never a problem to the staff or other residents. He was described as respectful and mannerly. They also noted his constant smile. (TR 3528, 3532, 3536, 3537, 3540, 3544, 3545).

Kim Shepherd, a human service worker, worked in NICHOLAS' ward. She described that he was unusual in that he went through the program with only two maladaptive behaviors and always seemed calm and uninterested. She described him as quiet, shy, and childlike. (TR 3547-3549). He enjoyed watching cartoons and she would have to ensure that he had an opportunity to watch his cartoons because of his passiveness with other residents. All of the individuals believed that NICHOLAS did well in a structured environment. (TR 3550).

Patricia Primus worked in the Mental Health Unit at the Palm Beach County Jail as a psychiatric nurse. She was assigned to the unit where NICHOLAS was housed upon his return from Chattahoochee. From March through November, 1995 she observed NICHOLAS on a daily basis. She testified that he would participate

in various classes but his ability to understand topics was very limited. (TR 3558). During classes when questions would be asked he would be the first to raise his hand but he generally would not have the answer when called upon. He would simply grin and other inmates would laugh at him. (TR 3559). She said that NICHOLAS would help on the floor with cleaning, serving trays, and delivering linens. She never heard of him having any problems with any other inmates. (TR 3561). He would play card games and occasionally horseplay. However, he would always respond to the first request to stop playing. (TR 3562). He followed the rules on the ward, was quiet and would not initiate conversation but would respond with one to three word answers. (TR 3568-3569). He was always polite and cooperative. She said that NICHOLAS generally had no expression or just a smile but occasionally would giggle. (TR 3569-3570).

Johnny Ruth Rogers, a staff nurse in the unit, worked with NICHOLAS for several months prior to the trial. Although NICHOLAS was not required to participate in their group sessions, he normally would attend. She never saw him in a bad mood or angry and found him helpful with anything requested of him. (TR 3577-3579).

Santi Bruce-Addey was also a nurse in NICHOLAS' unit at the Palm Beach County Jail. She would see him daily on the 3:00 to 11:00 p.m. shift. She also described his eagerness to answer questions by raising his hand but then his inability to come up with the appropriate response. (TR 3583). She described him as

acting like a child: quiet, calm, and occasionally playful. (TR 3584). He was never a problem in the unit. During his trial she would ask him what happened in court and he would simply respond by saying "nothing" or "I don't know".

Veronica Leon testified to her contact with NICHOLAS at the Palm Beach County Jail. She was also an RN assigned to his unit. She described him as obedient and never angry or aggressive. He was generally unemotional or would smile. (TR 3588-3589).

Circuit Judge Roger Colton testified that in 1993 he was appointed attorney ad litem for NICHOLAS HARDY. (TR 3594). He described his role as that of assisting the Court in ensuring that the conditions of release were being met. (TR 3595). He first met with NICHOLAS in April of 1993 at Delray Community Hospital. At that time NICHOLAS could not communicate at all. (TR 3596). He later visited NICHOLAS at his mother's home at the end of April 1993. At that time NICHOLAS couldn't walk but he could nod his head. Judge Colton commented on what he recalled most clearly was NICHOLAS' constant smile. (TR 3599). He also testified to the NICHOLAS' childish behavior of eating crayons and bugs and his difficulty with toilet training. (TR 3600). Judge Colton visited with NICHOLAS again at the end of June and was impressed with his physical improvements. At that time NICHOLAS could walk and speak with one word responses. (TR 3601). However, he did not believe he could communicate in any meaningful manner. He still had feeding tubes but was taking soft food orally. He continued to smile inappropriately. (TR 3602). The last time Judge Colton

visited with NICHOLAS was at the jail in August of 1993. He was very impressed with the improvement in his physical well-being. (TR 3603).

Mark Goldstein, M.D., testified concerning the neurological damage NICHOLAS had suffered. Dr. Goldstein specialized in neurology, the evaluation and treatment of brains that were structurally impaired. (TR 3617). During Dr. Goldstein's testimony, photographs of the Defendant were introduced as to how his head appeared at the time he was admitted into the hospital. (TR 3619). He testified that NICHOLAS' brain was injured both from the gunshot itself and the bone fragments which had gone into his brain. He described how NICHOLAS lost part of his brain through the laceration in his head and additional brain matter was lost when swelling occurred during the first week. (TR 3622). Dr. Goldstein showed the jury CAT scan films of NICHOLAS' brain and the portions which were missing. (TR 3634). He testified that more than 50% of the left frontal lobe was gone and that 10% to 20% of the right frontal lobe was gone. (TR 3636, 3638). Dr. Goldstein described the left frontal lobe as controlling motor functions on the right side of the body, language ability, emotion, ambition, and personality: "The things that make us human." (TR 3639).

Dr. Goldstein described the antiquated procedure of lobotomies as being similar to the injury suffered by NICHOLAS' gunshot wound. (TR 3639). However, he testified that the Defendant's injury was much more extensive than a simple lobotomy.

(TR 3640). The expected behavior as a result of the brain damage is childlike, lacking in ambition, easily distracted, very difficult to get excited or angry, memory problems, concentration problems, and motivation problems. (TR 3640).

Dr. Goldstein met with the Defendant prior to the sentencing hearing. He found him to be dull and slow-witted, not spontaneous in demeanor, childlike in his interaction and expression. (TR 3641). He opined that NICHOLAS HARDY was no longer the same person he was prior to the brain injury. (TR 3645).

Dr. Lawrence Levine, a neuropsychologist, testified concerning his review of the records and evaluation of the Defendant. The purpose of the neuropsychological evaluation performed by Dr. Levine was to determine the Defendant's functional capabilities and limitations. (TR 3673). He found the Defendant very distractable during the testing but otherwise cooperative. (TR 3677). He concluded that NICHOLAS had significant problems with attention and that his problem solving skills were impaired. (TR 3687-3688). Dr. Levine found the Defendant's functioning was at a first grade level with reading and though able to do basic additions he did not have mathematical skills to do multiplication, division or subtraction. (TR 3697-3698). The doctor believed that the testing revealed a profile perfectly consistent with the physical evidence of brain damage. (TR 3700).

The doctor described the effects of frontal lobe damage to include problems in thinking, personality, and behavior. (TR

3713). He indicated that people with severe frontal lobe damage such as the Defendant lose initiative and frequently just sit. (TR 3714). He opined that the personality changes dramatically with frontal lobe damage in that it is the frontal lobe which makes us individual and human. (TR 3717). The doctor described how the process of lobotomies made individuals docile and compliant, and stripped them of initiative. He believed the Defendant's injury was equivalent and more severe than a lobotomy. (TR 3728).

Dr. Levine found the Defendant childlike, lacking in curiosity, with a shallow affect, a slowness in thinking, lack of spontaneity and initiative, and no awareness of his deficits. (TR 3720-3723). The doctor did not believe that much improvement would be seen in the Defendant over the years. (TR 3730). He further opined that the personality that NICHOLAS HARDY had at the time of the homicide no longer existed. (TR 3731).

In rebuttal the State called Deputy Sheriff Beach who worked at the Palm Beach County Jail. He testified that he observed NICHOLAS communicate with other inmates, that he knew how to ask if he could go in the backroom to watch TV and knew how to turn on the TV. (TR 3771-3772). He also testified that the Defendant assisted housemen with handing out linens. (TR 3773). The State rested. (TR 3775).

The defense argued that the evidence was insufficient to support an instruction on the aggravating circumstance of cold, calculated and premeditated. After hearing arguments and reviewing the law, the Court ruled that the evidence of the Defendant's

intent to kill a police officer, the fact the officer was shot two times, and the collateral crime evidence was sufficient to warrant an instruction on the cold, calculated and premeditated aggravating circumstance. (TR 3801-3802).

During closing argument the State made numerous comments concerning the Defendant's character. Specifically, the State argued that the Defendant and people of "like character", should be held accountable for their actions; that the Defendant was a violent person, with violent instincts. (TR 3825, 3835). The State argued the collateral evidence showed the "predisposition to kill". (TR 3828). The State argued that the Defendant's prior statement that he would "kill a cop" was indicative of his intent and character. (TR 3828).

The State argued that the mitigation offered by the defense was merely an attempt to blame someone else and escape accountability (TR 3832-3834); that the evidence of HARDY'S condition today was not mitigation and that in fact his inherent violence and instincts to do violence would only be less controllable given his condition (TR 3839); and that if he was in prison he would be less able to control his violent instincts because that was the kind of person he was. (T 3843-3844). The State argued that the doctors' testimony was the "biggest lie" and that the Defendant was a "cold-blooded cop killer". (TR 3845). In closing the State argued since the mitigation had nothing to do with the crime itself it should be given no weight. (TR 3846).

The Court instructed the jury as to the aggravating circumstances of the victim was a law enforcement officer and the cold, calculated and premeditated circumstance. The Court also instructed the jury concerning the Defendant's age in mitigation and any other aspect of his character or background. (TR 3882-3885).

The Court held an allocution hearing on January 8, 1996. At this hearing the victim's two sisters and wife testified to their desire for the death penalty and their opinion of the Defendant's worthlessness. (TR 3912, 3914, 3915, 3923-3925). Sgt. Eisenberg testified to the nature of the crime as "a crime against humanity." (TR 3923).

The defense presented testimony from HARDY'S mother and sister that he had no memory of the homicide and that he'd gladly go the electric chair because had no appreciation of the death penalty. (TR 3983, 3993). The defense also presented Dr. Levine who opined his testing was consistent with the evaluation conducted in July 1993 and that Hardy had made only marginal progress with his cognitive abilities. (TR 3938).

On February 14, 1996 a hearing was held. The Court read her order finding the two aggravating circumstances, that the victim was a law enforcement officer and the murder was cold, calculated, and premeditated outweighed the mitigation presented and sentenced the Defendant to death. (TR 4020-4032).

SUMMARY OF ARGUMENT

NICHOLAS HARDY was incompetent to stand trial in this capital murder case. The trial court erred in declaring him to be competent and proceeding with the trial and sentencing proceeding.

The State exercised peremptory challenges in a racially discriminating manner thereby depriving the Defendant of his right to a fair and impartial jury.

The trial court erred in permitting testimony in the guilt phase of the Defendant's prior statement in reference to the Rodney King beating and how he would react in a like situation. The trial court also erred in permitting evidence of the Defendant's possession of a separate firearm earlier on the night of the homicide which had no relevance to the facts of the case.

In the penalty phase, the trial court erred in permitting the State to introduce extensive testimony concerning collateral crime evidence. The collateral crime evidence became a feature of the penalty phase, and interjected non-statutory aggravating circumstances into the jury's consideration. The prosecutor's closing argument furthered the damage by urging the jury to consider the collateral crime evidence as evidence of the Defendant's violent instincts and predisposition to commit crime. The prosecutor's argument also improperly urged the jury to send a message to the community on how to treat people who kill law enforcement officers and improperly denigrated unrebutted mitigation.

The trial court erred in finding that the homicide was committed in a cold, calculated and premeditated manner. There was no evidence sufficient to prove beyond a reasonable doubt that this aggravating circumstance applied in this case. Even if this aggravating circumstance does apply, the death penalty is not proportionate for NICHOLAS HARDY given the substantial mitigation evident on the record.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DECLARING THE DEFENDANT COMPETENT TO STAND TRIAL.

At the competency hearings held on August 13, 1993, February 23, 1995 and again during trial on October 26, 1995 the trial court heard extensive testimony concerning the Defendant's uncontroverted brain damage. What was controverted was the extent of impairment and whether it rendered him incompetent. The Court held that the Defendant was competent. This was error given the Defendant's specific limitations and the nature of the proceedings.

The mental health professionals generally agreed that HARDY had no real recollection of the homicide. While it is true amnesia is not normally a sufficient basis for declaring a defendant incompetent, coupled with the other impairments and the nature of capital trial proceedings, a different conclusion is warranted in this case.

NICHOLAS HARDY spent a year at the Mentally Retarded Defendant Program "learning" trial competency. However, given the specific disabilities resulting from his brain damage, learning trial competency was not sufficient to ensure trial competency. At the competency hearing held February 23, 1995 the Court heard testimony and considered reports from Drs. McKenzie, Barnard, and Sternthal. The doctors agreed that the Defendant's IQ no longer fell within the mentally retarded range. However, this does not end the inquiry as to his competence. Dr. Barnard's report

indicates that the Defendant's IQ testing was higher than the mental retardation range. However, his adaptive behavior in areas of communication, daily living, and socialization still fell within the profoundly to severe mental retardation range. The doctor noted that there continued to be expressive aphasia, the Defendant's inability to give correct verbal labels. Often times HARDY would get answers wrong and would take an excessive period of time to find the correct word. Dr. Barnard also indicated that HARDY'S memory problems continued with erratic patterns of recall. Report of Dr. Barnard, February, 1995, (St. Ex. 1 in Competency Hearing).

Dr. Sternthal testified in February that he believed the Defendant was incompetent. He specifically noted his lack of appreciation of the seriousness of the proceedings. HARDY presented as "excessively and inappropriately happy". His chuckling and laughing at his own errors in testing interfered with the doctor's ability to administer the tests. The Defendant had no insight into his limitations. Dr. Sternthal agreed there had been substantial improvement in intellectual functioning but believed that his expressive difficulties and his memory impairments rendered him incompetent. In particular, the doctor opined that HARDY was proficient at reciting in a rote manner responses on competency questioning. However, when specifically questioned as to his understanding of issues, HARDY'S limitations became apparent:

> Nicholas Hardy's anosognosia has contributed to his being incorrectly seen as competent to

stand trial. For the most part, he is unable to formulate thoughts and answer open-ended questions. His typical answers to a question that needs more than a yes or no answer are What? and I don't know. The questioner is then likely to reduce the complexity of the question and require yes or no answers, and give the Defendant information and see if he grasps or recognizes the idea being explored. Mr. Hardy then does partially recognize the issues and may even say something relevant. However, when it comes to being a competent defendant, acknowledging recognition of information does not suffice. The defendant must be able to formulate his perception of a situation and verbalize this to his attorney. The attorney needs information from the client. This writer found himself almost believing that Mr. Hardy understood the meaning of his charges as he made a few clear overlearned statements but could not explain the meaning of the very words he used to explain himself. He could not answer other related questions. He could however acknowledge some understanding of what he had said. Nevertheless, his only clear verbalizations were of things he was taught by multiple exposures to the material.

* * *

This writer's conclusion is that Mr. Hardy's use of language is very impaired. He is unable to answer open-ended questions and carry on a meaningful conversation because of three serious problems. First, his verbal memory is so poor that he may not be able to retain an open-ended question as he tries to formulate and answer resulting in his often saying "What?" Second, he is only able to juggle a small number of verbal details in mind at one time. Third, is the confusion in the use of prepositions, an essential part of language. Thus, he is still answering yes -- no questions inconsistently and often contradicts himself.

Report of Sternthal, February, 1995. (St. Ex. 1 in Competency Hearing).

The evaluations conducted during trial present further evidence of the Defendant's incompetence. Dr. Barnard opined the Defendant was competent because of his ability to answer certain questions concerning trial proceedings. However, HARDY could not name his attorneys by name. This may not seen significant except that this evaluation occurred after several days of jury selection where the Defendant was present with his attorneys all day long. Dr. Barnard indicated that the Defendant continued to require a great deal of time to respond to questions and had difficulty disclosing pertinent information and testifying relevantly. At the competency hearing in October, 1995 the doctor recommended that proceedings be slowed down and that the Defendant be provided a third person to interpret and assist him in understanding what was going on in trial. (TR 1655-1656). There is no indication that such steps were taken to ensure the Defendant's understanding of the process.

Dr. Heiken testified that the Defendant was incompetent. (TR 1592). He also noted HARDY'S superficial appearance of understanding: "Mr. Hardy will present in a manner where he appears to understand what was being asked of him on the surface but, when this is explored deeper, he is unable to comprehend nor use his judgment once he has this information. Specifically, his problem areas include poor social judgment, slow speed of mental operations, and poor attention span and concentration abilities."

Report of Dr. Heiken, October, 1995. (___ Ex. _____); (TR 1565).[2] Dr. Heiken also noted HARDY'S inability to comprehend and express verbally.

Certainly the right to a fair trial envisions the right to be competent to stand trial. The test for whether a defendant is competent to stand trial is whether "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L. Ed. 2d 824 (1960); See also Sec. 916.12(1), Fla. Stat.; Fla.R.Crim.P. 3.211(a)(1). The trial court must consider all evidence relevant to competence and it is the function of the trial court to resolve factual disputes. Hunter v. State, 660 So.2d 244 (Fla. 1995).

The specific impairments rendered HARDY incapable of testifying, incapable of withstanding cross-examination, incapable of disclosing relevant information in the guilt phase. Furthermore, although amnesia standing alone does not mandate a finding of incompetence, coupled with the other effects of the brain damage, it rendered HARDY incompetent. State v. Cooks, 642 So.2d 23 (Fla. 5th DCA 1994). In this case, the experts agreed that HARDY suffered cognitive impairment from his brain damage. Specifically, it was agreed that the Defendant had difficulty expressing himself, that he would often say yes instead of no or

[2] The trial court apparently reviewed the report although it is unclear where in the record or evidence the report can be found.

otherwise give an initial incorrect answer, that he had a flat, unemotional affect, and that he had no memory of the events in question.

Absent any memory of the events, it would have been impossible for defense counsel to develop potential statutory mitigating circumstances such as the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, Sec. 921.141(6)(b), Fla. Stat., and the defendant acted under extreme duress or under the substantial domination of another person, Sec. 921.141(6)(e), Fla. Stat., and the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, Sec. 921.141(6)(f), Fla. Stat. In order to develop mitigating circumstances based upon mental mitigation at the time of the offense, a memory of the events would be necessary. Absent having any memory of the events, the Defendant was deprived of his ability to develop and present mitigation.[3] The need for reliability in the fact finding aspect of penalty proceedings, Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 1866, 100 L. Ed. 2d 384 (1988), requires that a defendant have the present ability to meaningfully develop mitigation. The Defendant's lack of memory and severe cognitive impairments, rendered him incompetent in this capital trial and sentencing proceedings.

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[3] The attorneys for the Defendant both testified on a proffer that they were never able to discuss the facts of the murder with him as he had no recall of the events. (R 4013, 4016).

ISSUE II

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO EXERCISE PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER.

The State exercised a number of peremptory challenges on black females. (TR 2196, 2199, 2202). The defense objected and the Court inquired of the State as to their reasoning. The Court permitted the peremptory challenges. The Court erred in permitting the State to exercise a peremptory challenge on juror Gibson.

The voir dire indicates virtually no questioning of Ms. Gibson by the State. Ms. Gibson provided basic biographical answers to the Court's questions indicating that she had lived in Palm Beach County 19 years, she was an "instructional person", never married, no grown children, never served as a juror, never participated in any court proceedings, no friends or relatives in law enforcement, she had been a victim of a crime, and she was physically fit and certified her willingness to follow the law. (TR 1953). The prosecutor did not ask Ms. Gibson any further questions. When it came time for peremptory challenges, the State moved to excuse Ms. Gibson. The defense pointed out that Ms. Gibson was a black female and objected to the peremptory challenge. The Court asked the State for a non-racial reason for striking the juror. The prosecutor indicated "She's nineteen years old. I think she's awfully immature to be handling a case of this magnitude." (TR 2196-2197). The defense objected on the age reason. The Court requested any additional reasons and another

prosecutor proffered that her position as an "instructional aid" was a second reason. The State indicated that it did not like teachers, especially young teachers. (TR 2197). The Court permitted the State to exercise a peremptory challenge. Thereafter, the State exercised two additional peremptory challenges against black females. (TR 2199, 2202).

The reasons proffered by the State are not adequate racially neutral explanations of "legitimate reasons" for the State's use of its peremptory challenges. Batson v. Kentucky, 476 U.S. 79, 96-98, 106 S.Ct. 1712, 1722-1724, 90 L. Ed. 2d 69 (1986); State v. Slappy, 522 So.2d 18 (Fla. 1988).

In State v. Slappy, the Court held that the trial court should look at several factors in determining whether the State's reasons are not supported by the record or an impermissible pretext:

> (1) Alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror's who were not challenged.

522 So.2d at 22.

In the instant case, the record only indicates that Ms. Gibson was a resident of West Palm Beach for 19 years, it does not indicate her age. There are no age requirements for jury service on a capital case. There is nothing in her responses to

substantiate the State's conclusion that she was "immature". Her answer to the question of her employment indicates she is an "instructional person" not a teacher. Even if she is a teacher or an instructional aid, that standing alone is not a sufficient reason given no showing of any bias or particular philosophies. It is noteworthy that the State never questioned Ms. Gibson whatsoever about her beliefs on any of the issues in this case or any alleged bias she might show as a result of being a "instructional person". This renders the State's explanation immediately suspect. "The rule in Neal would be meaningless indeed if, by simply declining to ask any questions at all, the State could excuse all blacks from the venire." Slappy, 522 So.2d at n. 2.

In Slappy, the prosecutor exercised a peremptory challenge on two African-American school teachers indicating a concern about "liberalism". The Court held that the reason proffered was inadequate given the State's failure to question the jurors on the grounds alleged for bias. Further, the Court held that the State's contention that all elementary school assistants are liberal is unacceptable absent any showing on the record that the jurors in question possessed this trait. 522 So.2d at 23.

Furthermore, the State's pretext is revealed in the acceptance of juror Paul who was also a school teacher. (TR 1962-2201). See Roundtree v. State, 546 So.2d 1042, 1045 (1989) (State's reason for challenging black jurors applied equally to white jurors it accepted revealed pretext for racial discrimination).

The reasons proffered by the State for exercising the preemptory challenge against juror Gibson are unrelated to the facts or issues in this case. The pretext is apparent given the State's acceptance of another juror of like occupation. The State's exercise of a peremptory challenge in a racially discriminatory manner violated HARDY'S right to a fair and impartial trial. Art. I, Sec. 2, 9, and 16, Fla. Const.; Amend. V, VI, VIII and XIV, U.S. Const.

ISSUE III

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE EVIDENCE OF THE DEFENDANT'S PRIOR STATEMENT CONCERNING CONFRONTATIONS WITH POLICE OFFICERS.

During redirect examination of witness Glenn Wilson the State elicited testimony that several weeks prior to the homicide the Defendant and Wilson were discussing how the Defendant felt about being "mixed".[4] The Defendant told Wilson that it didn't really matter to him but that the only thing about race that made him mad was "the Rodney King thing". The Defendant told Wilson that "If it ever came down to him or a cop, that it was going to be the cop." (TR 2431). The statement was made in reference to the Rodney King incident which occurred in Los Angeles in 1991 where six L.A. police officers severely beat King while he was laying on the ground. (TR 2431-2432).

The statement was irrelevant to the issues before the Court and, to the extent there was any probative value, it was far outweighed by the prejudicial impact of this testimony. Sec. 90.403, Fla. Stat. The statement was highly prejudicial by interjecting racial fears into the facts of the case. In the Rodney King case, several white officers were indicted in California state court for the brutal beating of a black man. The officers were acquitted. The acquittals touched off massive race riots in the Los Angeles area which resulted in many deaths,

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[4] The Defendant's father is African-American and his mother is caucasian. (TR 1001).

injuries, and extensive property damage. Koon v. United States, 116 S.Ct. 2035, 135 L. Ed. 2d 392 (1996).

The statement concerning the Defendant's view of the Rodney King incident raised the specter of race being a motivating fact behind the murder in this case when in fact there was no evidence to support such a conclusion. Further, the statement made reference to a collateral crime, the intention of the Defendant to resist if battered by white police officers. Such a factual scenario had no similarity to the facts of the instant case.

The courts have long recognized the risk that racial prejudice may influence jurors. The risk of racial prejudice infecting a criminal trial takes on greater significance in the context of a capital sentencing proceeding. Robinson v. State, 520 So.2d 1 (1988). The limited probative value must be balanced against the significant risk of prejudice.

The State argued that the evidence was relevant to HARDY'S intent to kill a police officer. However, the statement is not proof of any intent to kill a police officer.[5] Rather, it is merely an expressed intent by the Defendant to not allow himself to be battered and brutalized by police officers.

The statement was not relevant to any defense raised. The defense raised in this case was that another individual committed the homicide. Therefore, testimony concerning the

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[5] In closing argument in the trial and penalty phase the State continued to refer to this statement as one where the Defendant proclaimed his intent to kill a police officer. This simply is not an accurate portrayal of this evidence and misled the jury.

Defendant's statement, lacking any similarity to the instant crime, was not proper rebuttal to prove identity. The prejudice, however, infected the entire case. It portrayed the Defendant as one with a mission to kill a police officer, particularly if race was in issue.

The trial court reversibly erred in permitting the testimony concerning the Defendant's prior statement.

ISSUE IV

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE EVIDENCE OF THE DEFENDANT'S POSSESSION OF A STOLEN .22 RIFLE.

The State presented testimony that on the night of the homicide the Defendant also possessed a .22 rifle with a scope on it which had been stolen in a residential burglary. Apparently the rifle was left in the car when the four boys abandoned the broken down car.

The evidence was not relevant to any fact in issue in this case. The rifle was not used, carried, or displayed during the homicide. There was no causal connection between possession of the stolen rifle and the homicide. State v. Richardson, 621 So.2d 752 (Fla. 5th DCA 1993). The fact that the rifle was stolen in a residential burglary was not relevant to any issue in this case. The evidence was extremely prejudicial to the Defendant in that it implied that there was some intention to commit other crimes by virtue of carrying multiple weapons.

The danger that a jury would consider this evidence as proof of bad character and propensity to commit crime is obvious. Conley v. State, 599 So.2d 236 (Fla. 4th DCA 1992) (it was prejudicial error to admit evidence that murder weapon was given to defendant earlier to commit an unrelated crime). The trial court reversibly erred in permitting the evidence of the Defendant's possession of a stole rifle.

ISSUE V

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE COLLATERAL CRIME EVIDENCE IN THE PENALTY PHASE.

During the penalty phase the State introduced in its case-in-chief evidence that a day or two earlier the Defendant may have been present in a stolen car when someone in the car shot at a man in a truck. The State also introduced evidence that the Defendant was driving a stolen car later that day and threatened a man in order to get a bag of doughnuts. Someone in the car also shot at the man.

The State argued that the collateral crime evidence was admissible to show heightened premeditation to support the aggravating circumstance of cold, calculated and premeditated. However, the State further admitted it was evidence of his "predisposition" (TR 3179) and argued in closing that it was evidence of the Defendant's violent character. (TR 3828).

The Defendant's involvement in the collateral crimes was not proven by clear and convincing evidence. In order to be admissible, the Defendant's culpability in collateral crimes must be proven by clear and convincing evidence. State v. Norris, 168 So.2d 541 (Fla. 1964). In the incident involving Mr. Kenneth Speranza, the facts presented by the State indicated that one or more individuals riding in a four-door silver Cadillac were involved in shooting at Mr. Speranza. HARDY was not identified by Mr. Speranza nor was any firearm connected to him identified as having been used in the assault. The sole evidence of the

Defendant's involvement in this crime which occurred in the north western part of Palm Beach County, is the Defendant's statements the following day, in response to a classmate's questioning about an article concerning some shootings, that he was "involved". Absent showing clear and convincing evidence of the nature of HARDY'S involvement in the collateral crime, the evidence should never have been admitted.

The evidence concerning the Defendant's involvement in the shooting of Mr. David Cook was also insufficient to be presented to the jury. The testimony concerning this incident was that Mr. Cook was riding a bicycle carrying some doughnuts when a silver Cadillac stopped him. The driver demanded the doughnuts. Mr. Cook identified HARDY as the individual who was driving the car, although apparently he had been unable to identify him as the perpetrator at any earlier time. Mr. Cook saw a .38 revolver between the Defendant's legs on the car seat. He turned to walk away from the car and was shot several times. There was no evidence that HARDY shot him or that he was shot with a .38 revolver. In fact, a .22 caliber bullet was removed from his body at the hospital. Therefore, the evidence that HARDY participated in the shooting of Mr. Cook was insufficient to be presented to the jury.

Assuming, arguendo, that the evidence met the clear and convincing standard for use in the guilt phase, the evidence did not have sufficient indicia of reliability for introduction in the penalty phase. Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860,

1866, 100 L. Ed. 2d 384 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."; Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982) ("Reliability in the fact-finding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."). The introduction of such vague and speculative evidence violates the standards of due process that should be required in capital sentencing procedures.

Even if the evidence was sufficient to prove the Defendant's participation in these crimes, the collateral crimes were not relevant to the issues in the penalty phase. Specifically, the Defendant had not been convicted of either crime and therefore the evidence was not admitted for the purpose of proving conviction of prior violent crime. Sec. 921.141(5)(b), Fla. Stat. Rather, the State argued the evidence was proof of heightened premeditation of the Defendant's intention to kill the police officer. However, there was no evidence that the Defendant made any statements or that there was any other indication that the Defendant intended to kill a police officer if apprehended for his involvement in any of the crimes which occurred in the preceding days.

In Finney v. State, 660 So.2d 674 (Fla. 1995), the Court held that collateral crime evidence should only be used as evidence of an aggravating factor when the collateral crime evidence tends to prove a material fact necessary to establish the aggravating factor or tends to rebut the Defendant's theory as to why the

aggravator does not apply. "It should not be relied on when its only probative value in relation to the aggravating factor is as proof of the defendant's bad character or propensity." 660 So.2d at 681. The Court held that Section 90.404(2)(a), Florida Statutes, codifying the rule in Williams v. State, 110 So.2d 654 (Fla. 1959) should govern the admissibility of collateral crime evidence in a penalty phase. In Finney, the Court held it was error to permit evidence of a subsequent rape/robbery which the Defendant committed. The Court held there was nothing about the subsequent crime which was probative of the Defendant's motive to commit the homicide.

Similarly, in Power v. State, 605 So.2d 856 (Fla. 1992), the Court held that it was error to use the Defendant's prior sexual assaults as evidence of the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner. The trial court had found that the defendant's prior sexual assaults were evidence that the defendant had thought out, designed and prepared his method of attacking females. However, the Court held that evidence of the heightened premeditation to commit a sexual assault did not establish the heightened premeditation to murder. In so doing, it stated:

> Furthermore, even if it were permissible for a judge to rely on the circumstances of previous crimes to support the finding of an aggravating factor, such evidence, standing alone, can never establish, beyond a reasonable doubt, that the murder at issue was so aggravated.

605 So.2d at 864.

Even if there was some tangential value to this evidence, its value was far outweighed by the prejudicial impact on the Defendant's right to a fair sentencing proceeding. It is noteworthy that at no time during the prior crimes was the Defendant alleged to have made statements that he would kill before being arrested[6] or that he otherwise would take drastic action if he was apprehended for the prior crimes. There is no evidence that the Defendant knew the police were looking for him. Instead, the evidence merely portrayed the Defendant as being on a "crime spree" which included the murder of Sgt. Hunt. The evidence went far to prove that the Defendant had a bad character and perhaps a propensity to be involved in criminal behavior, but this is clearly an impermissible use of such evidence.

The prejudice to the Defendant was compounded by the fact that the other criminal episodes became a feature of the penalty phase. See Ashley v. State, 265 So.2d 685, 693 (Fla. 1972) ("[T]he State...may not make such crimes a feature of the trial instead of an incident."). Other than victim impact evidence, the State's entire case in the penalty phase rested upon the involvement in other criminal activities. The State called both victims and the individual whose car was stolen as well as a classmate of the Defendant and a police officer looking for the Defendant at the time the homicide occurred. There was no evidence that the

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[6] *Cf.* Griffin v. State, 639 So.2d 966 (Fla. 1994) (defendant said he would kill a police officer before going back to jail); Valle v. State, 581 So.2d 40 (Fla. 1991) (defendant said he would "waste" the officer).

Defendant was aware that he had been reported to the police or that in fact the police were looking for him. The extensive evidence concerning these other criminal episodes only furthered the prejudice which infected the entire penalty phase.

HARDY waived the statutory mitigating factor of no significant prior criminal activity, therefore it was not permissible rebuttal evidence. Maggard v. State, 399 So.2d 973 (Fla. 1981). It would not be proper impeachment of any of the defense mitigation witnesses. Geralds v. State, 601 So.2d 1157 (Fla. 1992). *Cf.* Wuornos v. State, 644 So.2d 1012 (Fla. 1994).

The use of the collateral crime evidence interjected in the penalty phase non-statutory aggravating circumstances in violation of Florida law[7] and therefore rendered the sentencing determination arbitrary and capricious in violation of the Florida and United States Constitutions. Art. I, Sec. 9, 16, 17, 21, 22, Fla. Const.; Amend. V, VI, VIII, XIV, U.S. Const. The erroneous admission of collateral crime evidence is presumed harmful because of the danger a jury will consider bad character a propensity to commit crime in determining guilt. Straight v. State, 397 So.2d 903 (Fla.1981). The prejudice to a defendant in a capital sentencing proceeding is even more egregious and creates a substantial risk that a jury will give undue weight to such information in recommending the death penalty. Geralds v. State,

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[7] Sec. 921.141(5), Fla. Stat., provides: "Aggravating circumstances shall be limited to the following..."; Elledge v. State, 346 So.2d 998 (1977).

601 So.2d 1157 (Fla. 1992); Castro v. State, 547 So.2d 111 (Fla. 1989).

The error in this case was compounded by the prosecutor's improper closing argument portraying the Defendant as a violent character with a criminal predisposition (See Issue VII).

The trial court erred in permitting the collateral evidence in the penalty phase. The sentence must be reversed for a new penalty proceeding.

ISSUE VI

THE PROSECUTOR'S CLOSING ARGUMENT WAS SO IMPROPER THAT IT DENIED THE DEFENDANT HIS RIGHT TO A FAIR SENTENCING DETERMINATION.

The prosecutor's closing argument in the penalty phase was so replete with improper statements of the law, of the facts, and exhortations as to the Defendant's bad character that it denied the Defendant his right to due process in the sentencing determination.

a. The prosecutor's closing argument improperly inflamed the jury to send a message to protect law enforcement officers.

The prosecutor's closing argument began with telling the jury the purpose of the law enforcement aggravating circumstance was to protect law enforcement officers from "people like the Defendant". The prosecutor's argument improperly played upon jurors' fear of anarchy and need for protection:

> They are the last defense between the public, the unsuspecting public, and the Defendant. (R 3823).
>
> * * *
>
> It [the aggravating circumstance] carries so much tremendous importance because it's people like James Hunt that protects us from people like the Defendant. (R 3825).

It is improper to argue that a jury verdict must send a message to the community. It is "an obvious appeal to the emotions and fears of the jurors." Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985). Clearly the purpose of the prosecutor's argument in this section was to encourage the jurors to send a message to

"people like the Defendant" that there is a need to protect law enforcement officers by sentencing this Defendant to death. It played on the jurors' most elemental fears, "dragging into the trial the specter of police murders and a lawless community". Campbell v. State, 679 So.2d 720 (Fla. 1996). The argument was improper and denied the Defendant a fair sentencing proceeding.

b. The prosecutor's argument repeatedly referred to collateral crime evidence and the Defendant's current condition as evidence of the Defendant's bad character and propensity to commit crime making him deserving of the death penalty.

The most egregious arguments the prosecutor engaged in were repeated references to the Defendant's character as proven by the collateral crime evidence. He repeatedly referred to HARDY as a "violent person" who had "instincts to do violence". (R 3835, 3838). In discussing the evidence of the collateral crimes the prosecutor said:

> And the Defendant admitted that he was involved in that shooting of that car, a cold, calculated person with a predisposition to kill. (R 3828).
>
> * * *
>
> And those kind of people with that character and that instinct and that violent drive should be held accountable for being that way. (R 3825).
>
> * * *
>
> This shows this is a person who's a cold person, a person who is a callous, a person who is violent, a person who will kill because that's what he does. (R 3826).
>
> * * *

> He shot and killed him because his mentality, his mindset was to shoot and kill. (R 3823).

The prosecutor's improper argument was that the death penalty was warranted because the Defendant himself was a cold, calculating person as proven by the collateral crime evidence. This is not a proper aggravating circumstance. Rather, the legal aggravating circumstance is that the capital murder was committed in a cold, calculated and premeditated manner. However, rather than addressing the actions of the Defendant that proved that the murder was committed in such a manner, the State chose to argue the character of the Defendant as proven by the collateral crime evidence. This is clearly an improper use of collateral crime evidence and extremely prejudicial to the Defendant.

More egregiously, the State argued that the suicide and HARDY'S resulting brain damage constituted additional non-statutory aggravating circumstances. Specifically, the State argued that the Defendant's attempted suicide was evidence that "this Defendant is a violent person who chooses violence to address situations"; "He's a violent person. His instinct is to do violence." (R 3835-3836). "This person is still capable of intent. This person is still capable of motive." (R 3837). "So what we have now, ladies and gentlemen, according to the defense's own witnesses, is a man who's inherently violent, whose instincts are to do violence, who before the injury had inability to control his instincts and now has damage to his head that will even lessen--give him lesser control of is own behavior." (R 3839).

In doing so, the State argued non-statutory aggravators of uncharged crimes and future dangerousness based upon the Defendant's character. This is improper and denied the Defendant a fair penalty proceeding. Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Campbell; Bertolotti. The trial court erred in overruling the objections to these arguments.

c. The State improperly denigrated the unrebutted mitigation.

The State argued that the mitigating evidence was an effort to "excuse" the crime. Mitigation does not excuse the crime; rather, it is necessary for the jury's determination as to whether the death penalty or life imprisonment is the appropriate sentence. To argue that it is an "excuse" is improper. Nonetheless, the prosecutor argued in response to mitigation as to the Defendant's troubled childhood:

> Granted, their life may have been not pleasant, as nice, maybe even pretty tough at times but that's not an excuse, that's not a valid reason to escape accountability for these actions. (R 3834).

The caselaw clearly recognizes childhood abuse and family hardship as legitimate mitigating circumstances. It is improper for the State to argue otherwise.

The state argued "they are going to try to escape accountability, they are going to ask you not to hold the Defendant accountable for his actions..." (R 3832). "That's the information that the defense is presenting to you as being mitigation, that you can blame someone else for your own actions, you can blame someone

else for your own decisions and therefore you don't have to be held accountable. That's not valid." (R 3833).

In response to a consideration of the Defendant's age as mitigation, the prosecutor argued that his ability to formulate an intent undermines any mitigation based upon age. (R 3834-3835). This is also an improper statement of the law. Clearly, a conviction for first degree murder includes the ability to formulate intent. If age was not an appropriate mitigator the law would not so recognize. The effort to mislead the jury about the law deprived the Defendant of a fair trial.

Finally, the State repeatedly argued that the Defendant's current condition had no relevance to a sentencing determination.

> So then they say, well, forgive Nicholas Hardy because he shot himself. How ludicrous. What does that have to do with killing a police officer in cold blood? (R 3835).
>
> * * *
>
> All they say is that he hurt himself, to forgive him and the State says that's not proper. Those mitigations have nothing to do with this crime and therefore they should get no weight whatsoever for these. (R 3846).

Finally, the State indulged in arguing the fear of how the Defendant will behave if released from prison in 25 years:

> So now, based on this evidence you can assume that he will be fine in 25 years? No, the next 25 years he won't be violent, he won't become--won't change because he's very compliant.
>
> We take exception because there's never been a time when this environment person has been in a general prison population with other serious criminals, with other violent individuals with assaults, with murderers, with robbers, where

> those people are put into large areas, locked up and the guards aren't sitting there. They are sitting outside.
>
> What's going to happen when all of those structures and controls leave? What do you think is going to happen? The man who could not control his instincts back on February 25, 1993 most certainly is not going to control his instincts in 1995, 1996 or 1999, whatever because that's who he is. He is who he is. (R 3844).

The improper effort to frighten the jury into thinking that there was some evidence that the Defendant was going to be violent in prison and upon his release was improper. The intended message was clear: unless the jury recommended death he would continue to be violent. This has long been recognized as an improper argument warranting reversal. Teffeteller v. State, 439 So.2d 840 (Fla. 1983).

The State's argument denigrating valid, legally recognized mitigation is akin to arguments which denigrate legally recognized defenses. See, Garron v. State, 528 So.2d 353 (Fla. 1988) (it is reversible error to allow argument intended to discredit insanity defense as legal defense). The proffered mitigation was appropriate, unrebutted, and legally recognized. The State's exhortations to disregard unrebutted mitigation was an effort to convince the jury not to follow the Court's instructions which require the jury to consider such mitigation in recommending an appropriate sentence.

The combined effect of the multiple improprieties in closing argument deprived the Defendant of his right to a fair

sentencing determination guided by principles of law rather than emotion.

ISSUE VII

THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS COLD, CALCULATED AND PREMEDITATED.

The aggravating circumstance that the crime was committed in a "cold, calculated and premeditated" manner, herein after "CCP", was not proven beyond a reasonable doubt.

In order for this aggravating circumstance to apply the Court must find that the killing was the product of cool and calm reflection and not an act resulting from frenzy, panic or rage; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident; and the defendant must exhibit heightened premeditation and there must be no pretense of moral or legal justification. Jackson v. State, 648 So.2d 85 (Fla. 1994). A suspicion that such factors exist is not sufficient; the aggravator must be proven beyond a reasonable doubt. Lloyd v. State, 524 So.2d 396, 403 (Fla. 1988). Circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate this aggravating factor. Geralds v. State, 601 So.2d 1157, 1163 (Fla. 1992).

The easiest factual scenario which causes the least controversy as to the application of this aggravator would be contract murders or execution style killings. McCray v. State, 416 So.2d 804 (Fla. 1982). In the instant case the testimony of the witnesses who were present at the time of the shooting was that it occurred within seconds of Sgt. Hunt beginning to pat down the four individuals. The victim was shot twice in the face in rapid

succession, apparently while standing. Although the State argued that shots to the head are "execution style" there are no facts in the instant case to support this finding. Rather, as this Court has found in the past, "execution style" refers to carefully planned, coldly executed murders occurring after calm, cool reflection. Richardson v. State, 604 So.2d 1107 (Fla. 1992).

In the instant case the State hypothesized that the murder occurred because of the Defendant's fear of being arrested with a loaded gun that would connect him to the collateral crimes. To the extent the evidence supported this hypothesis it is equally consistent with panic and frenzy, thereby precluding a finding of cool and calm reflection. Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992). Furthermore, there is simply no evidence to support the State's hypothesis (See Issue VI). It appears that the trial court was troubled by the lack of any reasonable explanation for the murder. (R 3196). However, the Court may not draw "logical inferences" to support a finding of a particular aggravating circumstance when the State has not met its burden of proof. Clark v. State, 443 So.2d 973, 976 (Fla. 1983).

Where the facts are unclear as to what led up to the murder, CCP cannot be found beyond a reasonable doubt. Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Hamilton v. State, 547 So.2d 630 (Fla. 1989). Even crimes which occur over a longer period of time have been held not to be CCP absent sufficient evidence of the careful planning necessary for this aggravating circumstance. See Capehart v. State, 583 So.2d 1009 (Fla. 1991) (fact that strangulation took

several minutes did not establish CCP); Thompson v. State, 619 So.2d 261 (Fla. 1993) (evidence of extensive beating and torturing of victim was insufficient to prove CCP where the evidence did not show intent to kill preceded the conduct that led to the victim's death); Padilla v. State, 618 So.2d 165, 170 (Fla. 1993) (no CCP where after being beaten by victim defendant leaves, obtains gun, and returns to shoot victim two times in the back of the head). There is no evidence that the Defendant made any effort to remove the victim to a remote location in order to support CCP. *Cf.* Hall v. State, 614 So.2d 473 (Fla. 1993) (abducting woman from parking lot and taking her to remote area supported CCP); Robinson v. State, 574 So.2d 108 (Fla. 1991). In Clark v. State, 609 So.2d 13 (Fla. 1992), this Court held that although the defendant drove around with the victim for some time prior to taking him to the woods and murdering him, the evidence supported only that the defendant may have decided on murder at some time during the drive not the careful premeditation necessary to support this aggravator.

There is no evidence of a previously announced intention to kill the victim or a law enforcement officer that evening. *Cf.* Green v. State, 583 So.2d 647 (Fla. 1991) (defendant said he was going to rip victim off and "do him in".); Rutherford v. State, 545 So.2d 853 (Fla. 1989) (defendant announced that he would make woman write him a check and then he would kill her); Mendyk v. State, 545 So.2d 846 (Fla. 1989) (after torturing woman, defendant then told companion that he was going back to kill her and he did). HARDY'S statement several weeks earlier, in reference to the Rodney King

beating by police, that if he was in that type of situation and it was him or a police officer it would be the officer is not evidence beyond a reasonable doubt of a carefully formed intention to murder Sgt. Hunt.

In three cases involving the killing of law enforcement officers, this Court has struck the aggravating circumstance of CCP. In Pietri v. State, 644 So.2d 1347 (Fla. 1994), the defendant had escaped from prison, stolen a truck, and stolen some firearms in a residential burglary. After the burglary, the defendant was seen speeding by Officer Chapel who gave chase. The defendant stopped after about a mile. As Officer Chapel approached the truck, the defendant shot him in the chest. The firearm examiner testified that Officer Chapel was shot from a distance of three to eight feet. The defendant sped off and was later apprehended. This Court held that the trial court erred in finding the aggravating circumstance of cold, calculated and premeditated. "While the record supports a finding that the murder was premeditated it does not show that careful design and heightened premeditation necessary for a murder to be committed in a cold, calculated, and premeditated manner. The fact that this murder occurred after a short chase does not show more premeditation than what is required for first degree murder." 644 So.2d at 1353. Likewise, in the present case the fact that this murder occurred after a brief encounter with Hunt does not show more premeditation than that required for the first degree murder conviction.

Similarly, in <u>Street v. State</u>, 636 So.2d 1297 (Fla. 1994), the defendant was engaged in a struggle with several officers when he took one officer's gun. He shot Officer Strzalkowski three times, the final bullet striking him in the head. Street then shot Officer Boles three times, ran out of ammunition, and went back to get Strzalkowski's gun. Street pursued Officer Boles around his car and shot him one more time in the chest. He then got into the police car and rode off remarking "now I have got my lift." The trial court found that the killing of Officer Boles was cold, calculated and premeditated in that it was more of an execution type murder including three shots, obtaining another gun, and shooting again. This Court held that the shooting did not reach the level of the heightened premeditation necessary for CCP. 636 So.2d at 1303.

Finally, in <u>Valdes v. State</u>, 626 So.2d 1316 (Fla. 1993), Valdes and his co-defendant ambushed a prison van in an effort to release an inmate held within. Both defendants were armed. The officer driving the van was ordered out of the van and forced to the back of the vehicle where he was shot three times, once in the head and twice in the chest. This Court held that although the escape effort was carefully planned, there was no evidence that there was a careful plan to kill anyone. There was some evidence that the defendant admitted "they" had planned the murder beforehand; however, the Court held that it was not evidence beyond a reasonable doubt. 626 So.2d at 1323.

The cases relied upon by the trial court in finding CCP are quite distinguishable from the facts of the instant case. In Griffin v. State, 639 So.2d 966 (Fla. 1994), this Court approved the finding of CCP where the evidence clearly indicated that the day prior to the homicide, after the defendant had committed a robbery, he stated to two witnesses that if they were pulled over by the police, he would get out and shoot because he was not going back to jail. The following day the defendant committed another burglary and as he was leaving the scene of the burglary, two officers attempted to pull his vehicle over. Again the defendant said he was not going back to jail. As the vehicle was pulled over the defendant got out of the car and began shooting at the police officers. This Court approved the trial court's finding that the defendant's explicit statements that if he was stopped after committing a crime he would kill the police officers in order to prevent going back to jail was sufficient to support the heightened premeditation necessary for this aggravating circumstance. There is no such evidence in the instant case.

In Jackson v. State, 498 So.2d 406 (Fla. 1986), this Court approved CCP based upon facts that showed that the defendant initially struggled with police while being placed under arrest. Once she was placed in the back seat of the car the defendant commented "Wait a minute you made me drop my damn keys." As the officer bent down to look for the keys the defendant shot him six times, four times in the head, once in the shoulder and once in the back. She then ran from the area. Following the shooting, she

went to a friend's house and told her that she had just shot a cop because she wasn't going back to jail. This Court initially found that Jackson's statements concerning her keys was intended to get the victim in a position so she could shoot him, the prior struggle with police evincing her intention not to be arrested, the subsequent statement, and the fact that six shots were fired was sufficient to support CCP.[8] In the instant case there was no evidence that HARDY positioned the officer for the fatal shots, no actions evincing an intention not to be arrested, and no statements before or after that the killing was planned to avoid arrest.

Another case relied upon by the trial court in finding CCP was Stein v. State, 632 So.2d 1361 (Fla. 1994). Stein was involved in a robbery of a Pizza Hut. The robbery was planned approximately a week prior to the murders. During the planning, the defendant stated that there could be no witnesses to the robbery. Two supervisors at the Pizza Hut were murdered, both bodies were found in the men's room. One victim suffered five gunshot wounds, four to the head and one to the chest from a distance of four to six inches away while he was sitting. The other victim suffered four gunshot wounds, one through the neck, one in the right shoulder, one in the chest, and one in the thigh. He apparently was also sitting on the floor at the time the shots

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[8] After the defendant received a new sentencing hearing in a collateral proceeding, this Court reversed the CCP finding based upon an improper instruction which, given the evidence, this Court could not conclude was harmless beyond a reasonable doubt. Jackson v. State, 648 So.2d 85, 90 (Fla. 1994).

began but was moving around during the shooting. The facts of the instant case are substantially different.

The final authority relied upon by the trial court in finding CCP in this case was Eutzy v. State, 458 So.2d 755 (Fla. 1984. First, the Court should not have relied on Eutzy given the "evolutionary refinement" in the law defining CCP since the original Eutzy decision. See Eutzy v. Dugger, 541 So.2d 1143 (Fla. 1989) (evolutionary refinement in the law does not require retroactive application); Rogers v. State, 511 So.2d 526, 533 (Fla. 1987) (CCP required careful plan or prearranged design, receding from prior holdings). Further, the limited facts in Eutzy are dissimilar from the instant case: the defendant hailed the victim's cab, drove around with the victim for 45 minutes with no funds to pay for the cab ride, then shot the victim in the back of the head, execution style. 458 So.2d at 757; Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. FL. 1989) (habeas corpus granted).

The Court improperly relied on collateral crime evidence to support the finding of CCP. The collateral crime evidence did not establish a prearranged plan to kill Hunt. (See Issue V). Further, even if permissible to consider such evidence it is not sufficient to support this aggravating factor. Power v. State, 605 So.2d 856, 864 (Fla. 1992).

In contrast, the evidence in the instant case does not support a careful plan and calm reflection and heightened premeditation. The victim was not removed to a different location, there was no prolonged period of reflection, there was no planning,

there were no statements indicating a previously formed intent to murder that night if stopped by a police officer. The collateral crime evidence does not support CCP in that there is no evidence of the defendant making statements that if caught during the commission of or escaping from the commission of any crime that there was an intention to kill a law enforcement officer, there were no statements indicating the desire to eliminate witnesses, and this 18 year old defendant did not reveal any careful plan or calm reflection. Indeed, the subsequent act of shooting himself in the head reveals a person overwhelmed by helplessness, hopelessness, and remorse. This undermines any finding of sophistication or cool reflection in the actions which led to Hunt's death.

There is no question that the murder of Sgt. Hunt was reprehensible. However, the facts of the instance case do not rise above the reprehensible nature of all premeditated murders such as to warrant a finding of the aggravating circumstance of cold, calculated and premeditated. The trial court erred in so finding.

Alternatively, the application to the Defendant of the CCP aggravating circumstance is unconstitutional as it doesn't genuinely narrow the class of death-eligible defendants in a rational manner.

Further, this aggravating circumstance is so vague and overbroad that it permits an arbitrary and inconsistent application as evidenced by the authorities cited herein. As a result, the jury and the Court were left with unbridled discretion in applying

this aggravating circumstance to the facts of this case. Therefore, Sec. 921.141(5)(i), Fla. Stat., as applied to this Defendant, violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution.

Given the strong mitigation presented both as to HARDY'S life history, his young age, and his substantial brain damage, the striking of the CCP aggravating circumstance compels imposition of a life sentence.

ISSUE VIII

THE ADMISSION OF VICTIM IMPACT EVIDENCE RENDERED THE SENTENCING DETERMINATION A VIOLATION OF FLORIDA AND FEDERAL CONSTITUTIONAL LAW.

After the jury recommendation, the trial court held an "allocution" hearing. (TR 3900). During the hearing, the State presented the most outrageous and improper victim impact testimony. Including the victim's family members demands for the death penalty, their opinion as to the Defendant's worthlessness and a fellow officer's opinion that the crime committed by HARDY was a crime against humanity. (TR 3912-3925). All of this testimony violates the specific rules governing the admission of victim impact evidence.

Section 921.141(7), Florida Statutes, provides:

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

Emphasis added.

Additionally, in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L. Ed. 2d 720 (1991), the Court held that victim impact testimony did not offend the Eighth Amendment so long as it fell within the parameters as outlined in the statute. See also

Windom v. State, 656 So.2d 432 (Fla. 1995). The testimony presented to the Court clearly violates the statute and caselaw.

Despite the trial court's assurances that it was only considering statutory aggravators and the mitigation presented, the presentation of the inflammatory and impermissible evidence renders the sentencing proceeding unconstitutional. Such evidence intrudes into the penalty decision considerations that have no rational bearing on any legitimate aim of capital sentencing. It is highly emotional and inflammatory, subverting the reasoned and objective inquiry which the Courts have required to guide and regularize the choice between death and lesser punishments. The chants for death have no place in a courtroom. The Court's decision to hear such evidence, despite the defense objection, renders any assurance that such evidence will not be considered illusory.

The presentation of the evidence in this case, from the victims as well as from a representative of law enforcement, renders the sentencing procedure fundamentally unfair, arbitrary and capricious. The admission of this evidence violates Article I, Section 2, 9, 16, 17 and 21 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

ISSUE IX

THE DEATH PENALTY IN THIS CASE IS NOT PROPORTIONATE.

Under the circumstances of this case, and the present condition of the Defendant, the death penalty is not a proportionate punishment. As this Court has said:

> 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.

Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). Death is a uniquely irrevocable penalty, justifying a more intensive level of scrutiny than would lesser penalties. Art. I, Sec. 9, Fla. Const.; Porter.

There exists in this case one true aggravating circumstance: that the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties. Sec. 921.141(5)(j), Fla. Stat. The mitigation presented clearly outweighs this aggravating factor. Thompson v. State, 647 So.2d 824 (Fla. 1994); Songer v. State, 544 So.2d 1010 (Fla. 1989). Even if this Court also considers the aggravating circumstance that the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification applies in this case, the death penalty is still not a proportionate penalty given the substantial mitigation present in this record. Kramer v. State, 619 So.2d 274, 277 (Fla. 1993).

The Defendant's young age of 18 has often been recognized as a statutory mitigating circumstance. Basset v. State, 449 So.2d 803 (Fla. 1984); Jackson v. State, 366 So.2d 752 (Fla. 1978); Scott v. State, 603 So.2d 1275 (Fla. 1992).

Substantial non-statutory mitigation was presented in the trial court. The most substantial mitigation is presented by the Defendant's current condition. He is severely and irrevocably brain damaged. As a result of the self-inflicted gunshot wound, HARDY lost 50% of his left frontal lobe and 25% of his right frontal lobe. The damage was so extensive that he was not expected to survive this injury. However, after two years of rehabilitative efforts, the Defendant reached a point where he can speak in one to three word sentences, he can clean his room, and he can bathe himself. He cannot read or write. He continues to have difficulty responding appropriately because of the permanent damage to his verbal abilities. The right side of his body is still afflicted from the original paralysis in that he cannot use his right arm to right or draw. The description of the Defendant's favorite activities mirror those of a young child: playing Yatzee and watching cartoons. The medical and mental health professions who spent two years with him prior to going to trial testified that he is docile, quiet, childlike, and completely lacking in any aggression, anger, or irritability. Although the State will surely argue that HARDY'S current condition should not "excuse" his conduct in committing this murder, his current condition is a

unique circumstance which makes this case unlike others where the death penalty has been approved.

In addition to HARDY'S current condition, substantial other mitigation was presented in the trial court. The Defendant's childhood was marred by violence both against him and against his loved ones. This is a mitigating factor. Neary v. State, 384 So.2d 881 (Fla. 1980); Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L. Ed. 2d 256 (1989); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L. Ed. 2d 347 (1987). The cycle of violence in his family goes back generations on both sides of his parents. Penry; Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L. Ed. 2d 1 (1982). The father-figures in his life have been alcoholics and violent men who provided no guidance or authority in this upbringing. Livingston v. State, 565 So.2d 1288 (Fla. 1990). His early years were marked with instability and insecurity with constant moves and relocations. Neary; Penry; Eddings; Hitchcock. His mother was unable to provide the guidance or support necessary for a healthy upbringing. His mother's efforts at supporting the family were limited and therefore he was raised in an impoverished home. Hitchcock; Brown v. State, 526 So.2d 903 (Fla. 1988). HARDY'S self-inflicted gunshot wound is evidence of substantial remorse. Smalley v. State, 546 So.2d 720 (Fla. 1989). Since the time of this incident NICHOLAS HARDY has been a model of good behavior and is unlikely to ever endanger others in a structured environment such as prison. Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 9 L. Ed. 2d 1 (1986); Demps v. Dugger, 874 F.2d

1385 (11th Cir. 1989). It is unlikely that NICHOLAS HARDY truly appreciates the punishment he has received. Everyone described him as smiling and childlike in the face of discussing the end of his natural life. His limited mental abilities mitigate against a sentence of death. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L. Ed. 2d 973 (1978).

In Songer v. State, 544 So.2d 1010 (Fla. 1989), the Court held that death was not a proportional penalty for the killing of a Florida Highway Patrolman by an escaped convict. The facts of the instant case are not as aggravated as the case of Morgan v. State, 639 So.2d 6 (Fla. 1994). In Morgan the defendant was convicted of the brutal murder of a 66 year old woman. He crushed her skull with a crescent wrench and stabbed her sixty times. He sexually brutalized her. This Court found the mental mitigation outweighed the aggravated nature of the homicide and found the penalty of death disproportionate. In Sinclair v. State, 657 So.2d 1138 (Fla. 1995), this Court found death to be disproportionate in a felony murder situation where the defendant clearly planned in advance his intention to commit robberies and murdered a cab driver by shooting him twice in the head. In Sinclair the mitigation was minimal. Nonetheless, this Court found death to be disproportionate. In Livingston v. State, 565 So.2d 1288 (Fla. 1988), the defendant entered a convenient store with a firearm, shot the attendant twice, fired another shot at another woman inside the store and carried off the cash register. The defendant was 17 years of age at the time. This Court found that the

mitigation presented by the Defendant's abusive background, youth, and marginal intellectual functioning outweighed the two aggravating circumstances supporting the death penalty.

In Kramer v. State, 619 So.2d 274, 275-76 (Fla. 1993), the Court found that despite the presence of two aggravating circumstances (prior violent felony and heinous, atrocious and cruel), the death penalty was disproportionate in light of the mitigation. See also, Maulden v. State, 617 So.2d 298, 303 (Fla. 1993) (death sentence disproportionate despite two aggravating circumstances); Blakely v. State, 561 So.2d 560 (Fla. 1990) (death sentence disproportionate despite two aggravating circumstances); and Wright v. State, 21 Fla. Law W. S498 (Nov. 21, 1996).

There is no question that the death of Sgt. Hunt is a tragedy. However, in light of the voluminous mitigation, this is not one of the most aggravated and least mitigated of murders. The penalty of death in this case is disproportionate and therefore violates Article I, Section 17 of the Florida Constitution and the Eighth Amendment of the United States Constitution.

CONCLUSION

For the reasons outlined and the authorities cited herein, NICHOLAS HARDY respectfully requests this Court to reverse the judgment of guilt and remand for a new trial. Alternatively, NICHOLAS HARDY requests this Court to reverse his sentence of death with directions to impose a sentence of life imprisonment or order a new sentencing proceeding by jury and Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Celia Terenzio, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, FL 33401 this ________ day of March, 1997.

____
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