IN THE SUPREME COURT OF FLORIDA

CASE NO: 94,317

JAMES FRANKLIN ROSE

Appellant,

vs.

STATE OF FLORIDA

Appellee.
_____/

AMENDED
INITIAL BRIEF OF APPELLANT
JAMES FRANKLIN ROSE

On Appeal From The Imposition Of The Sentence Of Death
By Electrocution By The Circuit Court In And For
Broward County, Florida
Case No.: 76-5036CF10A
Honorable Paul L. Backman

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CERTIFICATE OF INTERESTED PARTIES

Undersigned counsel for James Franklin Rose certifies that the following is a complete list of persons who have an interest in the outcome of this case. This is a criminal case and there are no identifiable corporate entities.

1. Gail E. Anderson, Assistant Capital Collateral Representative, Office of the Capital Collateral Representatives;
2. Honorable Paul L. Backman, 17th Judicial Circuit court Judge;
3. Sarah D. Baggett, Assistant Attorney General;
4. Richard Bartmon, Assistant Attorney General;
5. Craig S. Barnard, Chief Assistant Public Defender;
6. Lisa Berry, Victim;
7. Robert A. Butterworth, Attorney General for the State of Florida;
8. Louis G. Carres, Assistant Public Defender;
9. Charles Corces, Jr., Assistant Attorney General;
10. Michael J. Entin, Esquire, Counsel for Defendant, James Franklin Rose;
11. Honorable John Ferris, 17th Judicial Circuit Court Judge;
12. Honorable M. Daniel Futch, Jr., 17th Judicial Circuit Court Judge;

13. Georgina Jiminez-Orosa, Assistant Attorney General;

14. Richard Joranby, Esquire, 15th Judicial Circuit Public Defender;

15. Carolyn McCann, Assistant State Attorney for the 17th Judicial Circuit Court of Broward County;

16. Julie D. Naylor, Special Appointed Capital Collateral Representatives;

17. Ralph J. Ray, Jr., Assistant State Attorney for the 17th Judicial Circuit Court of Broward County;

18. James Franklin Rose, Appellant;

19. Richard L. Rosenbaum, Esquire, Appellate Counsel for James Franklin Rose;

20. Joan Fowler Rossin, Assistant Attorney General;

21. Honorable Russell E. Seay, Jr., 17th Judicial Circuit Court of Broward County;

22. Michael J. Satz, State Attorney for the 17th Judicial Circuit Court of Broward County;

23. Daren L. Shippy, Assistant Capital Collateral Representative, Office of the Capital Collateral Representatives;

24. Raag Singhal, Esquire, Counsel for Defendant, James Franklin Rose;

25. James Smith, Attorney General;

26. Larry Helms Spalding, Assistant Capital Collateral Representative, Office of the Capital Collateral Representatives;

27. Celia Terenzio, Assistant Attorney General;

28. The State of Florida.

Respectfully submitted,

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STATEMENT CERTIFYING TYPE SIZE AND STYLE

Appellant, James F. Rose, certifies that this Initial Brief of Appellant is typed in 14 point proportionately spaced Times New Roman.

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PRELIMINARY STATEMENT

The following symbols, abbreviations, and references will be utilized throughout this Initial Brief of Appellant, James Franklin Rose:

The term "Appellant" shall refer to the Defendant in the Circuit Court below, James F. Rose.

The term "Appellee" shall refer to the Plaintiff in the Circuit Court below, the State of Florida.

A 15 volume Record on appeal has been lodged in this court. The Record on appeal includes all pleadings and documents filed at the trial court level is contained in Volumes I through III, pages 1 through 445. Transcripts of hearings and the trial proceedings are contained in Volumes III through XV, pages 1 through 1628. Citations to the pleadings contained in the Record on appeal shall be indicated by an "R" followed by the appropriate page number (R). Citations to the transcript of the hearings, trial, and sentencing proceedings shall be indicated by a "T" followed by the appropriate page number (T).

All emphasis indicated herein have been supplied by the Appellant unless otherwise specified.

ISSUES ON APPEAL

1. Whether James Rose's death sentence should be overturned? Whether reversal and remand for imposition of a life sentence, or, alternatively, remand for a new penalty phase proceeding is required?

2. Whether the jury's recommendation was tainted by reliance on an aggravating factor in violation of the ex post facto clauses of the Florida and United States Constitutions?

3. Whether the trial court reversibly erred in refusing to vacate its sentencing order pursuant to Rule 3.800(b), Fla. R. Crim. P.?

4. Whether the court erroneously weighed aggravating and mitigating circumstances?

5. Whether reversible error permeated the remanded penalty proceedings?

6. Whether the use and misuse of photographic evidence requires resentencing?

7. Whether reversible error occurred when autopsy photographs were withheld in violation of Brady v. Maryland?

8. Whether the trial court abused its discretion by allowing gruesome photographs to be presented to the penalty phase jury?

9. Whether the trial court reversibly erred by failing to rule following a Richardson hearing surrounding the State's discovery violations pertaining to the photographs?

10. Whether James Rose's State and Federal Constitutional rights to a fair trial and due process of law were violated?

11. Whether prosecutorial misconduct created error during the State's closing argument?

12. Whether the prosecutor engaged in misconduct by improperly discrediting the

defense psychologist?

ISSUES ON APPEAL (continued)

13. Whether the trial court reversibly erred in allowing the State to elicit testimony designed to infer that sexual assault had occurred despite the lack of any evidence in support thereof?

14. Whether the trial court abused its discretion by allowing victim impact testimony and an impermissible aggravator?

15. Whether the trial court abused its discretion by allowing the decedent's mother's continued presence in the courtroom?

16. Whether cumulative errors during the penalty phase proceeding require reversal and remand?

17. Whether the trial court abused its discretion by requiring to read to the jury the list of 14 non-statutory mitigating factors sought by the defense?

18. Whether reversal is required as James Rose's death sentence is disproportionate?

19. Whether sentencing delay herein violates James Rose's fundamental State and Federal Constitutional rights?

20. Whether James Rose's sentence to death by electrocution violates the State and Federal Constitutions?

STATEMENT OF THE CASE

A. The History of This Case.

James Rose was arrested in November 1976 and charged by Indictment with the kidnaping and first degree murder of eight (8) year old Lisa Berry (R 1-2). He was convicted of both Counts and was sentenced to death by electrocution on the murder count and life imprisonment on the kidnaping count.[1]

James Rose appealed and challenged his convictions on several grounds. He contended that the evidence was insufficient to support his convictions for first-degree murder and kidnaping. The Florida Supreme Court found:

> ... that the record contains a chain of substantial, credible evidence to support the jury's finding that defendant was guilty of kidnaping and first-degree murder. Whether, as defendant asserts, the evidence failed to exclude all reasonable hypotheses of innocence is for the jury to determine, and we will not reverse a judgment based upon a verdict returned by a jury where there is substantial, competent evidence to support the jury verdict.
>
> Rose v. State, 425 So. 2d 521 (Fla. 1982), cert. denied, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983)[citations omitted].

In Rose, the Florida Supreme Court affirmed Rose's convictions and vacated

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[1]The jury was deadlocked six (6) to six (6) regarding their life/death verdict. An improper Allen charge prompted a seven (7) to five (5) death recommendation. Rose, 461 So. 2d at 86.

his death sentence and remanded for resentencing. Upon resentencing, the death sentence was reimposed and was affirmed on appeal. Rose v. State, 461 So. 2d 84 (Fla. 1984), cert. denied 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985).

James Rose filed a Motion for Post-Conviction Relief Pursuant to Rule 3.850, Fla. R. Crim. P., challenging the lawfulness of his conviction and death sentence on a variety of grounds. The trial court summarily denied Rose's motion without conducting an evidentiary hearing. On appeal, the Florida Supreme Court reversed and directed the trial court to "reconsider Rose's motion and to hold an evidentiary hearing on the ineffective assistance of counsel claims and any other appropriate factual issues presented in the motion." Rose v. State, 601 So. 2d 1181, 1184 (Fla.1992).

The trial court reconsidered Rose's 3.850 motion and conducted an evidentiary hearing on Rose's claims that he received ineffective assistance of counsel at both the guilt and penalty phases of his trial. The trial court again denied relief as to all claims, ruling that Rose's claims of ineffective assistance of counsel did not meet the standards set forth in Strickland v. Washington.[2]

On appeal to the Florida Supreme Court, in this Court's most recent

[2]Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 668 (1984).

encounter with James Rose's predicament, the Court stated:

> In light of the substantial mitigating evidence identified at the hearing below as compared to the sparseness of the evidence actually presented,[3] we find that counsel's errors deprived Rose of a reliable penalty phase proceeding. We further conclude that Rose was prejudiced by the ineffective assistance of counsel at the penalty phase for failing to investigate and present available mitigating evidence. See Hildwin, 654 So. 2d at 110.
>
> We affirm the trial court's denial of relief as to all claims raised in the 3.850 motion and hearing below except for Rose's claim alleging that counsel was ineffective during the resentencing proceeding. We reverse the denial of

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[3]Importantly, the Florida Supreme Court stated:

> Our confidence in the outcome of this proceeding is further undermined by the fact that at Rose's original sentencing trial, even without the presentation of substantial mitigation, the jury was deadlocked at a six-to-six vote on the recommendation of life or death. Rose v. State, 425 So. 2d at 525. The jury recommended death only after the trial court gave the jury an Allen charge. We vacated that death sentence and remanded for resentencing because the trial court reversibly erred in charging the jury to continue deliberations when it should have properly instructed them that a six-to-six vote constitutes a recommendation for life imprisonment. In effect, Rose has once received a recommendation of life imprisonment from a jury even without the substantial mitigation set out above.
>
> Rose v. State, 675 So. 2d 567, 574 (Fla. 1996)[Emphasis added].

> relief as to that claim, vacate the death sentence, and remand for a new sentencing proceeding before a jury during which the jury may properly consider available evidence of aggravation and mitigation before rendering a verdict.
>
> Rose, 675 So. 2d at 574.

B. Remanded Penalty Phase Proceedings

On remand, new penalty phase proceedings were presided over by the Honorable Paul L. Backman, Circuit Judge. Shortly after the Mandate was issued and the Order denying Motion for Rehearing was entered, the trial court ordered the Department of Corrections return James Rose to Broward County for court (R 3-31; 32-33; 34; 35). Thereafter, James Rose was held in the Broward County Jail pending a new penalty phase being conducted.

Again, the State of Florida filed its Notice of Intent to Seek Death Penalty (R 46-7). As a result, several defense motions were filed, inter alia, attacking the constitutionality of the death penalty; seeking to consider the original sentencing jury's recommendation of mercy (R 87-9); precluding the use of victim impact testimony (R 93-5); and seeking to preclude death as the sentencing delay violates the constitution (R 128-30). Further, the defense claimed that Section 921.141, Fla. Stat., violated the ex post facto provisions of the Florida and United States Constitution, and filed a Motion to Prohibit Application of the Statute (R 142-5).

Pretrial hearings were conducted on March 10, 1997 (T 1-67). Remanded penalty phase proceedings commenced on March 24, 1997 continuing on March 25, 26, 27, 31, April 1, 2, and 3, 1997 (T 68-350; 351-504; 504-794; 795-947; 948-1130; 1131-1152; 1153-1391; 1392-1524).

Ultimately, after hearing evidence proffered by the State including evidence supporting the aggravator "victim under the age of 12 years old," the jury returned an advisory sentence recommending that James Rose be sentenced to death by a vote of nine (9) to three (3) (T 207).

On April 25, 1997, the Court conducted a Spencer hearing and both parties were given the opportunity to present additional testimony, evidence, and argument outside the presence of the jury (T 1525-88).

Prior to the imposition of sentence, the State filed its sentencing recommendation (R 231-53). The defense filed a sentencing memorandum (R 254-70). The State filed a response to the Defendant's sentencing memorandum and the Defendant filed a response to the State's memorandum (R 271-98; 293-309).

On February 13, 1998, the trial court issued its sentencing order (R 341-62). Relying upon five (5) statutory aggravating factors,[4] and finding no statutory

[4]The aggravators were as follows: 1) the crime for which the defendant is to be sentenced was committed while he had been previously convicted of a felony and was under the sentence of imprisonment or on parole (F.S. 921.141(5)(a)); 2) the

mitigators, the court imposed death by electrocution (R 362; 363-4). Subsequently, on February 20, 1998 the court issued an Order to vacate previous sentence and resentence Defendant under separate order (R 371). Thereafter, on March 13, 1998 a corrected sentence was entered (R 372-4). James Rose was again sentenced to death by electrocution.

Shortly thereafter, the defense filed a Motion to Correct Sentencing Error or Motion for New Sentencing Hearing (R 394-412). A second motion was likewise filed .

On September 8, 1998 the trial court entered an Order denying Defendant's Second Motion to Correct Sentencing Error or Motion for New Sentencing Hearing (R 422-8). An Order denying Defendant's Motion to Correct Sentencing Hearing was likewise filed (R 429-30). James Rose was again sentenced to death by electrocution. A Notice of Appeal was timely filed on October 7, 1998 (R 431). This appeal ensues. James Franklin Rose remains on death row, housed at Union Correctional Institution, in Starke, Florida.

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defendant was previously convicted of a felony involving the use and/or threat of violence to some person (F.S. 921.141(5)(b)); 3) the capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or attempting to commit the crime of kidnaping (F.S. 921.141(5)(d)); 4) the capital felony was especially heinous, atrocious, or cruel (F.S. 921.141(5)(h)); 5) the victim of the capital felony was a person less than 12 years of age (F.S. 921.141.(5)(l)).

STATEMENT OF FACTS

A. At Trial.

In Rose v. State, 425 So.2d 521,522 (Fla. 1982), the Florida Supreme Court set forth the facts established at trial, stating as follows:

> Although circumstantial in nature, the evidence was sufficient for the jury to have found beyond a reasonable doubt that defendant, and no other person, kidnaped and murdered eight-year-old Lisa Berry. The evidence reveals that defendant was the last person to be seen with Lisa at the bowling alley on the night she disappeared. Barbara Berry, Lisa's mother, was at the bowling alley with family and friends when defendant arrived shortly after 9 p.m. on October 22, 1976. According to Barbara, defendant joined her and other team members at the bowling circle where they talked for several minutes. Shortly after 9:30 p.m., defendant said that he was going to the poolroom area of the bowling alley. Lisa told her mother that she was going with him. Defendant and Lisa were last seen by Lisa's sister Tracy, who testified that Lisa was outside the front door of the bowling alley and defendant was standing just inside the front door. Defendant gave Tracy money for cokes, but when she returned from the snack bar with the cokes, both defendant and Lisa were gone. Upon being informed by Tracy that she could not find defendant and Lisa, Barbara attempted to find them. While looking for them, she was paged for a telephone call which turned out to be from defendant. He asked Barbara the time; she said 10:30. He responded that it was 10:23. He asked what time she would be finished bowling; she said 11:30. Defendant was next seen entering the bowling alley at approximately 11:30 p.m. The medical examiner's testimony established the time of Lisa's death to be within twenty-four hours either side of 1

a.m., October 23, 1976.

The evidence reveals that defendant had a motive for killing Lisa. Although he and Lisa's mother had dated for about nine months, they were no longer dating regularly because he was extremely jealous about her working in the bowling alley bar and being around other men. Lisa's mother testified that defendant told her
that he could hurt her and that she did not know what he was capable of doing. A male friend of Barbara's who was at the bowling circle when defendant was there was asked by Lisa if he was going to have breakfast with her and her mother. According to testimony at trial, defendant, after having overheard this conversation had a look on his face as if to say, "What is going on?"

Several people present at the bowling alley testified that when defendant returned at approximately 11:30, he had a large red spot on his lower right trousers leg. Expert testimony revealed the spot to be type B blood. Type B bloodstains also were found on the outside of the passenger's door of defendant's white van, on the passenger's seat, and on the engine cover. Fingernail scrapings taken from defendant revealed blood. It was stipulated in the record that Lisa had type B blood and that defendant had type A blood.

At about 11:45 p.m. on the night Lisa disappeared, a white van was seen behind a Pantry Pride store located about a quarter of a mile from the bowling alley. Defendant was seen driving his white van that same night. According to testimony at trial, when the search for Lisa began shortly after defendant's return to the bowling alley at 11:30, he drove away and returned at least three times. Lisa's green sweater and pink pants were found the next afternoon behind the Pantry Pride. Her pink blouse was later found in defendant's van. Lisa's nude body was

found four days after her disappearance in a canal approximately ten miles from the bowling alley. Her shoes were found about a mile apart alongside a road between the canal and the bowling alley.

A paint-stained hammer was found in the canal about six feet from Lisa's body. Defendant was a painter, and expert testimony revealed that paint samples from the hammer were similar to paint samples taken from paint cans in his van. The medical examiner testified that Lisa's death resulted from severe head injuries caused by blunt force.

Expert witnesses also testified that a green fiber taken from defendant's clothing after his arrest was consistent with fibers from Lisa's green sweater found behind the Pantry Pride and that a crushed hair taken from defendant's sock was consistent with hair from Lisa's hairbrush. Defendant made numerous inconsistent attempts to account for his whereabouts on the evening Lisa disappeared and to explain away certain evidence. Defendant told Lisa's mother that he was at the Highway Bar when he telephoned her regarding the time and stated to her that it was 10:23. He was uncharacteristically exact about the time, and he could be clearly heard without background noise which, according to testimony, would not have been possible had he been at the bar when he telephoned since the band at the bar would have been playing loudly at that particular time.

When defendant returned to the bowling alley at 11:30, he pretended that Lisa was still alive. Acting as though Lisa was present at the bowling alley in his visible sight, he commented to Lisa's mother that Lisa was getting chubby and asked who was the person with the goatee to whom Lisa was talking. When she turned around to see who defendant was referring to, she saw neither Lisa nor a

person with a goatee.

After initially denying that the spot on his trousers leg was blood, defendant later explained that he had cut himself changing a tire. Testimony indicated the spare tire was fully inflated. He told a police officer that he had cut his leg while crawling underneath the van to check out a noise he had heard. When the officer took defendant to the area where he claimed to have crawled under the van, the officer could not find any impressions in the sand that could have been made by a human body.

In an attempt to cover the blood spot on his trousers which was first noticed and called to his attention upon his return to the bowling alley at 11:30, defendant first covered it with a whitewash or paint. Later, after he went into a restroom, the spot was covered with grease or some black substance. Defendant explained to a police detective that the blood on the seat of his van was from an injured friend whom he had taken home about two months earlier. The friend had type A blood. The blood on the seat was type B, the same as Lisa's.

Defendant, at one point, told police detectives that Lisa had last been near the van about two weeks prior to the night of her disappearance. He later stated that Lisa had attempted to get into the van earlier that evening and he told her to get out. Lisa's mother testified that Lisa had not been in defendant's van for about a year. Defendant was convicted for the kidnaping and first-degree murder of Lisa Berry. The jury recommended death, and the trial court sentenced him to death for the murder and to life imprisonment for the kidnaping.

Id at 522-23.

B. Guilt Phase Proceedings On Remand.

On remand, guilt phase proceedings were conducted by the Honorable Paul L. Backman, Circuit Court Judge.

As before, over defense objection the jury was shown photographs characterized as gruesome.[5] Thereafter, the State elicited testimony from numerous witnesses for sentencing purposes. Several of the decedent's family members testified concerning their knowledge of the events surrounding the incident. The decedent's grandmother, Margaret Szabo testified (T 519-534). Her former husband, Joseph Szabo testified via former testimony in a prior proceeding (T 556-594). The decedent's younger sister, Tracy Berry, likewise testified (T 595-98).

Several other individuals testified as fact witnesses concerning the events leading up to Lisa Berry's disappearance. For example, the sponsor of the decedent's mother's bowling league, Walter Isler testified (T 535-55). Barry Daniello likewise testified about the events which occurred at the bowling alley that evening (T 598-616). Judy Coppell similarly testified (T 617-24).

Two (2) of James Rose's prior parole officers/probation officers, Gloria Daniels and Charles Dickun testified as State witnesses (T 816-35; 1066-96).

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[5]The photographs consisted of close up pictures of the body of Lisa Berry floating in the canal. The body was covered with maggots. Maggots were all over the child's head, face, torso, and mouth (T 636-38).

Experts Dale Nute, John Pennie, and Dr. George Duncan provided expert testimony in the State's case-in-chief (T 804-14; 1010-25; 1029-64). Further, several law enforcement or former law enforcement officials testified their involvement in the case; Charles Walker (T 682-703), Arthur McLellan (T 704-45), Charles Tipton (T 757-78), Arthur Masters (T 784-90), Vincent Maffei (T 838-48), John Bukata (T 850-72), Allen Van Sant (T 882-910), Richard Hoffman (T 918-20), Ed King (T 929-47), Ralph Garner (T 956-73), Detective Cone (T 977-88), Jim Hughes (T 990-99), and Patricia Jackson (T 1003-9). Medical examiner Dr. Fatteh also testified (T 630-81). His autopsy findings led him to opine that Lisa Berry died as a result of severe head injuries caused by blunt force. A bar tender from the Highway Bar, Holly Cabral testified that she did not recall seeing James Rose the night of the incident, but on cross-examination she admitted that James Rose was "a regular" at the bar on Friday evenings (T 753).

In the defense case, Judy Greear testified that she lived with James Rose from 1975 through 1976 (T 1000). James Rose and she had a loving, romantic relationship. James Rose had a good relationship with her two (2) children. Ms. Greear testified that James Rose had a full time job as a painter (T 1104). She urged the jury to give James Rose life rather than recommend a sentence of death (T 1106).

Floyd Templeton testified that he met James Rose in 1973 when he was in a work release program. James Rose worked for him. He was a good painter (T 1110). He was honest and hard working (T 1115).

Floyd Templeton's wife, Ruth Templeton, likewise testified via former testimony (T 1117). Ms. Templeton testified that James Rose was not violent (T 1120).

Dr. Jethrow Toomer, a psychologist and professor from Florida International University was declared an expert by the court (T 1220). The doctor confirmed that James Rose was a slow learner (T 1223). He has an alcohol problem. Dr. Toomer testified that there was a likelihood that James Rose suffered from some organic impairment or brain damage as a result of traumas he had sustained to his head (T 1230). The doctor testified that James Rose was indeed adaptable to prison life (T 1242). He had not received any disciplinary action by the Department of Corrections since 1983 (T 1243).

STANDARD OF REVIEW

When reviewing aggravating factors on appeal, the Florida Supreme Court has reiterated the standard of review:

> [I]t is not this court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt - that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance, and if so, whether competent substantial evidence supports its finding.
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> Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied 118 S.Ct. 419, 139 L.Ed.2d 321 (1997); see also Alston v. State, 723 So. 2d 148, 160 (Fla. 1998).

The court in Campbell v. State, 571 So. 2d 415 (Fla. 1990), established relevant standards of review for mitigating circumstances: 1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this court; 2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; and finally 3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. See also Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997); Cave v. State, 727 So. 2d 227, 230 (Fla. 1998).

Finally, in evaluating the constitutionality of § 921.141(5)(l), the court must determine whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes. California Dep't of Corrections v. Morales, 514 U.S. 499, 509, 115 S.Ct. 1597, 1603, 131 L.Ed.2d 588 (1995); State v. Hootman, 709 So. 2d 1357, 1361, n. 5 (Fla. 1998).

SUMMARY OF ARGUMENT

54 year old James Rose asserts that the trial court's recent imposition of a sentence of death by electrocution should be overturned. After being under a death sentence for in excess of 23 years, James Rose maintains that based upon State and Federal Constitutional grounds the death sentence should be reversed and this matter remanded to the trial court for imposition of a life sentence, or alternatively, for a new penalty proceeding.

First and foremost, James Rose timely objected to the State of Florida's reliance upon the victim being under 12 years old as an aggravating circumstance pursuant to Section 921.147(5)(l), Florida Statutes during the remanded penalty phase proceedings. Not only did the State rely upon this improper aggravator, it became the feature of the proceedings. Although the defense filed a written pretrial motion to preclude the State's use of Lisa Berry's age as an aggravator and to preclude the use of victim impact testimony as being violative of the ex post facto provisions of the State and Federal Constitutions and argued the same post judgment, the trial court denied the defense requests.

Shortly after the remanded penalty phase proceedings concluded, the Florida Supreme Court resolved the issue of whether reliance upon a statutory aggravator enacted subsequent to an offense violated the ex post facto clause in Hootman v.

State, 709 So. 2d 1357 (Fla. 1998). In Hootman, the Supreme Court determined that an aggravating factor enacted into law after commission of a capital offense may not be considered in sentencing a defendant. In Hootman, the court determined that consideration of a subsequently enacted advanced age aggravating factor altered substantive law, disadvantaged the defendant and violated the ex post facto clauses of the Florida and United States Constitutions.

Because the improper aggravator was objected to pretrial, the jury was impermissibly tainted by the State's reliance upon the newly enacted aggravator. Because it is impossible to determine the effect the impermissible aggravator had on the jury, the trial court's belated "harmless error analysis" was insufficient as it was impossible for the judge to determine whether the unlawful aggravator had any effect on the jury's recommendation. Reversal and imposition of a sentence of life imprisonment is required or alternatively, reversal and remand for new penalty phase proceedings.

In addition to the reversible error which occurred as a result of the State's reliance upon an improper aggravator which was made the feature of the State's case during the penalty phase in front of the jury and in its arguments to the trial judge, evidentiary errors, singularly and cumulatively warrant reversal and remand. Specifically, the use of overly gruesome photographic evidence and misuse of

autopsy photographs in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), constituted reversible error. Further, the trial court reversibly permitted the State to elicit testimony design to infer that a sexual assault had occurred, when no such evidence existed. The testimony, together with the improper prosecutorial closing argument violated James Rose's State and Federal Constitutional rights to a fair trial and due process of law. Additionally, reversible error occurred as a result of the trial court's allowance of the introduction of improper victim input testimony and where the trial court allowed the decedent's mother to be present in the courtroom throughout trial without conducting a balancing analysis under Section 90.403, Florida Statutes with regards to the prejudice caused to James Rose. Singularly or cumulatively, James Rose maintains that reversal is required.

Sub judice, in light of James Rose's extreme mental and emotional disturbances, his capacity to appreciate his criminality and to conform his conduct to the law, his age, the fact that he had a difficult, non-nurturing childhood, the fact that he is of below average intelligence and a slow learner, the fact that he is an alcoholic and was under the influence of alcohol at the time of the crime, the fact that he has a good employment record, the fact that he is a good prisoner who has adapted his life to incarceration, the fact that he cooperated with police, the fact that

he has performed specific good deeds, and the fact that he possesses specific good characteristics, do not constitute this case as one of the most aggravated and least mitigated of all first degree murders. See Woods v. State, __ So. 2d __ (Fla. 1999)[1999 WL 215347]; Sinclair v. State, 657 So. 2d 1138, 1142 (Fla. 1995)

ARGUMENTS

I. JAMES ROSE'S DEATH SENTENCE SHOULD BE OVERTURNED; REVERSAL AND REMAND FOR IMPOSITION OF A LIFE SENTENCE, OR, ALTERNATIVELY, REMAND FOR A NEW PENALTY PROCEEDING IS REQUIRED.

After being incarcerated for in excess of 23 years for the offenses below, 54 year old James Rose asserts that his sentence to death by electrocution should be overturned for a plethora of reasons. James Rose maintains that based upon State and Federal Constitutional grounds, the death sentence should be reversed and this matter remanded to the trial court for imposition of a life sentence or, alternatively, for a new penalty phase proceeding.

James Rose asserts that the trial court improperly found that the murder was accompanied by five (5) aggravating and no mitigating circumstances. In actuality, not all of the aggravating circumstances were present. The most glaring error below was the prosecutor's use of an improper aggravator based on age pursuant to Hootman.[6] James Rose timely objected to the State of Florida's reliance upon the

[6]In State v. Matute-Chirinos, 713 So. 2d 1006 (Fla. 1998), the Florida Supreme Court abrogated Hootman to the extent that the Florida Supreme Court does not have jurisdiction to accept certification by a district court of appeal of a case pending in that court when the matter to be reviewed in not an appeal but is rather a writ of certiorari. The Matute-Chirinos decision did not effect the Supreme Court's determination that it is improper for a judge or jury to rely upon an aggravating factor enacted into law in violation of the ex post facto clauses of the

victim being 12 years old as an aggravating circumstance pursuant to Section 721.147(5)(1), Florida Statutes. Said law was enacted approximately ten (10) years after the offenses James Rose was convicted of committing. Prior to the remanded penalty trial, the defense filed a written motion to preclude the state's use of Lisa Berry's age as an aggravator and filed a Motion to Preclude the Use of Victim Impact Testimony as being Violative of the Ex Post Facto Provisions of the State and Federal Constitutions (R 93-5; 142-65).

Shortly after the remanded penalty trial was conducted, the Florida Supreme Court resolved the issue of whether reliance upon a statutory aggravator enacted subsequent to an offense would violate the ex post facto clause. The Hootman, supra court resolved this issue finding that application of the statutory provision permitting introduction of evidence of a victim's advance age for the jury's determination as to whether the death penalty may be imposed violated the constitutional ex post facto prohibition. The court held that the advanced age aggravator was retroactive. Since Hootman's conduct occurred before enactment, and since the statute disadvantaged the defendant by altering the definition of criminal conduct that could subject him to the death penalty and increased

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Florida and United States Constitutions. See Article X, Clause I, United States Constitution; Article I, Section 10, Florida Constitution.

punishment based on a new aggravator, reversal was required

The same holds true herein with regards to Lisa Berry being under the age of 12. Because the evidence was objected to pretrial, the jury was impermissibly tainted by the State's reliance upon the newly enacted aggravator. As it is impossible to determine the effect the impermissible aggravator had on the jury, no "harmless error analysis" can second guess the jury's divided recommendation of death. Although the sentencing court determined that reliance upon an improper and unlawful factor could be harmless error in terms of a judge's analysis following a non-tainted jury recommendation, the effect of the jury's reliance on the impermissible and unlawful aggravator cannot be measured or fairly assessed. Absent reliance upon the impermissible aggravator might the penalty phase jury have recommended life? Or been split. Or advised death by only a small majority, i.e. seven (7) to five (5), or eight (8) to four (4)? We shall never know unless and until this Court remands for new penalty phase proceedings absent the impermissible aggravator pursuant to Hootman.

Additionally, the trial judge erred in finding that the offense was especially heinous, atrocious, or cruel. Further, based upon the uncontroverted expert testimony of Dr. Jethrow Toomer, James Rose established statutory mitigators which the court seemingly ignored.

The law is well settled that any consideration of mitigation must fall within certain established guidelines. In the context of the death penalty, the concept of mitigation allows the court to:

> Not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record in any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death . . . Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases. Lockett v. Ohio, 458 U.S. 586, 604-5, 98 S.Ct. 2958, 2964-65, 57 L.Ed.2d 973 (1978).
>
> Downs v. Dugger, 514 So 2d 1069, 1070 (Fla. 1987).

Moreover, as set forth by the United States Supreme Court in Eddings v. Oklahoma, 455 U.S. 104, 114, 115, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982):

> [J]ust as the state may not by statute preclude the sentencer from considering any mitigating factor, neither made the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. . . The sentencer, and the court of criminal appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.
>
> Id.

In this case, the mitigating factors and the errors with regard to the

aggravators relied on and presented to the jury warrant reversal.

In addition to the reversible error which occurred as a result of the State's reliance upon an improper aggravator in presenting its case to both the jury to render its recommendation and to the court to render its final sentence, evidentiary errors, singularly and cumulatively warrant reversal and remand. Specifically, the use of overly gruesome photographic evidence and the misuse of autopsy photographs in violation of Brady v. Maryland caused reversible error. Further, the trial court reversibly permitted the State to elicit testimony designed to infer that a sexual assault had occurred. No evidence existed to form any good faith basis for such an insinuation. The testimony, together with the prosecutor's improper closing argument, violated James Rose's State and Federal Constitutional rights to a fair trial and to due process of law.

Additionally, reversible error occurred as a result of the trial court's allowance of the introduction of improper victim impact testimony and was exacerbated by the trial court's allowance of the decedent's mother to be present in the courtroom throughout trial. Singularly or cumulatively, James Rose maintains that reversal is required.

A. The Jury's Advisory Recommendation Was Tainted By Reliance On An Aggravating Factor In Violation Of The Ex Post Facto Clauses Of The Florida And United States

Constitutions.

Shortly after remand for resentencing by the Florida Supreme Court in March 1996, the State again filed its Notice of Intent to Seek Death Penalty (R 46-7). The State asserted that several aggravating circumstances warrant imposition of the ultimate penalty in this case - death by electrocution.

Prior to the remanded penalty phase, the defense filed a Motion to Prohibit Application of Section 921.141(5)(1) and Section 921.141(7), Florida Statutes. In the motion, the defense noted that the offense sub judice took place on or about October 22, 1976. Section 921.141(7) concerning a non-statutory aggravator of victim impact testimony became effective on October 1, 1992. Section 921.141(1) concerning age of a victim became effective on October 1, 1995. 1995 Fla. Sess. Law. Surv. Ch. 95-151, Section 1. The defense unsuccessfully sought to prohibit the State of Florida from introducing evidence concerning Section 921.141(5)(1) and Section 921.141(7). The State filed a response to the Defendant's motion (R 170-3; 174-7).[7]

Subsequently, post-trial, James Rose filed two (2) Motions to Correct

[7]Although the Record on appeal fails to contain an order denying the defense motion, in light of the trial court's subsequent actions in allowing the evidence, allowing the jury's advisory sentence to be based upon the aggravator, and in light of the court's sentencing order of February 13, 1998, it is clear that the court denied the defense motion (R 341-62).

Sentencing Errors pursuant to Rule 3.800(b), Florida Rules of Criminal Procedure (R 394-412).

On September 8, 1998, the trial court issued its order on Defendant's second Motion to Correct Sentencing Error pursuant to Fla. R. Crim. P. 3.800(b) or Motion for New Sentencing Hearing (R 422-8). The trial court addressed the recent Florida Supreme Court's decision in State v. Hootman, 709 So. 2d 1357 (Fla. 1998). The trial court, giving "great credence to the Florida Supreme Court in the case of Hootman" struck it's application and/or consideration of the aggravating factor "the victim of the capital felony was a person less than 12 years of age, F.S. 921.141(5)(1)." (R 424) Thereafter, the trial court conducted a "harmless error analysis" pursuant to State v. DiGuilio, 491 So. 2d 129 (Fla. 1986). The court concluded:

> This court has also conducted a thorough review of all evidence presented to the jury and finds that the inclusion of the aforementioned invalid aggravating factor would not have effected the jury's recommendation of death, which was by a vote of 9 to 3.
>
> * * *
>
> . . . the totality of the remaining aggravating factors and the lack of the significant mitigating circumstances conclusively demonstrates that death is the appropriate sentence in this case.

(R 427-8).

Based upon Hootman and the timely bona fide objection below, the trial court reversibly erred in allowing the State to rely upon an aggravating factor enacted into law after commission of the capital offense and erred in considering the aggravating factor in sentencing James Rose. Clearly based upon Hootman, the aggravating factor, "victim of the capital felony was person less than 12 years of age" altered substantive law, disadvantaged James Rose and violated the ex post facto provision.

In Hootman, the court stated:

> Unlike the situations involved in the cases relied upon by the State, Section 921.141(5)(m) constitutes a substantial change in the substantive law on capital punishment since the trier of fact and the court may now consider the victim's advance age as the sole determining factor in finding an aggravating circumstance. In other words, once it has been established that the victim was of advanced years in age, the aggravator is conclusively shown. While there is no guarantee Hootman would receive the death penalty, the judge and jury's decision would certainly be effected by consideration of this new aggravator, which would not have been the case had Hootman been tried, convicted, and sentenced before the date of enactment. Thus, consideration of the advanced age aggravator undoubtedly disadvantages Hootman by exposing him to a penalty of death and cannot be said to be a mere procedural change in the law.
>
> Accordingly, we approve the decision of the trial court and hold that Section 921.141(5)(m) may not be retroactively applied against Hootman since the newly

> amended section was not in effect at the time of the alleged offense and substantially alters the substantive law of capital punishment in Florida.
>
> Id. at 1360 (R 709).

While the trial court determined that "striking one aggravating factor does not necessarily require resentencing" in the case at bar, based upon the history of this case, resentencing is required. One need only observe the close facts surrounding the jury's recommendation of death. Indeed, the child's age evoked sympathy and became the feature of the State's evidence and argument to the jury and the judge. Clearly, a likelihood of a different sentence existed. The error which occurred below cannot be deemed harmless.[8] This Court is reminded that the first jury determining a recommendation as to James Rose's fate was hopelessly deadlocked six (6) to six (6). Ultimately, death by a vote of seven (7) to five (5) was recommended after an improper "Allen charge."

Further, while the trial court states that it "did not give disproportionate weight to the aforementioned stricken aggravator . . ." it is clear that the State made the aggravator a feature of the trial and it was impossible for the jury not to have given disproportionate weight to the stricken aggravator. For example, during the

[8]This argument is further supported by the remainder of the arguments contained throughout this Initial Brief.

State's closing argument it continuously stressed throughout the argument that the child was eight (8) years old, (T 1594; 1595; 1597; 1598) or that the victim was less than 12 (T 1599). The State's closing argument was replete with references to Lisa Berry's age, stating that she was less than 12 years old (T 1406; 1407). She was a child under the age of 13 (T 1400). "She is an 8 year old girl, a little 8 year old girl." (T 1408).[9]

Based upon Hootman and the totality of the circumstances, the State clearly relied upon an unlawful aggravator in presenting its case to the penalty phase jury. The penalty phase jurors were bombarded with references to Lisa Berry's age. At the conclusion of the presentation of the evidence, the State stressed on a multitude of occasions Lisa Berry's age, and argued to the jury that the age alone was an aggravator and that the aggravators were "no brainers." (T 1414) Thereafter, the judge instructed the jury that Lisa Berry's age could be utilized as an aggravator and that the jurors could whatever weight the jury wanted in determining whether a recommendation of death was appropriate.

Sub judice, because the sentencing judge improperly determined that no mitigating circumstances existed, improperly instructed the jury concerning an

[9]See also "because she was an 8 year old," - "this little 8 year old girl" (T 1410); "Lisa weighed 91 pounds. Lisa was 8." (T 1411); "This 8 year old girl." (T 1415); "same" (1435); "same" (1437).

aggravating factor and erroneously found other aggravators which were not sufficiently proven, a real likelihood of a different sentence exists. Appellant suggests that with the mitigating evidence presented, the initial jury would have easily sentenced him to life rather than being "hung" by a six (6) to six (6) prior to the erroneous Allen charge. Based upon the foregoing, reversal is required.

B. The Trial Court Reversibly Erred In Refusing To Vacate Its Sentencing Order Pursuant to Rule 3.800(b), Fla. R. Crim. P.; The Court Erroneously Weighed Aggravating and Mitigating Circumstances.

James Rose requested the trial court correct sentencing errors pursuant to Rule 3.800(b), Fla. R. Crim. P. (R 375-83). Likewise, a Second Motion to Correct Sentencing Error Pursuant to Rule 3.800(b) or Motion for New Sentencing was filed (R 394-412).

Pursuant to Rule 3.800(b), a defendant may file a motion to correct the sentence. Death sentences can be corrected as proscribed by Rule 3.800(b). Anderson v. State, 267 So. 2d 8 (Fla. 1972). Sub judice, based upon allowance of an impermissible aggravator and errors committed in determining and applying the aggravators and mitigators, this case was ripe for correction of the death sentence to a term of life imprisonment.

James Rose's initial Motion to Correct Sentencing requested the court correct

sentencing errors which were apparent from the sentence of death by electrocution imposed by the court. James Rose asserted that the trial court gave undue weight to aggravating factors, including the aggravator that "the defendant was previously convicted of a felony involving the use and/or threat of violence of some person." (R 386) Specifically, the underlying felonies utilized by the court, including a 1969 breaking and entering with intent to commit grand larceny, did not indicate a threat of violence. State witness Detective Ed King testified that James Rose covered the victim, Ms. Etta Cilia's mouth to keep her quiet, telling her that she would not be hurt (T 921-40). Further, this factor allowed impermissible doubling, as this aggravating was based on the exact same conduct as the first aggravating factor "the crime for which the defendant is to be sentenced was committed while he had been previously been convicted of felony and was under the sentence of imprisonment or on parole." Because the facts which warrant the basis for finding one (1) aggravating circumstance could not be considered as a basis for another aggravating circumstance, the trial court reversibly erred. See Castro v. State, 597 So. 2d 259 (Fla. 1992); Monlyn v. State, 705 So. 2d 1, 6 (Fla. 1997).

Additionally, with regard to the third aggravating factor, "the capital felony was committed while the defendant was engaged in the commission or attempt to commit or attempting to commit a crime of kidnaping," the defense asserts that the

trial court gave the factor undue weight. Although the jury found James Rose guilty of kidnaping, the Appellant maintains that his conviction was predicated upon the presumption that an individual under the age of 13 cannot consent, thereby establishing the trial court's error in applying undue weight to the aggravator. Undisputedly, James Rose got along well with Lisa Berry (T 534; 606). Barbara Berry testified that James Rose got along quite well with her children (T 581; 387). The evidence established that Lisa Berry was allowed to run free in a bowling alley bar late on a Friday night. James Rose, who had dated Lisa Berry's mother for approximately one (1) year bought her a toy and sat her on his lap. As argued below, Lisa Berry went with James Rose willingly, if at all.

James Rose maintains that the trial judge erred in finding that the capital felony was especially heinous, atrocious, or cruel, as set forth in the fourth aggravating circumstance. The State failed to establish an intent to the offense extraordinarily painful. Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990); Espinosa v. State, 112 S.Ct. 2926 (1992). Second, there was no showing that the deceased did not immediately lose consciousness. Herzog v. State, 439 So. 2d 1372 (Fla. 1982). In fact, the State's expert testified that in his opinion death occurred within four (4) to eight (8) minutes, but he did not rule out immediate loss of consciousness. See Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989).

With regard to the fifth aggravating factor that "the victim of the capital felony was a person less than 12 years of age," the court should not have given said factor any weight as the factor violated the ex post facto clause of the United States and Florida Constitutions.[10]

Further, with regards to statutory and non-statutory mitigators, the trial court's finding that James Rose was not under the influence of extreme mental or emotional disturbance at the time of the offense is defied by the Record. Mr. Charles Dickun, James Rose's former probation officer who had known James Rose since 1970 testified that James Rose was the product of an illegitimate birth and did not get along well with his stepfather during his formative years (T 1093). He testified that James Rose hated and feared his stepfather. The same witness likewise testified that James Rose had an IQ of 84 near the time of the crime (T 1093). Such an intelligence quota is far lower than the IQ of 99 considered by the trial court, scored after Rose had been undergoing rehabilitation in prison for approximately ten (10) years.

The trial court indicated in its sentencing order that there was no evidence of longstanding psychiatric history or any mental issues prior to James Rose entering the criminal justice system. The court's finding was directly contradicted by the

[10]See Argument IA, supra.

testimony of Mr. Charles Dickun who related the psychological testing was performed on James Rose as far back as 1961, when he was 16. James Rose entered the criminal justice system prior to 16th birthday, while a sixth grader. He eventually completed the seventh grade (T 1088).

Dr. Jethrow Toomer, an expert in forensic psychology testified that James Rose suffered from a borderline personality disorder which resulted in his ability to do well for short periods of time but based on his lack of coping skills and alcohol problems resulted in his criminal troubles (T 1220-50). Dr. Jethrow Toomer testified concerning James Rose's neurological impairments as determined by Dr. Hyman Eisenstein. Via Dr. Toomer, the court was presented with evidence of several incidents of head trauma where James Rose was rendered unconscious (T 1230). The court also learned that based upon neurological testing, James Rose has brain damage (T 1230). Said testimony was uncontroverted and unrebutted by the State.

Coupling Dr. Toomer's testimony with James Rose's alcohol problem, a statutory mitigating circumstance was clearly established (T 1227). Even Officer Dennis Walker, the first officer on the scene the night of the incident, reported that James Rose appeared to be under the influence of alcohol (T 697; 699).

The defense presented evidence at the hearing on James Rose's Motion for

Post Conviction Relief which prompted this court to write:

> James Rose presented evidence at the hearing below that the following information was available had counsel conducted a reasonable investigation: 1) Rose grew up in poverty; 2) Rose was emotionally abused and neglected throughout his childhood; 3) Rose's mother locked him in a closet for extended periods of time as a child and tried to lose him and leave without him when they were out; 4) Rose was a slow learner and was retained in the fourth, fifth, and seventh grades; 5) Rose's I.Q. is 84; 6) Rose was severely injured in a 30 foot fall and suffered head trauma, chronic blackouts, dizziness, and blurred vision; 7) Rose is an alcoholic; and 8) Rose had previously been characterized by a physician as schizoid.
>
> In addition, Dr. Jethrow Toomer, a clinical and forensic psychologist, testified that: 1) Rose suffers from organic brain damage; 2) Rose has a longstanding personality disorder; 3) Rose is a chronic alcoholic; 4) Rose meets the criteria for the statutory mitigator of being under the influence of an extreme emotional or mental disturbance at the time of the offense, see § 921.141(6)(b) Fla. Stat. (1993); and 5) Rose's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired at the time of the offense, see id. § 921.141(6)(f). Dr. Toomer's opinion was based on a psycho social evaluation of Rose in which he administered a battery of psychological tests and reviewed Rose's school, hospital, medical and prison records. His testimony was essentially uncontested. In addition to the evidence outlined above, Rose presented substantial lay testimony regarding mitigation at the post-conviction hearing which had not been investigated or was not presented by counsel during the penalty phase proceedings.

Rose v. State, 675 So. 2d 567,
571-572 (Fla. 1996).

James Rose asserts that the trial court erred in failing to find the aforementioned statutory and non-statutory mitigating circumstance as well as the "capacity to appreciate criminality or conform conduct" circumstance as set forth in § 921.141(6)(f), Florida Statutes. Assuming arguendo, that the trial court was correct in refusing to find either or both of those statutory mitigating circumstances, the evidence rose to the level of that required for non-statutory mitigation which does not require that the mental or emotional disturbance be "extreme." See Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

Additionally, James Rose asserts that the trial court should have accorded the mitigating circumstance "the defendant's non-nurturing childhood" greater weight. Further, the trial court erred in according only little weight to the mitigating circumstance "the defendant is below average intelligence and is a slow learner." Mr. Charles Dickun testified that Rose scored 84 on an IQ test in 1961, and was below average intelligence (T 1093). Dr. Toomer testified James Rose scored 89 on an IQ test in 1997 (T 1223). Mr. Dickun confirmed that at age 17 James Rose only completed the seventh grade and had learned to write his name only to sign paychecks.

The trial court erred in failing to find the mitigating circumstance "the defendant is an alcoholic and was intoxicated at the time of the murder." Mr. Charles Dickun testified that James Rose and his family and all the people who knew him, knew that he had a serious problem with alcohol (T 1090). Mr. Dickun further testified that Ms. Etta Cilia, the victim of the breaking and entering case termed Jim Rose a "sweet boy when he wasn't drinking." (T 1090-91) Both Ms. Celia and Rose Jernigan said to Mr. Dickun that James Rose was a completely different person while he was drinking (T 1090). Further, it was uncontroverted that a special condition of James Rose's earlier probation that he was not permitted to enter bars or consume alcohol. Further, Ms. Gloria Daniels testified that her reports indicated James Rose has a problem with alcohol (T 833). Even Detective Ed King testified that Rose's breaking and entering priors were alcohol related (T 929). In fact, Detective King characterized the 1969 offense as one of stupidity in which Rose stole beer out of Ms. Cilia's refrigerator (T 929-30).

During questioning of State witness Detective Al Van Sant, the detective admitted that he found Rose in a bar opening a beer from a six (6) pack he had purchased (T 890). Mr. Walter Isler confirmed James Rose was drinking the night of the murder (T 555). James Rose even admitted to law enforcement officers during the nearly 20 hours of questioning that ensued after his apprehension that he

had been drinking. Finally, Officer Dennis Walker, the lead officer on the scene the night of the disappearance has consistently testified that James Rose smelled like he had been drinking and appeared to be under the influence (T 695-97). On cross-examination Officer Walker characterized Rose as moderately intoxicated (T 699). On redirect, Officer Walker was asked whether James Rose was intoxicated and responded "correct, yes." (T 702)

Importantly, Dr. Toomer's uncontroverted testimony detailed James Rose's history of alcohol abuse and applied the same to his lack of coping skills and to his borderline personality disorder (T 1227-31). It was Dr. Toomer uncontradicted opinion that alcohol was breaking James Rose physically and behaviorally. Clearly, these facts constitute a valid mitigating circumstance that James Rose asserts should have given great weight. See Wright v. State, 586 So. 2d 1024, 1031 (Fla. 1991); Buford v. State, 570 So. 2d 923, 925 (Fla. 1990); Stevens v. State, 552 So. 2d 1-82, 1086 (Fla. 1989).

Finally, the trial court erred in refusing to accord each of the remaining non-statutory mitigating circumstances greater weight. James Rose had shown that he is adaptable to a life of incarceration. He has received no disciplinary reports in the last 16 years. Secondly, James Rose fully cooperated with the police and did

everything they asked of him.[11] Third, with regards to James Rose's specific good deeds, James Rose provided information and aided in solving a case for the Broward State Attorneys Office which resulted in three (3) individuals receiving substantial prison sentences.[12] Further, James Rose put out a fire in prison and again exposing himself to risk and helping save others.

Rule 3.800(b), Fla. R. Crim. P., allows the trial court to correct a sentence imposed in violation of the Constitution or the laws of the United States or the State of Florida. Mathis v. State, 720 So. 2d 1116 (Fla. 5th DCA 1998). Because the law is well settled that no sentencing error may be considered on direct appeal unless the error has been preserved for review, i.e. presented to and ruled on by the trial court, the issue of the trial court's improper denial of James Rose's Motion to Correct Sentence is properly before this Court.

Based upon Hootman and the other factors set forth herein, the trial court reversibly erred in ignoring James Rose's statutory mitigating circumstances and in refusing to vacate his sentencing order pursuant to Rule 3.800(b), Fla. R. Crim. P.

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[11]James Rose maintains that his unwavering assertion of innocence should not be held against him or constitute a failure to cooperate.

[12]Coincidentally, the three (3) individuals were prosecuted by Assistant State Attorney Ralph J. Ray, Jr., the same prosecutor who has continuously prosecuted James Rose throughout the 70's, 80's, and 90's.

In that the trial court failed to correct the illegal death sentence entered, reversal and remand is required.

C. Reversible Error Permeated The Remanded Penalty Proceedings.

James Rose asserts that the trial court committed evidentiary errors which became the feature of the sentencing proceedings casting serious doubt upon the reliability of the sentencing proceedings. See Bowles v. State, 716 So. 2d 769 (Fla. 1998). Because of a doubt in the reliability of the sentencing proceedings, reversal and remand is required. See Hitchcock v. State, 673 so. 2d 859 (Fla. 1996).

i. The Use and Misuse of Photographic Evidence Requires Resentencing.

James Rose contends that the State of Florida's use and misuse of photographic evidence below requires resentencing (T 518; 636-37; 648; 651; 652-54; 656). While the admission of photographic evidence lies in the trial court's discretion and will not be disturbed absent a clear showing of abuse, at bar the trial court reversible erred in admitting unnecessary gruesome photographs which had no independent relevance. See Pangburn v. State, 661 So. 2d 1182, 1187 (Fla. 1995); Grey v. State, 727 So. 2d 1063, 1065 (Fla. 4th DCA 1999). In this case, the photographs did not bear on the issues of the nature or the extent of the injuries or

the nature or force of the violence used, thus questions concerning premeditation or intent were not related to the photographs (T 636; 648). Grey at 1065; King v. State, 545 So. 2d 375, 378 (Fla. 4th DCA 1989).

Further, the State misused photographic evidence by failing to provide the defense with the evidence. Important autopsy photographs which might have assisted the defense especially with regard to defeating the HAC aggravator were sprung upon the defense at the last minute. See for example missing photographs (T 636, 648, 651, 654, 1098). Based upon the admission of the improper evidence, reversal is required.

ii Reversible Error Occurred When Autopsy Photographs Were Withheld In Violation Of Brady v. Maryland.

James Rose asserts that the State of Florida improperly withheld autopsy photographs in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The photographs were the subject of considerable controversy throughout trial. Ultimately, at the conclusion of trial, a "Richardson"[13] hearing was conducted wherein Dr. Joshua Perper and Dr. Robert Hinnam each testified (R 1531-1558; 1559-1566). The prosecutor proffered his own testimony (R 1570-72).

[13]Richardson v. State, 246 So. 2d 77 (Fla. 1971).

Although it is clear from the Record the court intended to rule upon the State's failure to notify the defense that additional autopsy photographs existed, no ruling was ever issued by the judge. The photographs appear from this Record to be useful in determining whether the decedent's head was fractured or whether the head was "split" based upon the extended time period the body was submerged and other factors. The photographs are Brady material which should have been disclosed to the defense so that James Rose could have an expert review the same and assist the defense in utilizing the exculpatory evidence, or at a minimum evidence which would defeat one or more of the State's aggravators.

iii. The Trial Court Abused Its Discretion By Allowing Gruesome Photographs To Be Presented To The Penalty Phase Jury.

The trial court abused its discretion by allowing gruesome photographs to be presented to penalty phase jury (T 636; 648). The gruesome photographs were not necessary to prove or disprove or disprove any material fact. Clearly, § 90.401, Florida Statutes provides that "[r]elevant evidence is evidence stemming to prove or disprove a material fact." Based upon the Record in this case, the State's use of gruesome photographs had no logical tendency to prove either motive or any of the aggravators relied upon by the State. In this case, the gruesome photographs were inappropriate as they were not independently relevant or corroborative of other

evidence. See Czubak v. State, 570 So. 2d 925, 298 (Fla. 1990). Reversal is required.

iv The Trial Court Reversibly Erred By Failing To Rule Following A Richardson Hearing Surrounding The State's Discovery Violation Pertaining To The Photographs.

James Rose asserts that the trial court reversibly erred by failing to rule following a Richardson hearing surrounding the State's discovery violation pertaining to the photographs. The photographs caused considerable controversy during the remanded penalty phase proceedings. No determination could be made whether the photographs had ever been viewed previously by the prosecution.

Dr. Joshua Perper testified at the Richardson hearing, as did the medical examiner, Dr. Robert Hinman (T 1531-58; 1559-66). Although the court took testimony from each of the doctors, and although the prosecutor expressed his anger at the medical examiner's office for allowing defense counsel access to the medical examiner's file prior to the prosecutor's access, the court never ruled on this important discovery violation (T 1570).

Since we are at this juncture unable to ascertain whether the discovery violation changed James Rose's strategy during the penalty phase, no harmless error

analysis can conducted; State v Schopp, 653 So. 2d 1016 (Fla. 1995); Pender v. State, 700 So. 2d 664 (Fla. 1997). Reversal is required.

D. James Rose's State and Federal Constitutional Rights To A Fair Trial And Due Process Of Law Were Violated.

James Rose maintains that he did not receive a fair trial in violation of his rights to due process of the law pursuant to Article I, Section 16 of the Florida Constitution and applicable provisions of the United States Constitution. Rios v. State, __ So. 2d __ (Fla. 3d DCA 1999) [1999 WL 211864]. Clearly, a defendant has a due process right to a fair trial. Drope v Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); Carter v. State, 706 So. 2d 873, 875 (Fla. 1997). The most grievous errors which occurred at the remanded penalty phase proceedings included the prosecutor's misconduct during closing argument in commenting in what he believed the victim might have said concerning the incident. Similarly, although there was no evidence whatsoever to support it, the State elicited testimony designed to insinuate and infer that a sexual assault had occurred. Further, the trial court abused its discretion by allowing victim impact testimony and by allowing the decedent's mother to remain in the courtroom throughout the remanded penalty

phase proceedings. Likewise significant is the fact that the trial court refused to read to the jury the list of the 14 non-statutory mitigating factors sought by the defense. James Rose asserts that singularly and cumulatively the errors during the remanded penalty phase proceedings require reversal and remand.

i. Prosecutorial Misconduct Created Error During The State's Closing Argument.

James Rose asserts that the prosecutor engaged in an improper closing argument in commenting on what he believed the victim might have said. The prosecutor stated:

> So you know who the last person to see Lisa alive was, as shown by the evidence? James Franklin Rose. And he takes this little eight old girl in his van to somewhere. And don't you know, drawing on your own human experience and common sense, she probably wanted to know where are we going? My mother's at the bowling alley.
>
> (T 1411-12).

A defense objection immediately lodged, and was sustained (R 1411). Nevertheless, the effect of the improper argument was huge. It impacted the jury's determination of what an appropriate sentence should be at bar. James Rose understands that wide latitude is permitted in closing argument. See Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982); Gore v. State, 719 So. 2d 1197, 2000 (Fla.

1998). This wide latitude does not extend to permit improper argument. Sub judice, by speaking to the jury as if the decedent overly stressing an improper aggravator (age), the prosecutor crossed the line between proper and improper closing argument. James Rose likens the instant case to the situation presented in Urbin v. State, 714 So. 2d 411 (Fla. 1998), where this court reversed a death sentence where the prosecutor used emotional fear and dehumanized and demonized the Defendant. The prosecutor's closing argument at bar was equally offensive. Reversal and remand is required.

ii The Prosecutor Engaged In Misconduct By Improperly Discrediting The Defense Psychologist.

James Rose asserts that the prosecutor engaged in misconduct by inappropriately discrediting the defense psychologist, Dr. Jethrow Toomer in cross-examination. Although arguably the cross-examination was not as blatant as that deemed error in Campbell v. State, 679 So. 2d 720 (Fla. 1996), the prosecutor questioned Dr. Toomer at length concerning the frequency of his testifying for defendants in murder cases, and quizzed him at length about specific murder cases in the South Florida area in which he participated (T 1256-65). The prosecutor likewise impermissibly questioned the amount of revenue generated by Dr. Toomer as a result of his participation as a psychologist in murder cases in the South Florida

area (T 1273-1313).

While the State may permissibly point out the frequency with which a defense expert testifies for capital defendants, the overall examination by the State of the defense expert was prejudicial as it sought introduction of the relevant materials. See Henry v. State, 574 So. 2d 66 (Fla. 1991). The prosecutor unfairly exploited the jurors' natural sense of sympathy and outrage for other murder defendants in the South Florida area, and made them fear for their own safety. Reversal and remand for resentencing is required.

iii The Trial Court Reversibly Erred In Allowing The State To Elicit Testimony Designed To Infer That A Sexual Assault Had Occurred Despite The Lack Of Any Evidence In Support Thereof.

James Rose asserts that the trial court reversibly erred in allowing the State of Florida to introduce evidence inferring that the decedent had been the victim of sexual assault. Clearly, there was no evidence of such.

The Appellant understands that the State could, in good faith, represent that Lisa Berry was found without clothing. However, after floating a canal for an extended period of time, the State had no good faith basis for suggesting or inferring that Appellant had removed the child's clothing. Even assuming arguendo such evidence existed, no evidence whatsoever supported the State's inferences that

James Rose had committed a rape or engaged in sexual assault (R 932-33).

At bar, the prosecutor desired to introduce evidence that the decedent "had been sexually assaulted." (T 643) Because the prosecutor could not establish that there was sexual contact and, if there was, that it took place prior to her death the court refused to allow Dr. Fatteh to testify concerning an implication of sexual abuse (T 641-7).

During the examination of Detective Tipton, the State brought up the fact that law enforcement seized slacks with a broken zipper learned to have been Lisa Berry's (T 778). The clear inference was the James Rose had sexually assaulted the decedent. The defense brought the same to the court's attention (T 792). Based upon the improper evidence, reversal is required.

iv The Trial Court Abused Its Discretion By Allowing Victim Impact Testimony And An Impermissible Aggravator.

James Rose asserts that the trial court abused its discretion in admitting testimony from family members of the decedent and in allowing the decedent's mother to remain in the courtroom throughout the sentencing phase proceedings over defense objection (T 418-22). In essence, the testimony of the family members of the decedent and the decedent's mother's presence throughout the

proceedings constituted improper victim impact evidence.[14] James Rose asserts that the family members testimony and presence did not comport with Section 921.141(7), Florida Statutes.

James Rose concedes that this Court has previously rejected contentions that the admission of victim impact evidence pursuant to § 921. 141(7), Florida Statutes violates the prohibition against ex post facto laws. See Burns v. State, 699 So. 2d 646, 653 (Fla. 1997); Archer v. State, 673 So. 2d 17, 21 (Fla.), cert. denied 117 S.Ct. 197, 136 L.Ed.2d 134 (1996); Windom v. State, 654 So. 2d 432, 439 (Fla.), cert. denied 116 S.Ct. 571, 133 L.Ed.2d 495 (1995). Although the Appellant contends that the State of Florida violated his Federal rights at bar, the Florida Supreme Court has repeatedly upheld § 921.141 against claims that the capital sentencing statute in Florida improperly regulates practice and procedure. See Burns at 653; Vaught v. State, 410 So. 2d 147, 149 (Fla. 1982). Likewise, this Court has rejected arguments that victim impact evidence is irrelevant under Florida Sentencing Statute because it does not go to any aggravator or to rebut any mitigator. Bonifay v. State, 680 So. 2d 413, 419 (Fla. 1996). Finally, this Court has rejected defense assertions that victim impact evidence violates equal protection

[14]Appellant concedes that the victim impact testimony was not presented to the jury-only to the court (T 1573-8).

because it encourages the jury to give different weight to the value of different victim's lives. Burns at 653; citing Payne v. Tennessee, 501 U.S. 808, 823, 111 S.Ct. 2597, 2607, 115 L.Ed.2d 720 (1991).

However, in light of the totality of the errors which occurred below, the evidence was impermissible. Neither the jury nor judge should have been exposed to the decedent's mother needing to "pay the highest price." (T 1576) She stated ". . . we need to enforce it [the death penalty]." (T 1575) Clearly such testimony violated Section 921.141(7) which prohibits "[c]haracterizations and opinions about the crime, the defendant, and the appropriate sentence." Reversal is required.

v The Trial Court Abused Its Discretion By Allowing The Decedent's Mother's Continued Presence In The Courtroom.

James Rose maintains that the trial court abused its discretion in allowing the decedent's mother to remain in the courtroom throughout the sentencing phase proceedings over defense objection after she testified as a State witness without assessing the prejudice such procedure caused the Defendant to suffer (T 418-22).

Appellant acknowledges that since the 1990 enactment of Section 90.616, Florida Statutes, a statutory rule of sequestration superseded the common law standard of "sound judicial discretion" in determining whether a witness should be excepted from the rule. However, the trial court still maintains discretion to

determine if the presence of the person is "essential to the presentation of the ... cause." Strausser v. State, 682 So. 2d 539, 541 (Fla. 1996). While the judge retains discretion in dealing with this issue, the discretion can only be exercised within the relevant statutory exceptions contained in Section 2(c) and (d). See Knight v. State, 721 So. 2d 287, 302 n. 9 (Fla. 1998).

At bar, the court conducted no analysis whatsoever to determine whether Barbara Berry's presence would be prejudicial to James Rose. James Rose suggests that by failing to conduct a 90.403 analysis as to the prejudicial effect, reversal is required.

The Appellant acknowledges that pursuant to Section 90.616, Florida Statutes:

> (1) At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses except as provided in subsection (2).
>
> (2) A witness may not be excluded if the witness is:
>
> > (d) In a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless, upon motion, the court determines such person's presence to be prejudicial.

In the case at bar, the jury sentencing recommendation was tainted by the

improper presence of Barbara Berry throughout trial. See § 921.141(7). Reversal and remand is required.

vi Cumulative Errors During The Penalty Phase Proceedings Require Reversal And Remand.

James Rose suggests that the totality of the errors below rose to the level of fundamental error and that under this standard, James Rose's sentence should be reversed where singularly and cumulatively the effect of the trial court's actions caused fundamental error. While one error in isolation may not be sufficient to rise to the level of fundamental error, if it contributes to the overall cumulative effect of error, reversal is required. See Freeman v. State, 717 So. 2d 105, 106 (Fla. 5th DCA 1998); DeFreitas v. State, 701 So. 2d 539 (Fla. 4th DCA 1997). See for example Cochran v. State, 711 So. 2d 1159 (Fla. 4th DCA 1998)[cumulative effect of errors in prosecutor's closing argument amounted to fundamental error].

vii The Trial Court Abused Its Discretion By Refusing To Read To The Jury The List Of 14 Non-Statutory Mitigating Factors Sought By The Defense.

James Rose maintains that the court reversibly erred in refusing to instruct the

jury concerning 14 non-statutory mitigators which were present in the case (T 1375). The court acknowledges that it enjoyed discretion in giving such an instruction, yet refused to instruct the jury as requested by the defense (T 1376).

While the Appellant acknowledges this court's decision in James v. State, 695 So. 2d 1229, 1238 (Fla.), cert. denied 118 S.Ct. 569, 139 L.Ed.2d 409 (1997), that the trial court is only required to give the "catch-all" instruction on non-statutory mitigating evidence, he asserts error occurred at bar. C.f. Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998).

E. Reversal Is Required As James Rose's Death Sentence Is Disproportionate.

James Rose contends that the death penalty was unwarranted in this case. Clearly, a proportionality review involves consideration of the totality of the circumstances of a case in comparison of that case with other death penalty cases. Snipes v. State, __ So. 2d __ (Fla. 1999)[1999 WL 247242]; Urbin v. State, 714 So. 2d 411 (Fla. 1998). The totality of the circumstances reveals that James Rose should be sentenced to life imprisonment based upon the jury's six (6) to six (6) vote. Additionally, based upon the facts presented at the remanded penalty proceedings, a death sentence is disproportionate.

As set forth by Justice Anstead in a recent dissenting opinion in Cave v.

State, 727 So. 2d 233, 234 (Fla. 1998):

> This Court has recently reaffirmed the constitutional basis of its proportionality review in death penalty cases, while emphasizing its singular role in ensuring the integrity of Florida's capital sentencing process:
>
> In performing a proportionality review, a reviewing court must never lose sight of the fact that the death penalty has long been reserved for only the most aggravated and least mitigated of first-degree murders. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973). See also Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998) (reasoning that '[t]he people of Florida have designated the death penalty as an appropriate sanction for certain crimes, and in order to ensure its continued viability under our state and federal constitutions 'the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious crimes.'')(footnote omitted).
>
> Proportionality review 'requires a discrete analysis of the facts,' Terry v. State, 668 So. 2d 954, 965 (Fla. 1996), entailing a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. We underscored this imperative in Tillman v. State, 591 So. 2d 167 (Fla. 1991):
>
> > We have described the 'proportionality review' conducted by this Court as follows:
> >
> > Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the

> number of aggravating and mitigating circumstances. Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, § 17, Fla. Const. It clearly is 'unusual' to impose death based on facts similar to those in cases in which death previously was deemed improper. Id. Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, § 9, Fla. Const.; Porter.
>
> ... Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law. Id. at 169 (alterations in original) (citations and footnote omitted). As we recently reaffirmed, proportionality review involves consideration of 'the totality of the circumstances in a case' in comparison with other death penalty cases. Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997) (citing Terry, 668 So. 2d at 965). Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998). The statement from Tillman quoted in Urbin should be emphasized: '[P]roportionality review is a unique and highly serious function of this Court.' Cave's death sentence cannot withstand this stringent standard of review.
>
> Id. at 234.

When this Honorable court compares the totality of the circumstances of this

case to other similar cases, it is clear that James Rose's sentence of death cannot with stand proportionality review.

In Snipes, supra, there were two (2) aggravating circumstances presented: 1) that the murder was cold, calculated, and premeditated without pretense of legal or moral justification; and 2) that the murder was committed for pecuniary gain. In Snipes, there was some mitigation, since Snipes was only 17 at the time he committed the murder. He was sexually abused for a number of years as a child, abused drugs and alcohol, and had no prior violent history. Snipes voluntary confessed to the crime, told others about it, and expressed remorse. In Snipes the court stated:

> Given these circumstances, we find this case to be closer those cases in which we have reversed the death penalty for the imposition of a life sentence. For example, in Urbin, there were 2 valid aggravating circumstances (prior violent felony and pecuniary gain) and there were a number of mitigating circumstances (age of 17, substantial impairment, drug and alcohol abuse, dyslexia, employment history, and lack of a father). We found in Urbin that the defendant's age of 17 was particularly compelling when coupled with the substantial impairment and family neglect. As in Urbin, here we find Snipes age of 17 to be particularly compelling when coupled with the history of sex and drug abuse, and the other mitigating circumstances. See also Livingston v. State, 565 So. 2d 1288 (Fla. 1988)[defendant's youth, inexperience, and immaturity in addition to limited intellectual functioning and extensive use of cocaine and marijuana counted

> against 2 aggravating circumstances of prior violent felony in commission during robbery warranting life sentence.
>
> Id. at 1999 WL 2472424 *8.

In Sinclair, the defendant robbed and fatally shot a cab driver. He was convicted of first degree murder and sentenced to death. The trial court found one (1) aggravating factor, that the murder was committed while engaged in the commission of a felony and, no statutory mitigating factors, three (3) non-statutory mitigating factors (cooperation with the police; dull - below normal intelligence level; and Sinclair was raised without a father figure). In Sinclair, the Florida Supreme Court held that death would be a disproportionate penalty. Id. at 1142.

In light of the totality of the factors surrounding this case, including the fact that James Rose has been on death row for in excess of 23 years, together with the statutory and non-statutory mitigating circumstances, imposition of the death penalty in this case is a disproportionate punishment when compared to other capital cases. The Florida Supreme Court has repeated noted that the death penalty is reserved only for "the most aggravated and unmitigated of most serious crimes." State v. Dickson, 283 So. 2d 1 (Fla. 1973). Clearly, the offense below is not the most aggravated and unmitigated of capital crimes.

James Rose reminds this Honorable Court that his case is unique and that the

Grand Jury deliberated for two and one-half (2 ½) hours before returning an Indictment below rather than indicting in just minutes (R 268). The first jury deliberated in excess of ten (10) hours on the issue of guilt. The jury was equally divided six (6) to six (6) as to whether James Rose should receive life imprisonment. Because of the trial court's improper Allen Charge, the jury recommended death by a seven (7) to five (5) margin.

James Rose cites the case of Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) in support of his quest for a life sentence. In Scott, a death sentence was originally upheld based upon five (5) aggravators and two (2) mitigators. The sentence was ultimately reduced to life imprisonment based upon new mitigators including Scott's good behavior in prison. James Rose asserts that the situation herein is analogous to that presented in Scott, and that his sentence should be reduced to life imprisonment.

Based upon uncontroverted testimony, James Rose's actions are aligned with the two (2) statutory mental mitigators which the Florida Supreme Court has ruled are the two (2) most significant. See Santos v. State, 629 So. 2d 838 (Fla. 1994).

Similarly, James Rose relies upon the factually analogous case of Nivert v. State, 574 So. 2d 1059 (Fla. 1990) in support of his position. Nivert, like Rose, was so impaired during his life by alcohol that testimony indicated he was a completely

different person sober rather than drunk. In Nivert the court held that this factor outweighed even a finding of heinous, atrocious, and cruel. The testimony in the case at bar indicates that James Rose was seen as a sweet person when sober. When intoxicated, however, James Rose was not in control of his actions. However, this case is distinguishable from Nivert because sub judice, the facts do not support HAC an important aggravator. Instead, the aggravator in this case deal more with James Rose's past rather than with heinous facts of the case (R 270).

Reversal and remand is required.

F. Sentencing Delay Herein Violates James Rose's Fundamental State and Federal Constitutional Rights.

James Rose asserted pretrial, and maintains herein that because he has been continuously incarcerated since October 27, 1976 and has been under a sentence of death since May 13, 1977, sentencing delay in his case violates Article I, §§ 2, 9, 16, and 17, Florida Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments, United States Constitution.

As argued below, the psychologically devastating effects of a lengthy stay on death row have been widely noted by jurists. See People v. Anderson, 493 P.2d 880, 6 Cal.3d 628, 649 (Cal. 1972)[the cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanization

effects of the lengthy imprisonment prior to the execution during which the judicial and administrative procedures essential to the due process of law are carried out].

Similarly, in a book entitled The Isolation of Death Row - Facing the Death Penalty, the author writes "the physical and psychological pressure besetting capital inmates has been widely noted . . . courts and commentators have argued that the extreme psychological stress accompanying death row confinement is an Eighth Amendment violation in itself or is an element making the death penalty cruel and unusual punishment. Mello, "Facing Death Alone," 37 Amer. L. Rev. 35, 37-39 (1986).

In this case, James Rose's prolonged stay on death row constitutes cruel and unusual punishment. In Tillman v. State, 591 So. 2d 167 (Fla. 1991), the Florida Supreme Court noted that Article I, § 17, Florida Constitution prevents "cruel and unusual punishment." Id. at 169. A death sentence violates such provision if it is truly "unusual."

The Appellant asserts that his case is indeed truly unusual. He has once had a jury recommend mercy, only to have the trial judge unlawfully provide an Allen instruction resulting in a change of the recommendation. James Rose can never have another jury consider the facts in the way his trial jury did. Through the appellate process, James Rose has resided on death row longer than nearly all other

Florida death row inmates.

James Rose acknowledges that this term the United States Supreme Court decided not to hear, at this time, an appeal from two (2) death row inmate concerning the cruelty of the amount of time they had spent on death row. Knight v. State, case number 98-9741; Moore v. Nebraska, 99-5291. Nevertheless, Justice Breyer dissented from the court's decision stating "both of these cases involve astonishingly long delays flowing in significant part from constitutionally defective death penalty procedures. Where a delay, measured in decades, reflects the State's own failure to comply with the constitution's demands, the claim that time has rendered the execution in human is a particularly strong one." See also Justice Bryer's dissent in Elledge v. Florida, case number 98-54210.

Based upon the unusual circumstances presented in this case and that fact that James Rose has remained on death row under a death sentence for over two (2) decades, a sentence of death is precluded and this Honorable Court should remand for imposition of a life sentence.

G. James Rose's Sentence to Death by Electrocution Violates The State And Federal Constitutions.

James Rose asserts that imposition of a sentence to death by electrocution violates his State and Federal Constitutional rights. This is so because by death electrocution in Florida constitutes cruel and unusual punishment in violation of both the Florida and Federal Constitutions.

On October 23, 1999, the United States Supreme Court agreed to consider the constitutionality of electrocution for the first time in more than a century. Bryan v. Moore, case number 99-6723. James Rose adopts the arguments raised by the defendant therein, and notes that Florida's electric chair presents a risk of "physical violence, disfigurement and torment" as to amount to cruel and unusual punishment under the Eighth and Fourteenth Amendments.

Further, because of the substantial delay between James Rose's arrest and his resentencing, his constitutional rights to a speedy trial and due process, as well as to be free from cruel and unusual punishment have been violated.

CONCLUSION

Based upon the foregoing grounds and authority, James Franklin Rose respectfully requests this Honorable Court enter an Order reversing the death sentence imposed, remanding this matter with directions to the trial court that a sentence of life imprisonment be ordered, or, alternatively, remand for resentencing. Alternatively, James Franklin Rose requests this Honorable Court reverse the trial court order denying Defendant's Second Motion to Correct Sentencing Error, or Motion for New Sentencing Hearing Based Upon State v. Hootman, reversing and remanding this matter for resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of this Amended Initial Brief of Appellant were mailed to the Clerk of the Florida Supreme Court on **December _____, 1999**, and a copy mailed to Assistant Attorney General Sarah Baggett, Office of the Attorney General, 1655 Palm Beach Lakes Blvd., West Palm Bch., FL 33401.

Respectfully submitted,

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BY_____
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