IN THE SUPREME COURT OF FLORIDA

JAMES HITCHCOCK,

Appellant,

v. **CASE NO. 92,717**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The statement of the case contained in Hitchcock's brief is argumentative and is denied. The State relies upon the following statement of the case.

In this Court's 1996 opinion, which was Hitchcock's last appearance before this Court, the procedural history of this case was summarized as follows:

> James Ernest Hitchcock appeals the death sentence imposed upon him after a second remand for resentencing. We have jurisdiction pursuant to article V, section 3(b)(1) of the *Florida Constitution*. We again remand for resentencing because evidence portraying Hitchcock as a pedophile, including unverified allegations of Hitchcock's sexual abuse of a number of children, was erroneously made a feature of his resentencing proceeding. This evidence was prejudicial and deprived Hitchcock of a fair sentencing.
>
> Hitchcock was convicted for the 1976 strangulation murder of his brother's thirteen-year-old stepdaughter. The facts surrounding the murder are set forth in *Hitchcock v. State*, 413 So.2d 741 (Fla.) (*Hitchcock I*), *cert. denied*, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982). The jury recommended a sentence of death, and the trial judge followed that recommendation. This Court affirmed Hitchcock's conviction and sentence. *Id*. Thereafter, we affirmed the denial of Hitchcock's motion for postconviction relief. *Hitchcock v. State*, 432 So.2d 42 (Fla. 1983) (*Hitchcock II*). In later habeas corpus proceedings in the federal courts, however, the United States Supreme Court granted certiorari and vacated Hitchcock's death sentence because the advisory jury was instructed not to consider and the sentencing judge refused to consider evidence of nonstatutory mitigating circumstances. *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).
>
> On remand, the jury again recommended the death penalty, which the trial judge subsequently imposed. This Court affirmed the sentence. *Hitchcock v. State*, 578 So.2d 685 (Fla. 1990) (*Hitchcock III*), *cert. denied*, 502 U.S. 912,

> 112 S.Ct. 311, 116 L.Ed.2d 254 (1991). On rehearing, the United States Supreme Court granted certiorari and remanded to this Court for reconsideration in light of *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). *Hitchcock v. Florida*, 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). We vacated Hitchcock's death sentence and directed the trial court to empanel a jury and conduct a new penalty proceeding within ninety days. *Hitchcock v. State*, 614 So.2d 483 (Fla. 1993) (*Hitchcock IV*).
>
> In this third sentencing proceeding, now before us for review, the jury unanimously recommended the death penalty, which the trial judge then imposed. On appeal, Hitchcock raises eleven issues. [footnote omitted] Because we again remand for resentencing, we address only four of those issues.

Hitchcock v. State, 673 So.2d 859, 860 (Fla. 1996). This Court denied rehearing on May 15, 1996, and the mandate was issued on June 14, 1996. (R631).

Beginning in August of 1996, numerous motions relating to the fourth penalty phase proceeding were filed. (R650 *et seq.*). Ultimately, the penalty phase began on September 9, 1996, and concluded with the jury's recommendation of death (by a 10-2 margin) on September 11, 1996. (R1024). A *Spencer* hearing was duly conducted on October 8, 1996, (TR397 *et seq*), and, on October 10, 1996, the court followed the jury's recommendation and sentenced Hitchcock to death. (TR 426 *et seq*). The trial court found the following aggravating circumstances:

> 1. That Hitchcock was under sentence of imprisonment at the time of the murder;
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> 2. That the murder was committed during the commission of the crime of sexual battery;

> 3. That the murder was committed for the purpose of avoiding or preventing lawful arrest; and,
>
> 4. That the murder was especially heinous, atrocious, or cruel.

(TR430-31). The sentencing court found the statutory age mitigator, based on Hitchcock's age of 20 at the time of the murder. (TR434). The court also found non-statutory mitigation based upon the deprivations suffered by Hitchcock during his early years, as well as positive character traits exhibited by Hitchcock before and after the commission of the murder. (TR435-6). The court found that these matters were not entitled to significant weight. (TR436). Following due consideration of the aggravators and mitigators, the trial court sentenced Hitchcock to death. (TR437).

On October 18, 1996, Hitchcock filed a "motion to correct sentencing error". (R1061-1071). On October 23, 1996, Hitchcock filed a "motion for evidentiary hearing on newly discovered evidence". (R1075-98). On February 10, 1997, the State was ordered to respond to Hitchcock's motion to correct sentencing error, and duly filed such a response on March 11, 1997. (R1102).

On June 13, 1997, the court conducted a hearing on the motion to correct sentence, and issued an amended sentencing order on October 8, 1997. (R1111-19). On October 8, 1997, the court also ordered an evidentiary hearing on the "newly discovered evidence" matter. (R1122-33). On November 5, 1997, Hitchcock filed a "motion to correct sentence error in amended sentence order". (R1122-33).

That motion was denied on November 10, 1997. (R1134).

On December 3, 1997, the court conducted the hearing on the "newly discovered evidence" matter. (TR451-530). No order was issued by the presiding judge, and, on January 8, 1998, that judge (Michael Cycmanick) was suspended from the bench. (R1149). This case was reassigned to Judge Richard Conrad on January 13, 1998, for the express purpose of resolving the "new evidence" matter. (R1145). Judge Conrad set a new evidentiary hearing, and, on February 11, 1998, denied Hitchcock's motion for a new penalty phase. (R1155-57).[1] Judge Conrad conducted an evidentiary hearing on the "newly discovered evidence" claim on March 10, 1998, and, on March 18, 1998, issued an order denying all relief. (TR531-578; R1162-69). Notice of appeal was given on March 18, 1998 (R1170), and, on June 27, 1998, the record was certified as complete and transmitted. (R1183). Hitchcock filed his *Initial Brief* on April 5, 1999.

STATEMENT OF THE FACTS

The Statement of the Facts set out in Hitchcock's brief is argumentative and is denied. The State relies on the following Statement of the Facts.

Dr. Guillermo Ruiz is the retired Orange County Medical Examiner. (TR94). Dr. Ruiz was accepted as an expert in forensic

[1]Hitchcock had sought a new penalty phase based upon Cycmanick's removal from the bench. (R1148).

pathology. (TR95). In his capacity as the Orange County Medical Examiner, Dr. Ruiz was involved in the investigation of Cynthia Driggers' death on July 31, 1976. (TR95). Dr. Ruiz conducted an autopsy on Cynthia's body, and cataloged her injuries as follows: lacerations and contusions to her face in the area of the eyes, abrasions on the right sided of the forehead and neck, abrasions to the buttocks, and injuries to the neck consistent with manual strangulation. (TR111-115). Dr. Ruiz testified that Cynthia died as a result of asphyxiation due to strangulation. (TR116). Dr. Ruiz further testified that he observed a tear in the victim's hymen, indicating that she had been a virgin until shortly before her death. (TR116-7).[2] Cynthia lost consciousness as a result of being strangled to death, not as a result of a blow to the head. (TR126).

Debra Lynn Driggers was the victim's younger sister. (TR130-31).[3] In 1976, Lynn and Cynthia lived in Winter Garden, Florida, with their two brothers, younger sister, mother, step-father, and the defendant, James Hitchcock. (TR132). Before she was murdered, Cynthia told her sister, Lynn, that Hitchcock was doing inappropriate things to her. (TR133). Lynn tried to get her sister to tell their mother what was happening, and, when they told Hitchcock they were going to tell their mother what he was doing, he threatened to rape and kill both girls. (TR133). Lynn was 12

[2]Semen was found in the victim's vagina. (TR116).

[3]Lynn Driggers is a year younger than Cynthia. (TR131).

years old at that time, and took that threat seriously. (TR134).

Lynn and Cynthia had another conversation about Hitchcock's inappropriate behavior the night before Cindy's body was found. (TR134). Cynthia begged Lynn not to tell their mother what was going on because she was scared. (TR134). Cynthia's body was found the morning after that conversation took place. (TR135). Lynn was afraid to tell anyone what had happened for years afterward. (TR135, 143). In fact, Lynn did not tell anyone what had taken place until 1993, when she told the trial prosecutor about Hitchcock's behavior. (TR143). Lynn did not tell anyone what had happened at the time of the investigation into her sister's death because she was afraid that she would be killed, too. (TR143). Prior to 1993, no one had asked Lynn for information about the relationship between Hitchcock and the rest of the family. (TR144).

Dan Nazarchuk is a detective with the Orange County Sheriff's Department. (TR144-45). Detective Nazarchuk has been a homicide detective since 1973, and was the lead investigator in this case. (TR145). During the course of the investigation, Detective Nazarchuk interviewed Hitchcock on more than one occasion. (TR145). During the first such interview, Hitchcock denied all knowledge of the crime. (TR146). Hitchcock was interviewed again, and confessed to the murder in a statement which was admitted into evidence as State's Exhibit 6. (TR147).

Hitchcock presented various testimony in mitigation, which can

be characterized as being testimony about his early life, as well as his behavior while housed on Death Row.

Richard Green is an Assistant Public Defender from West Palm Beach who represented Hitchcock on appeal from 1978-88. (TR150-1). Green testified that, while incarcerated, Hitchcock earned a GED, and became somewhat more educated. (TR151-57).

Dr. Jethro Toomer is a psychologist engaged in the private practice of forensic psychology. (TR164-65). He was retained for the purpose of evaluating Hitchcock. (TR172). In carrying out that evaluation, Toomer administered various tests, and concluded that Hitchcock "suffers from borderline personality disorder", as well as "some personality difficulties". (TR172-76). Toomer did not connect any of those "mental conditions" to the murder of Cynthia Driggers.

Betty Augustine is Hitchcock's older sister. (TR195-96). She testified about the early years of their lives in rural Manila, Arkansas. (TR196-202). That testimony can be characterized as a description of the life of a poor, large, farm family some 40 years ago. (TR196-202).

Lisa Mackabee is Hitchcock's niece. (TR203). She has corresponded with Hitchcock over the years (TR204), and has been the recipient of advice and guidance from Hitchcock, whom she described as a "friend". (TR205). She has actually met Hitchcock on very few occasions. (TR206).

Wanda Green is another of Hitchcock's sisters. (TR207). She testified about the family's life during Hitchcock's childhood, and also testified about the relationship between her siblings and their stepfather. (TR210-11).

Charles Foster is a death row inmate who was housed near Hitchcock for a period of time. (TR211-213). Foster testified about how Hitchcock "talked him out of hurting" a guard, and acted as "peacemaker" between Foster and another inmate. (TR213-4; 215-6).

The testimony of Jerry White was presented through the reading of a transcript. (TR220 *et seq*). White's testimony can be summarized as being that Hitchcock taught another inmate (James Morgan) how to read, and that Hitchcock never treated White differently because he was black. (TR220-1).

James Harold Hitchcock is the defendant's older brother. (TR224). The defendant worked with his brother both at a service station (TR224-6), and picking fruit in the Winter Garden area. (TR226-8). Hitchcock worked with his brother picking fruit until he was arrested. (TR228)[4].

Inmate James Morgan testified that Hitchcock taught him how to read in 1985. (TR230-2; 233). Morgan has been off death row for the last two years, and has had no contact with Hitchcock. (TR233).

Ruby Hitchcock Slader is Hitchcock's niece. (TR234-5). She has

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[4]This arrest was apparently in Arkansas, rather than being the arrest for the murder at issue here. (TR229).

corresponded with Hitchcock over the years, and has been given advice by him. (TR235-7). She considers Hitchcock to be a friend who has had a positive effect on her life. (TR238).

The transcript testimony of Wayne Hitchcock, who is the defendant's first cousin, was read. (TR239 *et seq*). That testimony concerned how the defendant had saved one of his uncles from drowning. (TR241-2). The defendant was a hard worker who put in a lot of hours picking fruit. (TR247).

Martha Galloway is another of Hitchcock's sisters. (TR247-8). She described the poor conditions in which she and her siblings grew up in rural Arkansas. (TR248-53). She has always had a close relationship with her brother. (TR256).

Bertha Lorine Galloway is the defendant's mother. (TR260-61). She testified that the defendant is the first of her children to receive a high school diploma, and that he sends her birthday and Christmas cards. (TR262-3). Ms. Galloway also testified about how it was necessary for her to work at various jobs in order to feed her family. (TR263). Ms. Galloway also testified that she always loved her children and tried to raise them right. (TR264).

At the March 10, 1998, hearing conducted by Judge Richard Conrad, Hitchcock’s sister, Wanda Green, testified that Richard Hitchcock, (the defendant’s brother) admitted that Richard, not the defendant, killed the victim in this case. (R534-35; 540-41). However, on cross-examination, witness Green testified that she

told the public defender's investigator assigned to this case about the statement made to her by Richard. (R552). The investigator testified that he never had a face-to-face conversation with her regarding the Richard Hitchcock "confession". (R 566). Ms. Green never made any effort to convey that information to Hitchcock's attorneys, choosing instead to make the statement, for the first time, to the news media. (R 557-8). The public defender's investigator was never told of the "confession" by Green, even though he was in her presence on several occasions, as were other members of the defendant's family who supported him. (R564; 566-67).[5]

[5]Richard Hitchcock made this statement in 1995, and it was not revealed by Green until 1996. (R550-51). The "confession" by Richard purportedly occurred in August of 1995. Richard was killed an automobile accident shortly thereafter. (R541-42).

SUMMARY OF THE ARGUMENT

1. The "MMPI Report" was properly admitted into evidence because that document was relevant to the sentencing determination. Under settled law, relevancy is the standard for determining the admissibility of evidence at the penalty phase of a Florida capital trial. Hitchcock had every opportunity to present whatever rebuttal evidence he wanted to present, and should not be heard to complain because he did not take advantage of that opportunity. To the extent that a component of this claim alleges that the State committed some impropriety during closing argument, no such issue is preserved for review because Hitchcock did not object.

2. Hitchcock's claim that the State "misstated the law" regarding the jury's consideration of mitigating evidence has no legal basis. The law is not, as Hitchcock argues, in such a state as to preclude the prosecution from arguing that a particular matter presented as "mitigation" is not, in fact, mitigating in nature.

3. Hitchcock's claim that the State committed error during closing argument by challenging the conclusions reached by Hitchcock's expert witness is not preserved for review, and, moreover, is without merit.

4. The "fundamental error during closing argument" claim relies upon out-of-context quotations from the record when, in fact, nothing is preserved for review because no objection was

made. Moreover, when the complained-of arguments are read in context, there is no basis for reversal, and, hence, no merit to Hitchcock's claim.

5. The claim concerning the successor judge is not a basis for relief. Hitchcock obtained a substantial delay by filing an unauthorized *Florida Rule of Criminal Procedure* 3.800 motion, which was followed by a claim of newly discovered evidence which resulted in an evidentiary hearing. As the result of Judge Cycmanick's removal from the bench, another hearing on the "newly discovered evidence" claim was conducted by Judge Richard Conrad. Hitchcock also filed a motion for a "new penalty phase" alleging that Judge Conrad needed to hear the penalty phase evidence in order to evaluate the "new evidence". Judge Conrad denied the motion for a new penalty phase, and Hitchcock now claims that it was improper for Judge Conrad to rule on that motion. There is no basis for relief because this claim has no legal or rational basis.

6. The facts found by the sentencing court established that the "avoiding arrest" aggravating circumstance was proven beyond a reasonable doubt. That aggravator applies in this case under controlling law. To the extent that Hitchcock includes a jury instruction component to this claim, that claim is not only foreclosed by binding precedent, but also unpreserved for appellate review.

7. Hitchcock's challenge to the under sentence of

imprisonment and felony murder aggravating circumstances are foreclosed by binding precedent because, under settled Florida law, both of those aggravators are available to the sentencing court in this case. Moreover, this claim is not preserved for appellate review because it was not properly raised in the trial court.

8. Hitchcock's claim that the evidence was not sufficient to support the felony murder aggravating circumstance is rebutted by the facts found by the sentencing court. The evidence establishes the felony murder aggravating circumstance beyond a reasonable doubt. To the extent that Hitchcock claims that the felony-murder aggravating circumstance is unconstitutional *per se*, that claim has been repeatedly rejected by this Court.

9. The claim concerning the application of the heinous, atrocious, or cruel aggravating circumstance, and the associated jury instruction claim, is without merit. The jury instruction that was given in this case has been repeatedly upheld in the post-*Espinosa* rulings of this Court. To the extent that Hitchcock challenges the applicability of the heinous, atrocious, or cruel aggravator, this Court has expressly rejected any "intent" element associated with that aggravating circumstance, and, moreover, has repeatedly held that strangulation murders are virtually *per se* heinous, atrocious, or cruel. This aggravator applies to this case beyond a reasonable doubt.

10. Hitchcock's argument that the avoiding arrest, felony

murder, and under sentence of imprisonment aggravating circumstances "overlap" has no legal basis.

11. Hitchcock's claim that the sentencing order is in some way inadequate is rebutted by the sentencing order, which carefully evaluated the aggravation and mitigation, engaged in a proper weighing of those factors, and concluded that death was the appropriate sentence. The order complies in all respects with the requirements of law, and there is no basis for relief.

12. Hitchcock's claim that death is not proportionate in this case is contrary to the precedent of this Court. This case presents four strong aggravating circumstances, weighed against weak non-statutory mitigation. The aggravation is very strong, and the mitigation is virtually nonexistent. Death is the only proper sentence.

13. The claim concerning the testimony of Hitchcock's "former" attorney is not a basis for relief because, if there was any "error", that "error" was injected into the record by Hitchcock himself. In any event, assuming, arguendo, that there was error, the facts about which Hitchcock complains were presented to the jury by him through the testimony of three other witnesses. There is no basis for relief.

14. Hitchcock's "new evidence" claim is not a basis for relief because the credibility determinations were properly made by the trial court, are supported by competent, substantial evidence,

and should not be disturbed.[6]

15. Hitchcock's claim that he should have been allowed to present evidence of a plea bargain offer that was rejected by him is not a basis for relief because, as this Court has previously held, Hitchcock rejected that offer, rendering it a nullity that had no force and effect. Such evidence is irrelevant, and was properly excluded.

16. The "length of incarceration" claim has been previously rejected by this Court, and, because Hitchcock has never identified any "prejudice", there is no basis for relief. There is no legal basis for granting relief on the grounds contained in Hitchcock's brief, and, in fact, all precedent is to the contrary. This claim has no constitutional basis, and relief should not be granted on it.

[6]Hitchcock essentially re-argues Claim 5, above.

ARGUMENT

1. THE ADMISSION OF THE MMPI REPORT CLAIM

On pages 20-29 of his brief, Hitchcock argues that it was error for the trial court to admit some three pages of a narrative report of the results of the Minnesota Multiphasic Personality Inventory (MMPI) administered to the defendant. This claim is not a basis for reversal for the following reasons.

In his brief, Hitchcock presents the admission of three pages of the MMPI report as a complex evidentiary issue with multiple parts and sub-parts. However, a review of the record of Hitchcock's trial does not bear that presentation out. The true facts are that Hitchcock's mental state expert, Dr. Toomer, administered the MMPI to Hitchcock, and relied on the results of that test (among others) in reaching his opinions and conclusions about Hitchcock's mental state. (R172-4). Despite Hitchcock's histrionic argument (or perhaps because of it), it is difficult to determine exactly why the three pages of the MMPI report at issue were **not** relevant to the issue before the fact-finder. Of course, the standard of admissibility of evidence at the penalty phase of a capital trial is one of relevancy:

> ... In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence,

> provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

§921.141(1), *Florida Statutes.* Obviously, the MMPI report (which was generated at the instance of Hitchcock's expert) was relevant to the mental mitigators which were the subject of that expert witness's testimony. (R171-193). Regardless of Hitchcock's characterization of the State's use of the report as some sort of improper "tactic" (and regardless of whether or not the State considered what it was doing to be "rebuttal"), the state of the law is that relevant evidence is admissible at the penalty phase of a capital trial. The report was properly admitted under that standard -- Hitchcock's brief ignores that standard, and, in so doing, argues for reversal based upon legally inapplicable matters. *Wuornos v. State,* 644 So.2d 1012, 1013 (1994) (Evidence that defendant had threatened police during her incarceration, that she had used gun to threaten man to give her a ride, and that she had previously claimed religious conversion during incarceration on other charges was relevant in penalty phase of capital murder trial to controvert defendant's theory that she never attacked without provocation and had undergone recent religious conversion); *Alvord v. State*, 322 So.2d 533, 538 (1975) (“There should not be narrow application nor interpretation of rules of evidence in the penalty hearing, whether in regard to relevance or as to any other matter except illegally seized evidence.”)

Because the report was relevant, it was properly admitted into

evidence. Moreover, Hitchcock was given every opportunity to recall his expert witness and present whatever testimony he wished regarding the three pages of the MMPI report that were admitted into evidence. (R275). Hitchcock did not avail himself of that opportunity, and should not be heard to complain. To the extent that the report at issue contains hearsay, Hitchcock was afforded the opportunity to present whatever rebuttal he wanted, as required by § 921.141(1).[7]

Because the MMPI report was relevant to the mitigation argued by Hitchcock, it was properly admitted into evidence under well-settled law. To the extent that further discussion of this issue is necessary, if the report confirmed Dr. Toomer's testimony (as Hitchcock claims that it does) and the State's arguments about the report were in error, it is difficult to ascertain the basis for complaint. If the report was helpful to the defense, there can be no prejudice, and, hence, no basis for reversal. Even if the State misinterpreted the report in final argument, the jury had the document in front of it and was well-able to discern what it said. Once again, there can be no prejudice to the defense[8]. This claim is, in short, a non-issue based upon arguments that have no

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[7]Hitchcock has not argued that the report contained hearsay -- if it does, he had a fair opportunity to present rebuttal but did not take it.

[8]If the State mis-stated what the report said, it is unlikely that such a statement helped the State. The facts of this case speak for themselves.

application to the penalty phase of a death penalty case. There is no basis for reversal.

Finally, to the extent that Hitchcock attempts to blend in elements of a claim that there was some error with regard to the State's use of the MMPI report in closing argument, no such claim was preserved for appellate review by timely objection at trial. Florida law is settled that issues concerning closing argument are not preserved unless a timely objection is made -- no such objection was made here, and nothing is preserved for this Court's review. *Nixon v. State*, 572 So.2d 1336 (Fla. 1990); *Chandler v. State*, 702 So.2d 186 (Fla. 1997); *Allen v. State*, 662 So.2d 323, 328 (Fla. 1995); *Kilgore v. State*, 688 So.2d 895, 898 (Fla. 1996). In any event, the State's argument was not improper, and did not deprive Hitchcock of a fair trial. *Chandler, supra*. The sentence of death should be affirmed in all respects.

2. THE "MITIGATION ARGUMENT" CLAIM

On pages 30-36 of his brief, Hitchcock argues that the State "misstated the law" regarding the jury's consideration of evidence offered in mitigation. Hitchcock's argument seems to be that whatever evidence the defendant claims is "mitigating" must be accepted as such by the jury without further consideration of its true value in relation to the sentencing recommendation.[9] This

[9]To the extent that Hitchcock complains about a statement during *voir dire* and about a subsequent statement in closing argument, such were not preserved by timely objection. *Chandler,*

argument has no legal basis.

Once again, the precise nature of Hitchcock's claim is unclear. However, the claim contained in his brief seems to be that the State's argument that the circumstances of Hitchcock's early life were not mitigating was, somehow, error.[10]

In the context of a sentencing order, the law is clear that "in considering mitigating evidence a judge must determine if 'the facts alleged in mitigation are supported by the evidence,' if such facts as may be established are mitigating factors, i.e., 'may be considered as extenuating or reducing the degree of moral culpability for the crime committed,' and, if mitigators have been established, whether 'they are of sufficient weight to counterbalance the aggravating factors.'" *King v. State*, 623 So.2d 486 (Fla. 1993); *Rogers v. State*, 511 So.2d 526 (Fla. 1987) ("The effects produced by childhood traumas, on the other hand, indeed would have mitigating weight **if relevant to the defendant's character, record, or the circumstances of the offense**. ... However, in the present case Rogers' alleged childhood trauma does not meet this standard of relevance."); *Hall v. State*, 614 So.2d 473, 479 (Fla. 1993); *Preston v. State*, 607 So.2d at 412. ("The decision as to whether a mitigating circumstance has been

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supra; Nixon, supra. In the absence of a proper objection, nothing is preserved for review.

[10]The matters at issue were poverty, early living conditions, and sympathy.

established is within the trial court's discretion."). If the sentencing court is entitled to reject matters offered as mitigation when the proposed "mitigator" is not relevant to the defendant's character, record, or the circumstances of the offense, and that is the law, it makes no sense to argue, as Hitchcock does, that the State commits error by arguing to the advisory jury that a matter offered in mitigation shows nothing about the defendant's character. (R338 *et seq*). The State's argument accurately stated the law, and Hitchcock should not be heard to complain. There is no basis for relief because the claim contained in Hitchcock's brief is based upon a faulty legal premise that does not accurately reflect Florida law.

To the extent that further discussion of this issue is necessary, there is no rule of law that stands for the proposition that the State cannot argue to the jury that the matters offered by the defendant as mitigation were not established, are not truly mitigating in nature, or should be given little or no weight in the weighing process. A rule of law that foreclosed such legitimate argument would literally deprive the State of a fair trial, and would produce a proceeding that was hopelessly one-sided in favor of the defendant. The Constitution does not require such a result, *Davis v. Kemp*, 829 F.2d 1522, 1528 (11th Cir. 1987), and this Court should not adopt such a strained view of due process. There is no basis for reversal, despite Hitchcock's efforts to manufacture

error when none occurred. Hitchcock's death sentence should be affirmed in all respects.[11] Finally, even assuming *arguendo* that there was some error, it was harmless in the context of this case. When the evidence is fairly considered, even if the State's comments regarding the treatment of mitigation were erroneous, there is no reasonable probability of a different result given the clear evidence of aggravation that exists here. Any error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986).

3. THE CLOSING ARGUMENT CLAIM

On pages 37-39 of his brief, Hitchcock argues that he is entitled to a new trial based upon what he describes as the prosecutor's expression of his "personal views belittling the [expert] witness." A fair reading of the State's closing argument reveals that, even if the claim contained in Hitchcock's brief is preserved, it has no merit.

In his brief, Hitchcock implies that he objected to the comments at issue and that that objection was overruled. The true facts do not support that suggestion. The argument at issue reads as follows:

> Now, Doctor Toomer testified for about an hour and a half, and you will recall that when my turn came to

[11]To the extent that Hitchcock's brief contains a claim that it was error for the State to argue that sympathy for the defendant is not a valid mitigator, the law is clear that such is not error. *Saffle v. Parks,* 494 U.S. 484 (1990).

> cross-examine him, I didn't. And you may have asked yourselves why. I will tell you this --
>
> Ms. Cashman: Objection. Improper closing.
>
> Mr. Ashton: I don't think I've done anything improper yet.
>
> Ms. Cashman: I think he's about to and I'm going to --
>
> Mr. Ashton: Wait and see if I do or not.
>
> The Court: **Objection is overruled at this point.**

(R330). The State's closing argument continued without objection, even though defense counsel was well aware of the need to object to preserve any appellate issues. Under settled law, and objection must be timely made to preserve an issue concerning closing argument. In the absence of such objection, nothing is preserved for review. *Chandler, supra; Nixon, supra*. The true facts are that defense counsel obviously expected an "objectionable" comment to be made, and interposed an anticipatory objection that was properly overruled because, at the time it was made, there was nothing to object to. The State's argument continued, and defense counsel obviously could have objected **again** had an objection been thought appropriate. The absence of objection suggests that, in the context of trial, counsel did not believe the statements to be objectionable. This issue is not preserved for review, and relief should be denied on that basis. *Chandler v. State,* 702 So.2d 186, 191 (Fla. 1997); *Allen v. State*, 662 So.2d 323, 328 (Fla. 1995) (contemporaneous objection and accompanying motion for mistrial

required to preserve allegedly improper prosecutorial comments for appellate review); *Kilgore v. State,* 688 So.2d 895, 898 (Fla. 1996) (when allegedly improper prosecutorial comments are not preserved for appellate review, the whole claim is procedurally barred in absence of fundamental error). Hitchcock's untimely objection was not renewed, and preserved nothing for review.

To the extent that Hitchcock may argue that this claim represents an issue of "fundamental error", the true facts do not support that conclusion. When fairly considered, the State's argument amounts to nothing more than fair comment on the testimony. Because that is so, and because the argument about which Hitchcock complains is based on and supported by the facts, there is no basis for reversal. This claim is an attempt to create error when none exists. The State's argument was not improper, and none of the cases upon which Hitchcock relies is controlling. The State presented nothing more than legitimate argument based upon the evidence that was before the jury -- that is not a basis for reversal. In addition to being unpreserved for review, this claim has no merit because nothing improper was contained in the State's closing argument.

4. THE "FUNDAMENTAL ERROR DURING CLOSING" CLAIM

On pages 40-48 of his brief, Hitchcock reargues at least part of the foregoing claim, and argues additional perceived "errors" that he claims the State committed during closing argument. This

claim is another attempt to fit a square peg into a round hole by reliance upon out-of-context quotations from the record and from various cases. It is not a basis for relief for the following reasons.

The first reason that this claim is not a basis for relief is because it was not preserved for appellate review by timely objection. None of the claims of error contained in Hitchcock's brief was preserved for review by a timely objection followed by a motion for mistrial, and relief should be denied on that basis. *See, Chandler, supra; Allen, supra; Kilgore, supra; Nixon, supra*. The absence of an objection by counsel indicates that, at the time of trial and in context, none of the statements upon which error is predicated were perceived as having any improper content. *See, e.g., Sawyer v. Butler,* 881 F.2d 1273, 1287 (5th Cir. 1989) (*en banc*) ("[T]he absence of objection by competent counsel may suggest that the argument as it played in the courtroom was less pointed than it now reads in the transcript."). Trial counsel well-demonstrated a willingness to object to argument by the State, and the fact that no objection was made to the matters contained in Hitchcock's brief suggests that there was no perceived impropriety. It also demonstrates that, with the luxury of time and a made record, successor counsel can "comb the record" and identify new "errors" for review. *See, Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995). The claims contained in Hitchcock's brief are not

preserved for review, and relief should be denied on that basis.

Hitchcock's failure to preserve the claims contained in his brief by timely objection and a motion for mistrial is an independently adequate reason for the denial of relief. However, relief should also be denied for the additional reason that, when read in context, rather than being interpreted to suit one's purposes, none of the statements at issue are improper.[12]

Hitchcock's first claim of error is that the State improperly argued the law regarding mitigation[13]. In addition to being barred from review by the lack of an objection, the argument at issue was not improper for the reasons set out at pages 19-22, above. The true facts are that the argument about which Hitchcock complains reads as follows:

> ... if you find the aggravating circumstances just aren't that bad and someone shouldn't die for this, then your verdict is life and that's the end of it, you don't have to think any further. But if you find that the aggravating circumstances, standing alone, considered alone, are sufficient to justify the death penalty then you go to the next step. **You look at the evidence offered by the defense or argued by the defense in mitigation.**
>
> You ask yourself first, what facts have been proven. Because a lot of facts are offered to you but it's up to you to decide whether they're proven or not. The state

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[12]The State's closing argument is rather brief, and seems to be the result of a minimalist approach that was undertaken in an effort to avoid creation of appellate issues. Obviously, Hitchcock has sought to raise issues regardless of their lack of merit.

[13]Hitchcock refers to pages 320-21 of the record, but no argument of the sort referred to in his brief appears there. Hitchcock may have intended to refer to pages 318-19.

> has the burden of proof beyond a reasonable doubt. The defense's burden is less. **All they have to do is reasonably convince you that a particular fact is true, reasonably convince.**
>
> You ask yourself, am I reasonably convinced that fact A, that the defense is asking me to believe in mitigation is true. If you find it's not true and you're not convinced, then you throw it out and you don't consider it. If you find that it is proven, you ask yourselves the next question, is it mitigating, is this the kind of fact that should have any weight in deciding whether somebody lives or dies for a crime like this.

(R319-20). That argument is not improper -- it is an accurate statement of the law and the process of weighing aggravators and mitigators. Hitchcock's claim to the contrary (which appears to be a claim that anything that he determines is mitigating is automatically established as such and elevated to constitutional status) simply has no basis in law or fact. This unpreserved "claim" does not amount to "fundamental error" because it is not error at all. *See, Valle v. State*, 581 So.2d 40, 46-47 (Fla. 1991).

Hitchcock's next unpreserved claim is that the State "mischaracterized [the medical examiner's] testimony to establish the felony murder circumstance". The argument at issue reads as follows:

> We have proven beyond a reasonable doubt based upon that statement from the defendant, based upon the medical evidence from Doctor Gore [sic] there was evidence of recent hymenal tears, a recent sexual assault on the victim within hours prior to her death.

(R323). However, that argument came at the conclusion of the

portion of the State's argument that "In this case we have proven beyond a reasonable doubt that the defendant, James Ernest Hitchcock, raped Cynthia Driggers and that this murder was committed to cover up that crime." (R321-22). The State then read a part of Hitchcock's statement, wherein he admitted to having sex with the victim (who was 13 years old) and then strangling her when she protested that she was hurt and was going to tell her mother. That statement by the defendant, coupled with the medical testimony, clearly supports the reasonable inference that Hitchcock had sexually assaulted the victim. The State did not "mischaracterize" any testimony, and Hitchcock's claim to the contrary is an attempt to fabricate error where none exists.

Hitchcock next complains because the State referred to the sexual assault on the 13-year-old victim as a "rape". According to Hitchcock, the term "rape" is "emotionally charged" -- presumably, that is the basis for his claim of error, though he does not explain that claim and leaves the State and this Court to speculate about its true basis. However, the fact remains that Hitchcock did rape the victim, and that descriptive term for the offense committed against her is not a basis for reversal any more than it is a basis for reversal to state that the defendant "murdered" the victim. Murder is the ultimate act of depersonalization, and is a term that is at least as "emotionally charged" as is the term

"rape"[14]. There is no rule of law that compels reversal based upon an accurate argument by the State concerning the facts of the offense. To hold as Hitchcock argues would create a category of crimes which are so "emotionally charged" by their very nature that the State would not even be able to refer to the true facts in evidence during closing argument.[15] Such a rule would make no sense, and this Court should not create it. There simply was no error.

Hitchcock next argues that the State "told jurors to imagine what was in Cynthia's mind" in determining whether the heinous, atrocious, or cruel aggravator applied. That argument is based upon one sentence from a portion of the State's argument that took up a total of some five pages. (R324-29). What Hitchcock attempts to twist into an improper argument (by taking it out of context) is, in reality, a correct argument that, in determining the applicability of the heinous, atrocious, or cruel aggravator, the jury must evaluate the murder from the victim's perspective of what it is like to die by strangulation. That is an accurate statement of the law that, in fact, was announced by this Court in this case.

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[14]This argument is inconsistent with Hitchcock's Rule 3.800 motion, wherein he claimed that rape, not sexual battery, was the enumerated felony at the time he killed Cynthia. (R1126). The two positions are irreconcilable.

[15]An example of such a crime might be a sexual battery of a young child. No rational rule of law would foreclose the state from referring to the crime charged (sexual battery), but, under the view of the law advanced by Hitchcock, that would be the result. That is absurd.

Hitchcock v. State, 578 So.2d 685, 692 (Fla. 1990). Hitchcock's argument is utterly meritless, and would not be a basis for relief even if it was preserved for review.

Hitchcock also claims that the State improperly argued matters "outside the record" when it referred to the differences in society from the time of the crime in 1976 and the time of trial in 1996. That argument is based in the record (the crime occurred in 1976), and is a legitimate inference therefrom. There is simply no error, and, had the issue been preserved by objection, there would be no basis for reversal. In the absence of objection, this is a non-issue.

Hitchcock also argues that the State "mischaracterized appellant's statement as saying he choked [Cynthia] inside the house". Hitchcock's statement speaks for itself, and is set out below:

> I came in about 2:30, came in through the window in the dining room, went into my bedroom, then I went back out and I went into Cynthia's room. I went in and, uh, me and her had sex and she said it hurt. She was going to tell her mama, I said you can't, she said, I am, she started to get up, I wouldn't let her she started toed to holler, then when she did that I got up, **I grabbed her by the neck and I made her quit hollering**, I picked her up and carried her outside. I had my hand over her mouth at that time.

(R322). Hitchcock's statement, at the very least, gives rise to the legitimate inference that "grabbing by the neck" and "choking" are essentially the same thing. Clearly, Hitchcock stated that he applied pressure to Cynthia's neck which, after all, is the same

thing as saying that he choked her. The issue contained in brief was not preserved by objection at trial, and is not a basis for reversal. Moreover, this issue does not constitute "fundamental error" because it is not error to begin with.

Hitchcock next claims that the state improperly "put the jurors in the victim's shoes" in arguing the heinousness of death by strangulation. The true facts are that the State's argument was in the context of an argument that death by strangulation is slow and painful, facts which are supported by the record, and are within the common fund of knowledge. (R120-24; 126-27). This issue was not preserved by timely objection, and, regardless, is not a basis for relief.

The next claim contained in this part of Hitchcock's brief is a reargument concerning the defense witness, Toomer. This argument is not a basis for relief for the reasons set out at pages 16-19, above.

To the extent that Hitchcock raises additional issues concerning the MMPI report, there was no error in the State's closing argument -- the jury had the document before it, and was well able to review it in its entirety. In any event, the MMPI had been given to Hitchcock shortly before the proceedings at issue, and did, in fact, reveal his **current** mental status, as the State argued that it did. This issue was not preserved by timely objection, and, in any event, is not objectionable, anyway. The

"migrant worker" component of Hitchcock's brief is taken out of context. The true facts are that that comment was made in connection with Toomer's testimony that Hitchcock had a history of running away, when the true facts indicated that he lived with members of his family at all times, as those witnesses had testified. Toomer's testimony was inconsistent with the testimony of other defense witnesses, and the State was entitled to argue that matter. There was no objection to this argument, and nothing is available for review. In any event, it is not a basis for relief.

Hitchcock's claim that the State erroneously characterized the defense as "begging for sympathy" is without basis in fact. The State's argument, which Hitchcock has reproduced in his brief, represents a proper argument that is based on the evidence and the law. It was not a "golden rule" argument, nor did it improperly "eliminate" mitigation -- it was a proper argument that the jury should not be swayed by sympathy. *See, Saffle v. Parks,* 494 U.S. 4484 (1990); *Valle, supra; Kight v.* Dugger, 574 So.2d 1066, 1070 (Fla. 1990). In footnote 4 to his brief, Hitchcock misleadingly claims that the defense argued that sympathy did not play a role in the sentencing decision. The argument that the defense made was that the jury should not feel sorry for the **victim** -- that is contrary to the implication contained in Hitchcock's brief. This claim was not preserved by timely objection at trial, and,

therefore, is not available to Hitchcock. This claim has no legal basis, and, because that is so, cannot amount to "fundamental error."

Hitchcock's final claim is that the State made an "improper appeal to the principle of the *lex talionis*". This claim was not preserved by objection, and includes no citation of authority for the proposition that the complained of argument is improper. Moreover, *Black's Law Dictionary* defines "*lex talionis*" as being the "law of retaliation". The State did not argue for retaliation, it argued that death was the proper punishment in this case because the aggravators outweighed the mitigators, thereby rendering death the proportionate penalty. The State is clearly allowed to argue that the crime calls for a sentence of death, and Hitchcock's displeasure with that rule of law is meaningless. The sentence of death should be affirmed in all respects.

5. THE "SUBSTITUTE JUDGE" CLAIM

On pages 49-53, Hitchcock argues that it was error for a successor judge (Circuit Judge Richard Conrad) to rule on his claim of newly discovered evidence. As Hitchcock states in his brief, this issue appears against the background of former judge Michael Cycmanick's personal and professional difficulties that ultimately led to his departure from the bench.[16] Despite Hitchcock's efforts

[16]Hitchcock seems to base an unusual number of factual representations on matters reported in the Orlando *Sentinel.* Those facts are essentially irrelevant to the issue contained in his

at reliance on cases bearing no factual similarity to the issue before this Court, and despite Hitchcock's effort to confuse the true facts, this claim does not **negatively** implicate the credibility and integrity of the judicial system. The true facts demonstrate an overriding determination to insure that the defendant's rights are protected at every turn. This claim is frivolous for the reasons set out below.

Judge Cycmanick sentenced Hitchcock to death on October 8, 1996. (R1049). Hitchcock filed an unauthorized *Florida Rule of Criminal Procedure* 3.800 motion[17], and, on October 8, **1997**, an amended sentencing order was issued. (R1111). Hitchcock filed **another** Rule 3.800 motion on November 5, 1997, (R1120), which was denied in a written order issued on November 6, 1997. (R1134). Judge Cycmanick conducted an evidentiary hearing on the newly discovered evidence claim on December 3, 1997. (R451). No order issued as a result of that hearing.

On January 13, 1998, Chief Judge Belvin Perry issued an order assigning this case to Judge Richard Conrad. In pertinent part, that order read as follows:

> the Honorable Richard F. Conrad is assigned to the instant case for the sole purpose of disposing of Defendant's pending Motion for Evidentiary Hearing on

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brief, and seem to be included for the purpose of directing *ad hominem* abuse toward the Orange County bench.

[17]*See, Fotopoulos v. State,* 608 So.2d 794 (Fla. 1992); *Burch v. State,* 522 So.2d 810, 813 (Fla. 1988).

> Newly Discovered Evidence. Once a ruling is issued, this case shall revert to Division 18.

(R1145). On January 29, 1998, Judge Conrad ordered that the December 3, 1997, hearing be transcribed, and further ordered that a new evidentiary hearing on the "new evidence" claim would be conducted. (R1145; 1153). On February 4, 1998, Hitchcock filed his "Motion for New Penalty Phase". (R1148). The linchpin of that motion was that in order for Judge Conrad to evaluate the "new evidence", "it is essential the court have seen and heard from the other witnesses who testified at the penalty phase". (R1149).[18]

On February 9, 1998, Judge Conrad entered an order denying Hitchcock's motion for a new penalty phase. In relevant part, that order reads as follows:

> In the defendant's Motion for Evidentiary Hearing on Newly Discovered Evidence, the defendant's counsel claims to have recently discovered that Richard Hitchcock confessed to Wandalene Green that he killed the victim in this case prior to Richard's death in 1994. The motion notes that the defendant has always contended that his brother Richard killed the victim and that the defendant so testified at his original trial and at his 1988 penalty phase. Finally, the motion states that "[t]his

[18]Judge Conrad had the inherent authority to decide this motion in furtherance of his disposition of the new evidence motion. Any contrary rule would have resulted in the case being in a posture that it could never be ruled on. Moreover, Hitchcock has never claimed (until now) that Judge Conrad could not decide the "Motion for New Penalty Phase". That claim cannot be raised for the first time on appeal. *Tillman v. State*, 471 So.2d 32 (Fla. 1985). Had Judge Conrad actually granted his motion for a new penalty phase, it is doubtful that Hitchcock would have complained, unless he received yet another death sentence. It pushes the boundaries of professionalism to file a motion and claim on appeal that the court had no authority to decide the motion.

> evidence is not proffered as lingering doubt about guilt; it shows actual innocence of the killing, as Mr. Hitchcock has always contended and has always sought to prove."
>
> Since the alleged newly discovered evidence is related to the issue of the actual guilt or innocence of the defendant, this Court finds that after the scheduled rehearing it will be as qualified to rule on the validity of this claim as any other judge except the judge who presided over the case's original guilt phase. That judge is no longer sitting on the circuit court bench. Rehearing the proceedings related to the defendant's claim will allow this Court to itself evaluate the testimony and evidence presented upon it. A new penalty phase proceeding is unnecessary to this Court's decision as to whether the alleged newly discovered evidence qualifies as newly discovered evidence and whether it would probably produce an acquittal on retrial. *Jones v. State,* 591 So.2d 911 (Fla. 1991).

(R1156-57). Those findings demonstrate that Hitchcock has received a full and fair proceeding -- the fact that he does not like the result cannot change that fact. Judge Conrad's order denying the motion for a new penalty phase sets out precisely why, under the posture of this case (which was engineered by Hitchcock), a new penalty phase proceeding was not needed to resolve the claim brought by the defendant. Any other result would have been absolutely absurd -- Judge Conrad did not need to re-hear the penalty phase to decide an issue that Hitchcock had expressly represented as having nothing to do with sentencing. The issue that Judge Conrad had to decide was the two-part *Jones* newly discovered evidence test -- he did not need to hear the penalty phase evidence

to do that because he was not imposing sentence.[19]

If Hitchcock's claim is that Judge Cycmanick's difficulties with alcohol somehow compromised the sentencing process, the manner in which the alleged error took place is not apparent from Hitchcock's brief. Based upon his chronology of events, Judge Cycmanick was **charged** with "DUI" on June 27, 1997, well after the original proceedings. Whatever his legal status may have been when he entered the amended (and arguably unnecessary) sentencing order, the fact remains that the previous sentencing order had been entered well before the charges at issue were instituted. Judge Cycmanick undertook to issue an amended sentencing order in order to clarify certain complaints raised by the defense, primarily with regard to the consideration of the aggravators and mitigators as affected by various legal issues. (R1111 *et seq*). While the amended sentencing order was unnecessary, and only served to delay this case, the facts do not support the conclusion that Judge Cycmanick's alcohol-related problems in some way prevented a fair sentencing.[20] There is no basis for reversal.

To the extent that Hitchcock sets out various references to

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[19]Hitchcock relies on *Corbett v. State*, 602 So.2d 1240 (Fla. 1992), to support his claim for a new penalty phase. *Corbett* has nothing at all to do with the facts of this case, and further discussion of it is unnecessary.

[20]This Court, of course, can and will evaluate the sentencing order in the course of this appeal. Hitchcock's rights have been well-protected, and he has no basis for complaint.

the events that ultimately led to Judge Cycmanick's removal from the bench, that recitation is irrelevant to the issue before this Court, and serves no purpose other than to cloud the true issue. Those events were removed from the equation of this case when Judge Conrad conducted his evidentiary hearing on the newly discovered evidence claim. Further discussion is unwarranted, and all relief should be denied.

6. THE "AVOIDING ARREST" AGGRAVATING CIRCUMSTANCE

On pages 54-59 of his brief, Hitchcock argues that the trial court should not have found the avoiding arrest aggravator, and that the jury instruction given on that aggravator was unconstitutional. Neither claim has merit.

In finding that the murder was committed for the purpose of avoiding arrest, the sentencing court stated:

> It is absolutely clear from the defendant's statement as well as the testimony of the victim's sister and the medical examiner, Dr. Ruiz, that the murder was committed in order to "silence" her from reporting the sexual abuse of her and the consequences that would follow. I use the word "silence" because it sums up best why the Defendant was beating and" chokin'" (sic) her to stop her "screamin'" and "hollerin'" (sic). The "chokin' and chokin'" did, indeed, silence the victim from ever reporting his unlawful attacks to her mother. Additionally, pushing her into the bushes, going back into the house, showering, and washing his shirt conclusively demonstrates that the murder was definitely committed for purposes of avoiding or preventing lawful arrest. Thus, this aggravating factor has been proven beyond a reasonable doubt and will be given great weight.

(R1114). Those findings are supported by the evidence and should not be disturbed.

In his brief, Hitchcock relies on various decisions from this Court, none of which are dispositive of the issue. The facts of this case are analogous to the facts of *Correll v. State,* 523 So.2d 562 (Fla. 1988), where the defendant killed his daughter after killing three other members of his family. As this Court held:

> Correll next alleges that the trial court improperly found certain aggravating factors as a basis for the judgment of death. Correll first challenges the court's finding that the murders of Tuesday Correll and Marybeth Jones were committed for the purpose of avoiding arrest. In order to support this finding where the victim is not a law enforcement officer, the state must prove beyond a reasonable doubt that the dominant motive for the murder was the elimination of a witness. *Doyle v. State*, 460 So.2d 353 (Fla. 1984); *Menendez v. State*, 368 So.2d 1278 (Fla. 1979); *Riley v. State*, 366 So.2d 19 (Fla. 1978), *cert. denied,* 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982). We conclude that the evidence in this case supports the finding of this aggravating circumstance. With respect to Marybeth Jones, the facts indicate that she was the last person killed that night as she returned from seeing her boyfriend. . . . Correll was well acquainted with Jones and she could have easily identified him. It is also likely that Correll's daughter, Tuesday, was a witness to the murders. Since the relationship between Tuesday and her father appeared cordial, it is difficult to see why she was killed except to eliminate her as a witness. *See Hooper v. State*, 476 So.2d 1253 (Fla. 1985),*cert. denied*, 475 U.S. 1098, 106 S.Ct. 1501, 89 L.Ed.2d 901 (1986).

Correll v. State, 523 So.2d 562, 568 (Fla. 1988). When the factfindings of the sentencing court are compared to the facts of Correll, it is clear that the avoiding arrest aggravator was properly found in this case. Moreover, as this Court has stated:

> . . . a motive to eliminate a potential witness to an antecedent crime can provide the basis for this aggravating circumstance. *Swafford v. State*, 533 So.2d 270, 276 (Fla. 1988), *cert. denied*, 489 U.S. 1100, 109

> S.Ct. 1578, 103 L.Ed.2d 944 (1989). And, it is not necessary that an arrest be imminent at the time of the murder. *Id*. Finally, the avoid arrest aggravator can be supported by circumstantial evidence through inference from the facts shown. *Id*. at 276 n.6.

Consalvo v. State, 697 So.2d 805, 819 (Fla. 1996). Stated in slightly different terms:

> to support a valid avoid arrest aggravator where the victim is not a law enforcement officer, "the proof must demonstrate beyond a reasonable doubt that the victim was murdered solely or predominantly for the purpose of witness elimination." *Urbin*, 714 So.2d at 416.

Knight v. State, 721 So.2d 287, 298 (Fla. 1998). The proof in this case met that standard. *See also, Gore v. State,* 706 So.2d 1328, 1335 (Fla. 1997); *Swafford v. State*, 533 So.2d 270, 276 (Fla. 1988); *Harvey v. State*, 529 So.2d 1083, 1087 (Fla. 1988); *Harich v. State*, 437 So.2d 1082 (Fla. 1983).

To the extent that Hitchcock complains that the sentencing court used "actions after the murder" to support the avoiding arrest aggravator, that claim is based on an out-of-context interpretation of the sentencing order. The sentencing court properly found this aggravating circumstance.

Alternatively, without conceding error, even if this aggravator should not have been found to apply, there is no basis for reversal because the remaining aggravators support the death sentence. Any error was harmless beyond a reasonable doubt because

the aggravators still outweigh the mitigation.[21]

The jury instruction component of this claim is foreclosed by binding precedent. *Wike v. State*, 698 So.2d 817, 822 (Fla. 1997); *Whitton v. State*, 649 So.2d 861, 867 n. 10 (Fla. 1994) ("The avoiding arrest factor, unlike the heinous, atrocious, or cruel factor, does not contain terms so vague as to leave the jury without sufficient guidance for determining the absence or presence of the factor.").

Moreover, the jury instruction claim is not preserved for appellate review because there was no timely objection. *Occhicone v. State*, 570 So.2d 902, 905-06 (Fla. 1990).

7. THE SENTENCE OF IMPRISONMENT/FELONY-MURDER AGGRAVATORS

On pages 60-67 of his brief, Hitchcock argues that the under sentence of imprisonment and felony murder aggravators are unconstitutional as applied in this case. With regard to the sentence of imprisonment aggravator, the sentencing court made the following findings:

> It is uncontroverted that the murder in this case was committed while the Defendant was on parole from the State of Arkansas. This, this aggravating factor has been proven beyond a reasonable doubt.
>
> The defense argued in its motion to correct sentence that this aggravarting factor should not be found because it

[21]To the extent that Hitchcock claims that it was error to allow the state to argue the avoiding arrest aggravator, the law is well-settled that it is appropriate to allow an aggravator that has support in the evidence to go to the jury. *See, Hunter v. State,* 660 So.2d 244, 252 (Fla. 1995).

> did not exist at the time this murder was committed and so to apply it to the Defendant would violate the ex post facto clauses of both the United States and Florida Constitutions. However, the Florida Supreme Court has already rejected that argument in this case. ***Hitchcock v. State,*** 578 So.2d 685, 693 (Fla. 1990). Regardless, due to the possible legal ramifications of applying this factor in violation of the ex post facto laws, this Court will not give this aggravating factor the great weight it would otherwise warrant, but only moderate weight.

(R1112-3). This Court has previously held, **in this case**, that:

> In our original opinion in this case, we noted that the court could have found committed by a person under sentence of imprisonment in aggravation because Hitchcock was on parole at the time of this crime. 413 So.2d at 747 n. 6. The court found this aggravator applicable on resentencing. Hitchcock now argues that this is an ex post facto violation and constitutes double jeopardy because this Court did not recognize parole as the equivalent of being under sentence of imprisonment until *Aldridge v. State*, 351 So.2d 942 (Fla. 1977), *cert. denied,* 439 U.S. 882, 99 S.Ct. 220, 58 L.Ed.2d 194 (1978). Resentencing proceedings, however, are completely new proceedings. *King v. Dugger*, 555 So.2d 355 (Fla. 1990). These ex post facto and double jeopardy claims are of no merit because the resentencing occurred after we released *Aldridge*. *See Spaziano v. State*, 433 So.2d 508 (Fla. 1983), *aff'd,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

Hitchcock v. State,, 578 So.2d 685, 693 (Fla. 1990). The law in this State is that the under sentence of imprisonment aggravator applies to Hitchcock, and the lower court should not be put in error for following settled Florida law which was announced in this case. *See, Knight v. State,* 721 So.2d 287, 297 (Fla. 1998); *Trotter v. State,* 690 So.2d 1234, 1237 (Fla. 1996); *Zeigler v. State,* 580 So.2d 127, 130 (Fla. 1991). Under settled Florida law, and under the law of the case, the under sentence of imprisonment aggravator

applies.[22]

Insofar as Hitchcock raises an ex post facto claim concerning the felony-murder claim, that claim was also decided adversely to him in this Court's prior decision. This Court stated:

> In his second sentencing challenge, Hitchcock claims that the rape portion of section 921.141(5)(d) is so vague and confusing as to be unconstitutional because the crime of "rape" no longer exists in this state. (FN7) The trial judge substituted the words "sexual battery" for rape in his charge to the jury in listing the aggravating factors. In his charge to the jury during the initial phase of the trial, the trial judge defined involuntary sexual battery. The former definition of rape, "ravishes or carnally knows a person of the age of eleven years or more by force and against his or her will," section 794.01(2), *Florida Statutes* (1973), was substantially included therein. The defendant's conduct in this case conformed to this definition. *See Adams v. State*, 412 So.2d 85 (Fla. 1982). A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that contemplated conduct is forbidden. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). On the other hand, a statute is not void if its language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States v. Petrillo*, 332 U.S. 1, 8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877 (1947). Accordingly, we find no merit to appellant's contention on this point.

Hitchcock v. State, 413 So.2d at 747-48. The Court's analysis remains correct, is the law of the case, and should not be disturbed based upon Hitchcock's reargument of an issue that has already been decided adversely to him. There is no basis for

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[22]As Hitchcock concedes, resentencing proceedings are wholly new proceedings -- despite his efforts to argue around the facts, that concession is fatal to his case. This Court has upheld the under sentence of imprisonment aggravator in its prior decision in this case under that rationale. There simply is no error.

reversal.

In addition to having no legal basis, this claim is not preserved for review. As Hitchcock states in his brief, these claims were raised for the first time in the *Florida Rule of Criminal Procedure* 3.800 motion to correct sentencing error. However, as was addressed above, Rule 3.800 is inapplicable to cases in which the defendant has been sentenced to death. Because that is so, Hitchcock has not properly preserved the issue contained in his brief (because he raised it through an unauthorized motion), even though the sentencing court erroneously considered the motion. The grounds for relief contained in Hitchcock's brief were not properly presented below, and are not properly preserved for review by this Court.[23] This claim does not present a basis for relief.

8. THE SUFFICIENCY OF THE EVIDENCE OF FELONY-MURDER

On pages 68-70 of his brief, Hitchcock argues that the evidence was insufficient to support the felony-murder aggravator and that that aggravating circumstance is unconstitutional *per se.* Neither argument has merit.

In its original opinion upholding Hitchcock's **conviction**, this Court stated:

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[23]This argument is secondary to the merits argument, but is an equally adequate basis for the denial of relief. Counsel for the State is unaware of any decision on point, but it seems clear that an improper and inapplicable motion preserves nothing for appeal.

As his fourth point on appeal, Hitchcock challenges the sufficiency of the evidence to convict him of first-degree murder. He alleges that the evidence presented was insufficient to show either premeditation or felony murder.

A judgment of conviction comes to this Court with a presumption of correctness, and a claim of insufficiency of the evidence cannot prevail if substantial competent evidence supports the verdict. *Spinkellink v. State*, 313 So.2d 666 (Fla. 1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). Furthermore, when it is shown that the jurors have performed their duty faithfully and honestly and have reached a reasonable conclusion, more than a difference of opinion as to what the evidence shows is required for this Court to reverse them. *Alvord v. State*, 322 So.2d 533 (Fla. 1975), *cert. denied,* 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). At trial, Hitchcock testified that the girl consented to intercourse, that his brother Richard discovered them, and that Richard strangled the girl. The jury, however, also heard Hitchcock's prior statement that he choked the girl while still in her bedroom and then carried her outside where he again choked and beat her until she was quiet and finally hid her body in some bushes.

It is well settled that the credibility of witnesses and the weight to be given testimony is for the jury to decide. *Coco v. State*, 80 So.2d 346 (Fla.), *cert. denied*, 349 U.S. 931, 75 S.Ct. 774, 99 L.Ed. 1261, cert. denied, 350 U.S. 828, 76 S.Ct. 57, 100 L.Ed. 739 (1955). Choking the girl, taking her outside, and then choking her again -- all to make her be quiet -- is substantial evidence to have supported a finding of premeditation. **In addition, the total circumstances, including the time of night, entry through a window, the victim's tender years, and medical testimony that the child was of previously chaste character, refuted Hitchcock's claim of consent and could be a basis to find that the sexual battery was committed on the victim by force and against her will, thus warranting the instruction on felony murder.** Under these circumstances, the jury could easily have considered Hitchcock's contention that the girl consented to have been unreasonable. *See Conner v. State*, 106 So.2d 416 (Fla. 1958).

> We hold, therefore, that the evidence was sufficient to allow the state to take the case to the jury on theories of both premeditation and felony murder.

Hitchcock v. State, 413 So.2d at 745. In this Court's 1990 opinion, the Court made the following findings regarding the felony-murder aggravator:

> The court stated that Hitchcock's claim that the victim consented to having intercourse "is not supported by the record." We agree and hold that the court did not err in finding the murder to have been committed during a sexual battery. Hitchcock's claim that instructing the jury in terms of "sexual battery" rather than "rape" is an ex post facto violation is without merit. *See Tompkins v. State*, 502 So.2d 415 (Fla. 1986), *cert. denied*, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987); *Hitchcock v. State,* 413 So.2d 741 (Fla.), *cert. denied*, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982); *Adams.*

Hitchcock v. State, 578 So.2d 685, 693 (Fla. 1990).

Finally, in sentencing Hitchcock to death, the sentencing court stated, in connection with the felony-murder aggravator:

> There is no evidence to support any contention that the Defendant's sexual intercourse with Cynthia Driggers was consensual. Instead, the testimony of the medical examiner concerning the fresh tear of her hymen establishes that she was a virgin prior to sexual activity before her death. The testimony of her sister, Deborah, establishes that Cynthia was distressed over the Defendant's abuse of her to the point of wanting to tell her mother, but not doing so out of fear. Finally, the statement made by Defendant following his arrest [footnote omitted] is anything but consistent with a claim of consent:
>
> > I came in about 2:30, I came in through the window in the dining room, went into my bedroom, then I went back out and I went to Cynthia's room, I went in and uh, me and her had sex and she said she was hurt, she was gone tell her mama. I said you can't. And she said I am. She started to get up and I

> wouldn't let her and she started to holler then. When she did that, I got up and grabbed her by the neck and made her quit hollerin' and I picked her up and I carried her outside and I had my hand over her mouth at the time and we got outside and we was layin' on the grass and I told her Cindy you can't tell your mama. She said I am, said I got to I'm hurt and you just hurt me again. She started to scream then and I got her by the throat and I was chokin' her and, she, I let up and she was screamin' and I hit her again, hit her and I hit her twice, I think and she was still hollerin' so I choked her and I just kept chokin' and chokin' I don't know what happened I just choked her and choked then I started to pick her up and I pushed her over in the bushes and I got up and left an I went back in the house went in an took a shower, washed my shirt an I went in bedroom and I laid down, at's all I can tell you.

> Indeed, under the circumstances presented, this Court finds the contention of consent to be completely unreasonable. Thus, this aggravating factor has been proven beyond a reasonable doubt, and I find it to warrant great weight.
>
> The defense claims that use of the sexual battery, as opposed to rape, aggravating circumstance is an ex post facto application of the law. However, the Florida Supreme Court has already rejected that argument in this case. ***Hitchcock v. State,*** 578 So.2d 685, 693 (Fla. 1990).

(R1113). Hitchcock's own statement is sufficient to establish the felony-murder aggravator, and there is simply no basis for relief. The record establishes, beyond a reasonable doubt, that the victim was strangled during the commission of a sexual battery -- the felony-murder aggravator was properly found in this case.

To the extent that further discussion of this issue is necessary, there is no doubt that Cynthia did not "consent" as that

term is defined in §794.011 (1)(a) of the *Florida Statutes*. Further, there is no doubt that she was sexually battered by being subjected to vaginal penetration, as that term is defined in §794.011 (1)(h). Moreover, the evidence establishes that Cynthia was sexually battered, and that that sexual battery was accomplished by coercion, whether by force or violence or by threats of retaliation under §794.011 (4)(b) or (c). Under any reasonable view of the evidence, the during the course of a sexual battery aggravator is well established. The sentence of death should be affirmed in all respects.

To the extent that Hitchcock argues that the felony-murder aggravator is unconstitutional *per se*, that claim, as Hitchcock recognizes, has been repeatedly rejected by this Court. *See, Hunter v. State, supra.* Moreover, the United States Supreme Court decision cited in Hitchcock's brief does not stand for the proposition that the felony-murder aggravator is invalid. *See, Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). As this Court has held:

> . . . appellant contends that the trial court erred in instructing the jury that it could find the murder was committed during a sexual battery where it was also the underlying felony for purposes of establishing first-degree felony murder. He argues that the effect of this is the creation of an automatic aggravating circumstance for all felony-murder cases. We rejected this argument in *Mills v. State*, 476 So.2d 172, 178 (1985), wherein we concluded that the legislature had reasonably determined that a first-degree murder committed in the course of another dangerous felony was an aggravated capital felony.

Banks v. State, 700 So.2d 363, 367 (Fla. 1997). There is no basis for reversal based upon this legally invalid claim. *See, White v. State*, 403 So.2d 331 (Fla. 1981); *Bertolotti v. Dugger,* 883 F.2d 1503 (11th Cir. 1989). Hitchcock's death sentence should be affirmed in all respects.

9. THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR

On pages 71-76 of his brief, Hitchcock argues that the sentencing court should not have found the heinous, atrocious, or cruel aggravating circumstance, and that the jury was improperly instructed on this aggravator. Neither claim has merit.

The jury instruction claim itself is easily resolved. In this case, the jury was instructed:

> Fourth, the crime for which the defendant is sentenced was especially heinous, atrocious, or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict high degree of pain with utter indifference to or even the enjoyment of suffering of others.
>
> The kind of crime intended to be included in heinous, atrocious, and cruel is one that is accompanied by additional acts that show that the crime was consciousless or pitiless and was unnecessarily torturous to the victim.

(R367). That instruction is the functional equivalent of the following instruction, which has been expressly approved by this Court:

> Rolling argues that the trial court erred in giving an unconstitutionally vague jury instruction as to the heinous, atrocious, or cruel (HAC) aggravating factor. Here, the trial court gave the following HAC jury instruction:

> The crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means especially wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.
>
> In order for you to find a first-degree murder was heinous, atrocious or cruel, you must find that it was accompanied by additional acts that showed that the crime was conscious [sic] or pitiless, and was unnecessarily torturous to the victim.
>
> Events occurring after the victim dies or loses consciousness should not be considered by you to establish that this crime was especially heinous, atrocious, or cruel.

> As the State correctly explains, the instant instruction, which is similar in all material aspects to the instruction upheld by this Court in *Hall v. State*, 614 So.2d 473, 478 (Fla. 1993), has been reaffirmed on numerous occasions. *See Geralds v. State*, 674 So.2d 96 (Fla. 1996); *Merck v. State*, 664 So.2d 939, 943 (Fla. 1995). Consequently, we reject Rolling's claim that the trial court's instruction to the jury on the HAC aggravator was unconstitutional.

Rolling v. State, 695 So.2d 278, 296-97 (Fla. 1997). Hitchcock's claim concerning the jury instruction given on the heinous, atrocious, or cruel aggravator has no legal basis, and is not a basis for relief.

Hitchcock also argues that the jury should have been instructed that the heinous, atrocious, or cruel aggravator did not apply unless "the defendant has deliberately inflicted or consciously chosen a method with the intent to cause extraordinary mental anguish or physical pain". This "intent element" claim has

been expressly rejected by this Court. *See, Guzman v. State,* 721 So.2d 1155 (Fla. 1998).

Insofar as the applicability of the heinous, atrocious, or cruel aggravator to the facts of this case is concerned, the sentencing court made the following findings:

> This Court has great difficulty in expressing the horror, suffering, and physical and emotional trauma the child victim must have experienced in this case. The Defendant's statement demonstrates best what she endured in the course of his painful sexual assault, removal from her home, beatings and chokings in order to secure her eventual silence. [footnote omitted]. The Court cannot find words to say what she must have gone through. This child's murder fits every imaginable definition of these terms that have evolved even though this crime occurred over 20 yeas ago. It was heinous. It was cruel. It was atrocious. Thus, this aggravating factor has been proven beyond a reasonable doubt and will be given considerable weight.

(R1114). Those findings are supported by the evidence, and should not be disturbed. As Hitchcock conceded in 1990, "[s]trangulations are nearly per se heinous." *Hitchcock v. State,* 578 So.2d at 693. The evidence, and the facts, have not changed since this Court stated:

> That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious, or cruel. This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's. *Stano v. State*, 460 So.2d 890 (Fla. 1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985). Hitchcock stated that he kept "chokin' and chokin'" the victim, and hitting her, both inside and outside the house, until she finally lost consciousness. Fear and emotional strain can contribute to the heinousness of a killing. *Adams v. State*, 412 So.2d 850 (Fla.), *cert. denied,* 459 U.S. 882, 103 S.Ct.

> 182, 74 L.Ed.2d 148 (1982). As Hitchcock concedes in his brief, "[s]trangulations are nearly per se heinous." *See Doyle v. State*, 460 So.2d 353 (Fla. 1984); *Adams; Alvord v. State*, 322 So.2d 533 (Fla. 1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). The court did not err in finding this murder to have been heinous, atrocious, or cruel.

Hitchcock v. State, 578 So.2d at 692-93. Moreover, this Court has emphasized:

> We have previously held that it is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable. *Johnson v. State*, 465 So.2d 499, 507 (Fla.), *cert. denied*, --- U.S. ----, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985); *Adams*, 412 So.2d at 857; *Alvord v. State*, 322 So.2d 533, 541 (Fla. 1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976).

Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986). *Hildwin v. State,* 23 Fla. L. Weekly S447, (Fla. 1998) ("[I]t is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable. ... This Court has consistently upheld the HAC aggravator where a conscious victim was strangled. *See Robertson v. State*, 699 So.2d 1343, 1347 (Fla. 1997), *cert. denied*, --- U.S. ----, 118 S.Ct. 1097, 140 L.Ed.2d 152 (1998)."). *See also, Smith v. State*, 407 So.2d 894, 903 (Fla. 1981); *Johnson v. State,* 465 So.2d 499, 507 (Fla. 1985) ("The victim was murdered by means of strangulation, a method of killing to which this Court has held the

factor of heinousness applicable."); *James v. State,* 695 So.2d 1229 (Fla. 1997)*; Wyatt v. State*, 641 So.2d 1336 (Fla. 1994); *Preston v. State*, 607 So.2d 404 (Fla. 1992). There is no colorable argument to be made that the heinous, atrocious, or cruel aggravator does not apply in this case. There is no basis for reversal, and the sentence of death should be affirmed in all respects.

10/11. THE "DOUBLING" CLAIMS

On page 77-78 of his brief, Hitchcock argues, in abbreviated fashion, that the jury should have been instructed that:

> The State may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two (2) or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance.

(R997). Hitchcock speculates that, given such an instruction, the jury "could" have found that the avoiding arrest and felony-murder aggravators and the avoiding arrest and under sentence of imprisonment aggravators "overlapped in this fashion". Precisely how these aggravators "overlap" is not explained. However, such development is not necessary to determine that there is no legal basis for this claim.[24]

Florida law is settled that "[i]mproper doubling occurs when aggravating factors refer to the same aspect of the crime. *Provence v. State,* 337 So.2d 783, 786 (Fla. 1976), *cert. denied,* 431 U.S.

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[24]In addition to the jury instruction claim, Hitchcock raises a substantive doubling claim. The two are combined in this brief.

969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977)." *Foster v. State,* 679 So.2d 747, 754 (Fla. 1996). *See also, Gore v. State,* 706 So.2d 1328, 1334 (Fla. 1997)*; Stein v. State,* 632 So.2d 1361, 1366 (Fla. 1994); *Banks v. State,* 700 So.2d 363, 367 (Fla. 1997); *Echols v. State*, 484 So.2d 568, 575 (Fla. 1985); *Wike v. State,* 698 So.2d 817, 822 (Fla. 1997) ("no instruction on the doubling of CCP and avoid-arrest was requested, and, as set forth in the next claim, we conclude that the finding of these two aggravating circumstances was not error under the facts of this case.").

Initially, it is open to question whether the bare "anti-doubling" instruction proposed by Hitchcock was sufficient to preserve the claim now advanced on appeal. Hitchcock **never** informed the trial court of the factors that he believed "doubled", and has, moreover, not provided this Court with any authority for the proposition that the avoid arrest aggravator "doubles" with **both** the felony-murder **and** under sentence of imprisonment aggravating circumstances.[25] It makes no sense to place the lower court in error for refusing to give the instruction at issue when that court did not know which aggravators purportedly "doubled".

In his brief, Hitchcock relies on *Castro v. State* for the proposition that his requested jury instruction should have been

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[25]At trial, Hitchcock's written requested instruction was supported **only** by a citation to the *Provence* decision. Hitchcock never identified the factors that he believed doubled, nor did he ever explain why an improper "doubling" occurred. (R997-8).

given. However, *Castro* does not directly reach that result:

> In the present case, defense counsel objected to the jury's being instructed on both factors and also requested the following special instruction be given:
>
> > The state may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance. For example, the commission of a capital felony during the course of a robbery and done for pecuniary gain relates to the same aspect of the offense and may be considered as being only a single aggravating circumstance.
>
> The court refused the instruction on the authority of *Suarez*. However, *Suarez* did not involve a limiting instruction, but only the question of whether in that case it was reversible error when the jury was instructed on both aggravating factors. When applicable, the jury may be instructed on "doubled" aggravating circumstances since it may find one but not the other to exist. A limiting instruction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one, and thus the instruction should have been given.

Castro v. State, 597 So.2d 259, 261 (Fla. 1992). In contrast to the instruction at issue in *Castro,* Hitchcock did not identify for the jury the "overlapping" aggravators -- that omission was a clear invitation to speculation, and renders the requested instruction misleading and improper. The sentencing court properly refused to give the inaccurate and misleading "doubling" instruction.

In addition to the jury instruction being properly refused as misleading and confusing, the argument contained in Hitchcock's brief is legally impossible. The "avoiding arrest" aggravator has

been found to overlap with the "hindering law enforcement" aggravator **when the victim is a law enforcement officer.** Likewise, the felony-murder (robbery) aggravator has been held to "double" with the pecuniary gain aggravator. *See, Bello v. State*, 547 So.2d 914 (Fla. 1989); *Provence v. State,* 337 So.2d 783 (Fla. 1976). However, there appear to be no cases which hold that the avoid arrest aggravator "doubles" with not only the felony murder aggravator, but also with the under sentence of imprisonment aggravator. Some explication of the way in which Hitchcock contends these aggravators double is found in Claim 11, which is set out on page 78 of his brief.[26] In that claim, Hitchcock argues that the felony-murder and avoid arrest aggravators double because "the state argued that the murder occurred after a sexual battery, and that it was committed to conceal the sexual battery". *Initial Brief,* at 78. That claim is meritless on its face. The two aggravators are not based on the same aspect of the murder under this Court's decision in *Suarez v. State,* 481 So.2d 1201 (Fla. 1985), where a similar argument was rejected. To the extent that further discussion of this claim is necessary, Florida law is clear that the avoiding arrest aggravator requires proof that the dominant motive for the murder was the elimination of a witness. *Riley v. State,* 366 So.2d 19 (Fla. 1978). The felony murder

[26]Hitchcock does not claim to have ever raised a specific claim of improper doubling before the trial court -- this claim is barred because it is raised for the first time on appeal.

aggravator requires proof that the murder was committed while the defendant was engaged in the commission, attempt to commit, or flight after committing or attempting to commit, *inter alia*, a sexual battery. These two aggravators do not overlap because of the witness elimination component of the avoiding arrest aggravator, which exists independent of the "during a sexual battery" aggravator.

Moreover, the avoid arrest and sentence of imprisonment aggravators do not rely on the same facts to establish both aggravating cinrcumstances. The fact that Hitchcock was on parole is a fact that exists independently of the witness elimination component of the avoiding arrest aggravator, and does not "double". This claim has no legal basis, and the sentence of death should be affirmed in all respects[27].

12. THE SENTENCING ORDER CLAIM

On pages 79-81 of his brief, Hitchcock argues that the sentencing order is in some way inadequate.[28] Specifically, Hitchcock seems to complain that the findings as to the non-statutory mitigators contain no "facts." The portion of the

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[27]All three aggravators were upheld in this Court's 1990 opinion in this case. While not dispositive, such is an indication that the issues contained in the present brief have no legal basis.

[28]The actual argument concerning the order **in this case** is slightly over one paragraph in total length, does not contain a citation to the record, and does not discuss how the sentencing order is deficient.

sentencing order addressing the various mitigation is set out below:

1. STATUTORY MITIGATING CIRCUMSTANCE - The Age of the Defendant at the Time of the Crime:

The Defendant's chronological age of twenty at the time of the murder has been taken into consideration in light of extensive evidence presented on the deprivations he experienced as a child. The Court has evaluated and found this circumstance to be established by the evidence, and it will be given some weight.

2. NON-STATUTORY MITIGATING CIRCUMSTANCES:

a. The Defendant's Crime:

The defense presented testimony of relatives of the Defendant, Dr. Jethrow Toomer, and others to show that the Defendant:

i. was under the influence of alcohol and marijuana during the commission of the crime;

ii. had suffered from life long personality difficulties which influenced him at the time of the offense;

iii. committed the offense as a result of an unplanned impulsive act;

iv. was not armed before the altercation that led to the victim's death;

v. surrendered to and cooperated with the authorities; and

vi. gave a voluntary statement freely confessing his crime.

The Court has given careful consideration to this testimony and finds each of these non-statutory mitigating circumstances to be established. However, the Court gives each of those circumstances very little weight.

b. The Defendant's background:

The defense presented testimony of relatives of the Defendant, Dr. Jethrow Toomer, and others to show that the Defendant:

i. grew up in extreme, rural poverty which included living in a crowded home without adequate heating, without the modern necessities of running water or indoor plumbing, and without adequate food to maintain proper nutritional balances:

ii. at a young age, experienced the lingering death of his natural father who was an essential male role model for the Defendant and who, because of the family's impoverishment, was unable to afford treatment for his terminal illness;

iii. witnessed and was frightened by his mother's epileptic seizures;

iv. was a seventh grade dropout who was unable to pursue a formal education;

v. witnessed and experienced emotional and physical abuse his alcoholic stepfather visited upon himself, his mother and others;

vi. developed borderline personality disorders characterized by insecurity, instability, rejection, abandonment and lack of the ability to trust others due to his dysfunctional family life and emotional deprivations;

vii. left home at an early age, not with a clear plan or objective, but rather to escape- or run away from the circumstances he was in;

viii. worked hard in several demanding jobs, both for his own survival and to help his family during their times of need; and

ix. risked his life to save his uncle from drowning.

The Court has given careful consideration to this testimony and finds that the above non-statutory

mitigating circumstances were established. The Court gives each of those circumstances some weight.

c. Positive Character Traits of the Defendant:

The defense also presented testimony of relatives of the Defendant, Dr. Jethrow Toomer, and others to show that since the Defendant's imprisonment for this crime he:

i. has learned to read and write, secured his G.E.D. on his own and has now assisted or taught others to do likewise;

ii. has acted as a mediator or peacemaker, perhaps saving a corrections officer and another inmate from death or serious injury;

iii. "remediated" or improved his character "deficits" that existed from childhood;

iv. has been thoughtful and caring to his mother and to her family members through his letters and cards to them;

v. has shown artistic talent;

vi. has undertaken steps towards self improvement, including quitting smoking and developing maturity by showing an interest in world events, public television, and the arts;

vii. exhibited good conduct during the penalty proceedings before this Court; and

viii. has retained the love and support of his family members.

The Court has given careful consideration to this testimony and finds that the above non-statutory mitigating circumstances were established. The Court gives each of those circumstances some weight.

d. Plea Negotiations:

In the motion to correct sentence, the defense claims that the Court erred by failing to consider the affidavit of Assistant State Attorney Joe Micetech which was offered into evidence at the Spencer hearing. This

> affidavit contained information regarding plea negotiations between the State and the Defendant before the Defendant's guilt phase was originally tried. The Florida Supreme Court previously concluded that this information was irrelevant to the jury's sentencing recommendation. Hitchcock v. State, 578 So.2d 685, 689, 690-91 (Fla. 1990). This Court finds that information regarding the Defendant's plea negotiations are irrelevant to this Court's sentencing decision as well, and therefore, this information has not been considered.

(R1114-1117). A fair reading of the sentencing order establishes that the sentencing court properly evaluated the mitigating evidence and found that the aggravation outweighed it. The sentencing order concludes:

> The Court has now further considered and discussed the aggravating and mitigating circumstances raised by the Defendant's Motion to Correct Sentencing Error in this case. The Court finds the statutory and non-statutory mitigating circumstances to be to the Defendant's credit, but not of such significance as to outweigh or even weigh heavily against the aggravators. This Court concurs with the recommendation of the sentencing jury that in weighing the aggravating circumstances against the mitigating circumstances, and finds that the facts in this case competent substantial evidence are sufficiently egregious to qualify it as a capital murder for which the ultimate punishment is called for.

(R1118). In *Ferrell v. State,* 653 So.2d 367, 371 (Fla. 1995), this Court repeated the requirements of an adequate sentencing order:

> In *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990), we specifically addressed the difficulty our State courts have in applying the directive of section 921.141(3). To ease this difficulty, we set out requirements which we hoped would result in a uniform application of the section. We now find it necessary to further emphasize the requirements established in *Campbell*. **The sentencing judge must expressly evaluate in his or her written sentencing order each statutory and non-statutory mitigating circumstance proposed by the defendant. This**

> **evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature.** A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. **Once established, the mitigator is weighed against any aggravating circumstances**. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. **The result of this weighing process must be detailed in the written sentencing order** and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.

Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995). *See also, Knight v. State,* 721 So.2d 287, 299 (Fla. 1998); *Chandler v. State*, 702 So.2d 186 (Fla.1997); *Crump v. State,* 654 So.2d 545, 547 (Fla. 1995) ("Without a clear understanding of what mitigation the trial judge considered, weighed, and found, we cannot conduct an appropriate proportionality review."); *Mann v. State*, 420 So.2d 578, 581 (Fla. 1982) ("The trial judge's findings in regard to the death penalty should be of unmistakable clarity so that we can properly review them and not speculate as to what he found[.]"). Despite Hitchcock's best efforts to create a claim based upon the sentencing order, no such claim exists. The sentencing court found the proffered non-statutory mitigators to have been established (with the exception of invalid plea negotiation evidence), weighed that mitigation against the aggravation, and found that death was the proper sentence because the mitigators did not "outweigh or

even weigh heavily" against the aggravators. (R1118). That is the process required by *Ferrell* and *Campbell*, and there is no basis for reversal, especially when, as here, the defendant has not even explained how the sentencing order is deficient. The sentencing order is sufficient, and the sentence should be affirmed in all respects.

13. THE DEATH SENTENCE IS PROPORTIONATE

On pages 82-87 of his brief, Hitchcock argues that death is a disproportionate sentence for the strangulation-murder of a 13-year-old committed during the course of a sexual battery. This claim is wholly without merit. When the four strong aggravators are considered and weighed against the various mitigation, the result of such a comparison is an abiding conviction that death is the proper punishment for this crime. When this case is compared to similar cases in which the sentence of death was upheld, it is clear that death is the proportionate sentence in this case. *See, e.g., Gudinas v. State,* 692 So.2d 953 (Fla. 1997); *Hildwin v. State,* 727 So.2d 193 (Fla. 1988); *Cole v. State,* 701 So.2d 845 (Fla. 1997); *Sochor v. State,* 619 So.2d 285 (Fla. 1993)*; Marquard v.* State, 641 So.2d 54 (Fla. 1994); *Meyers v. State,* 704 So.2d 1368 (Fla. 1998).

To the extent that further discussion of this issue is necessary, none of the aggravators, contrary to Hitchcock's claim, should be stricken for the reasons previously stated. The

aggravation in this case is incredibly strong, and the mitigation is so weak as to be virtually non-existent. None of the mitigation truly mitigates the brutal murder, and death is the only proper penalty.[29]

14. THE TESTIMONY OF HITCHCOCK'S FORMER ATTORNEY

On pages 88-89 of his brief, Hitchcock argues that he is entitled to relief because the Court allowed testimony by Richard Greene (his former assistant public defender) that he has represented Hitchcock during his 1982/83 clemency proceedings. (TR151). While Hitchcock attempts to frame this issue in the context of an impropriety on the part of the State, the true facts are that the State's questioning of Hitchcock's former attorney was not improper because it did no more than explain the basis of the witness's knowledge about Hitchcock.[30]

The questioning upon which Hitchcock bases this claim is set out below:

> Q: How are you employed?
>
> A: I'm assistant public defender in the West Palm Beach public defender's office.
>
> Q: When you represented Mr. Hitchcock you were employed there?
>
> A: Yes, I've been there since 1978.

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[29]None of the cases relied on by Hitchcock compel the reduction of his sentence.

[30]Richard Greene's name appears on the cover of the initial brief as counsel of record.

> Q: Part of your work with Mr. Hitchcock, in fact, the part where you said you increased your involvement with him, that was in the context of your representation of him before the clemency board, is that correct?
>
> Ms. Cashman: Objection, your honor. Violates the motion in limine the court granted as to the history of the case.
>
> The Court: Objection is overruled.
>
> Q: Your answer?
>
> A: Yes.
>
> Q: The purpose of the clemency was to ask for computation [sic] of sentence?
>
> A: **To ask for reduction from the death sentence to life sentence, yes.**

(R158). As the emphasized portion of the record demonstrates, Hitchcock's own witness is responsible for telling the jury that he had previously been sentenced to death. It is axiomatic that Hitchcock cannot place "error" in the record and then obtain relief of some sort based upon that "error". The true facts are that, if Hitchcock's lawyer had not expressly stated that the purpose of the clemency proceeding was to obtain reduction of the death sentence, the jury would not have known what sentence had been imposed, only that a “commutation” of the sentence had been sought.[31] Hitchcock's

[31]Of course, clemency is not limited to cases in which the defendant is under death sentence. §940, Fla. Stat. In the absence of the non-responsive, volunteered response of the witness, the jury would not have known the prior sentence. In fact, it appears that the **answer** given by Greene conflicts with what trial counsel apparently believed was the court's order *in limine*. The answer certainly could be a deliberate attempt to place "error" in the record by someone who certainly should know better.

conclusion to the contrary requires an extensive pyramid of inferences about what the jury "believed" that requires one to accept, as fact, an extensive knowledge on the part of the jury about the clemency process. There is simply no basis for relief.

Moreover, even if the trial court should have sustained the objection, there is no basis for reversal because the error was harmless beyond a reasonable doubt. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986). The true facts are that the jury learned that Hitchcock was sentenced to death through the testimony of Charles Foster, Jerry White and James Morgan. (R212; 222; 231). Even if there was some error associated with the testimony of Hitchcock's former attorney, three of Hitchcock's other witnesses informed the jury that Hitchcock had been previously sentenced to death[32]. There is no basis for relief.

15/16. THE "NEW EVIDENCE" CLAIM

On pages 90-91 of his brief, Hitchcock re-argues the claim contained in claim 5 of his brief. The State relies on the arguments set out in connection with Claim 5, which appear at pages 33-38, above. The true facts are that Hitchcock is attempting to base error on matters that were never raised in the trial court -- it is axiomatic that that is not proper. There is no basis for relief. See page 35, above.

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[32]Hitchcock does not indicate how he was prejudiced by the "clemency" testimony when his own, subsequent, witnesses placed the same information before the jury.

17. THE REJECTED PLEA-BARGAIN CLAIM

On page 92 of his brief, Hitchcock raises a claim that has been a fixture in his brief over the years. Specifically, Hitchcock argues that he should have been allowed to introduce, as mitigation, an affidavit by the original prosecutor that showed that the State had offered, long ago, to recommend a life sentence in exchange for a plea of guilty. This Court has repeatedly rejected this claim, holding that because Hitchcock rejected the offer, it was a nullity that was of no force and effect. *Hitchcock v. State*, 578 So.2d at 690. There is no reason contained in Hitchcock's brief that calls the prior decisions of this Court on this issue into question.[33] Moreover, it would be absurd to place the lower court in error for following the prior decision of this Court in this case on this issue. The evidence of a rejected plea offer is irrelevant to any issue, and was properly excluded. This Court should follow its prior decisions on this point and deny relief.

18. THE LENGTH OF INCARCERATION CLAIM

On pages 93-99 of his brief, Hitchcock again argues that the length of time that he has been "on death row" has somehow disentitled the State to carry out its lawful sentence. This Court has rejected this claim on at least two prior occasions, and there

[33]Hitchcock does not acknowledge this Court's prior decisions on this issue.

is no reason to retreat from those prior rulings. *See, Hitchcock v. State,* 673 So.2d at 863. Hitchcock has not identified any prejudice, and there is no reason for this Court to address this issue. *See, Knight v. State*, 721 So.2d 287, 300 (Fla. 1998) (rejecting same claim).

To the extent that further discussion of this claim is necessary, Hitchcock has relied on decisions from foreign jurisdictions in his effort to fit the square peg of this case into the round hole of the speedy trial requirement. The analogy simply does not compel relief because a speedy trial claim is not the same as a delay from sentencing to execution brought about by the defendant's exercise of his right to review of his case. Because this case has been in virtually constant litigation since 1978, it is readily apparent that the delay in execution of the death sentence is not the result of **delay** by the State.[34] There is no basis for this claim, and all relief should be denied.

Further, this claim is not available to Hitchcock because it was not preserved by timely objection at trial.

The proceeding now before this Court is the appeal from Hitchcock's third resentencing proceeding. The first death sentence, which was imposed in 1977, remained in place for approximately 10 years before it was set aside by the United States

[34]Delay, of course, is the heart of a speedy trial claim.

Supreme Court in 1987.[35] Hitchcock was again sentenced to death in 1988, and that sentence was upheld by this Court. *Hitchcock v. State*, 578 So.2d 685 (Fla. 1990). Hitchcock again sought review by the United States Supreme Court, and that court remanded to this court for reconsideration in light of *Espinosa v. Florida*. *Hitchcock v. Florida*, 112 S.Ct. 3020 (1992). This Court subsequently vacated the death sentence and ordered a new penalty phase proceeding. That penalty phase also resulted in an advisory verdict of death, which was the sentence imposed by the trial court.[36] That sentence was reversed by this Court on March 21, 1996. Hitchcock attempts to pad the time span by arguing that the delay that this Court must look at was the interval between his initial arrest and the most recent proceeding. This argument is remarkably disingenuous.

The fundamental defect in Hitchcock's argument is two-fold: first, it ignores the basic difference between trial and appellate proceedings, and, second, Hitchcock's view of the speedy trial clause emphasizes collateral review as the main event in the review

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[35]That case reached the United States Supreme Court on writ of certiorari to the Eleventh Circuit Court of Appeals following denial of federal habeas corpus relief.

[36]Those penalty phase proceedings took place on August 23-30, 1993. The record was supplemented several times by Hitchcock, with the result that his brief was not filed with this Court until June 8, 1995. The proceedings at issue in the present appeal began in mid-1996, and concluded in March of 1998. Much of that time was spent on unauthorized Rule 3.800 motions or in "newly discovered evidence" litigation. Neither is the fault of the State.

process. In resolving the precise issue presented in this case, the United States Supreme Court stated:

> It has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events [citations omitted]. The rule of these cases, which dealt with the Double Jeopardy Clause, has been thought wise because it protects the societal interest in trying people accused of crime, rather than granting them immunization because of legal error at a previous trial, and because it enhances the probability that appellate courts will be vigilant to strike down prior convictions that are tainted with reversible error. [citations omitted]. These policies, so carefully preserved in this Court's interpretation of the Double Jeopardy Clause, would be seriously undercut by the interpretation given the Speedy Trial Clause by the court below. Indeed, such an interpretation would place a premium upon collateral rather than upon direct attack because of the greater possibility that immunization might attach.

United States v. Ewell, 383 U.S. 116, 121, 86 S.Ct. 773, L.Ed.2d (1966); *See also, United States v. Loud Hawk*, 484 U.S. 302, 311-12, 106 S.Ct. 648, 88 L.Ed.2d 640 (1985) (Reaffirming *Ewell*).

Despite Hitchcock's protestations to the contrary, this case is controlled by *Ewell* and *Loud Hawk*. In fact, the United States Supreme Court's rationale in *Ewell* is particularly apropos in this case, given the result that Hitchcock desires. Hitchcock has no constitutional basis for his claim, and the sentence of death

should be affirmed.[37]

To the extent that further discussion of this claim is necessary, Hitchcock's claim that the state is to blame because the standard jury instructions later found to be inadequate were the cause of two sentence reversals is spurious. If a defense attorney is not deficient (for ineffectiveness of counsel purposes) for not objecting to the standard jury instructions, and that is the law, it makes no sense at all to suggest that blame attaches to the state when the standard jury instructions are given, but the case is later reversed on jury instruction error. *See, e.g., Harvey v. Dugger*, 656 So.2d 1253 (Fla. 1995). It is blatantly ludicrous to suggest, as Hitchcock does, that the state has intentionally caused any error or delay in the prosecution of this case.

None of the cases relied upon by Hitchcock in his brief controls this issue, despite Hitchcock's efforts to insert a square peg in a round hole: no cited case dealt with the speedy trial doctrine in the context of resentencing after a reversal on appeal. *Harris v. Champion*, 15 F.3d 1540, 1560 (10th Cir. 1994), is the only case cited by Hitchcock which in any way addresses appellate delay, and that case is of no help to him because it deals with the narrow situation that confronted the appellate court when a multi-year backlog of appeals developed in the Oklahoma appellate courts.

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[37]Hitchcock has never identified any "prejudice" in the context of this claim. The Richard Hitchcock "statement" was not revealed until after Richard was dead. See pages 9-10; 33-38, above.

Harris does not deal with the situation presented in this case, which is purely whether the state can be barred from carrying out Hitchcock's death sentence due to the passage of time. *See, e.g., Lackey v. Texas*, 115 S.Ct. 1421 (1995); *Porter v. State*, 653 So.2d 374 (Fla. 1995); *Hitchcock v. State*, 578 So.2d 685 (Fla. 1990), *reversed on other grounds*, 112 S.Ct. 3020 (1992). Hitchcock's claim has no constitutional basis, and, in fact, is foreclosed by binding precedent. There is no basis for reversal, and Hitchcock's death sentence should be affirmed in all respects.

CONCLUSION

Based upon the above and foregoing arguments and authorities, the State respectfully requests that this Court affirm the judgment and sentence in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Gary Caldwell, Assistant Public Defender, 15th Judicial Circuit, Criminal Justice Bldg., 421 Third Street, 6th Floor, West Palm Beach, Florida 33401, this _____ day of June, 1999.

_____
Of Counsel