

IN THE SUPREME COURT OF FLORIDA

CASE NO: 94,317

JAMES FRANKLIN ROSE

Appellant,

vs.

STATE OF FLORIDA

Appellee.

**AMENDED
REPLY BRIEF OF APPELLANT
JAMES FRANKLIN ROSE**

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

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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 Reply 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 references to the Appellant’s Initial Brief shall be indicated by “IB” followed by the appropriate page number (IB).

All references to the Answer Brief of Appellee shall be indicated by “AEB” followed by the appropriate page number (AEB).

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?
2. Whether reversal and remand for imposition of a life sentence, or, alternatively, remand for a new penalty phase proceeding is required?
3. 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?
4. Whether the trial court reversibly erred in refusing to vacate its sentencing order pursuant to Rule 3.800(b), Fla. R. Crim. P.?
5. Whether the court erroneously weighed aggravating and mitigating circumstances?
6. Whether reversible error permeated the remanded penalty proceedings?
7. Whether the use and misuse of photographic evidence requires resentencing?
8. Whether reversible error occurred when autopsy photographs were withheld in violation of Brady v. Maryland?
9. Whether the trial court abused its discretion by allowing gruesome photographs to be presented to the penalty phase jury?
10. Whether the trial court reversibly erred by failing to rule following a Richardson hearing surrounding the State's discovery violations pertaining to the photographs?
11. Whether James Rose's State and Federal Constitutional rights to a fair trial and due process of law were violated?
12. Whether prosecutorial misconduct created error during the State's closing argument?
13. Whether the prosecutor engaged in misconduct by improperly discrediting the defense psychologist?

14. 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?
15. Whether the trial court abused its discretion by allowing victim impact testimony and an impermissible aggravator?
16. Whether the trial court abused its discretion by allowing the decedent's mother's continued presence in the courtroom?
17. Whether cumulative errors during the penalty phase proceeding require reversal and remand?
18. 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?
19. Whether reversal is required as James Rose's death sentence is disproportionate?
20. Whether sentencing delay herein violates James Rose's fundamental State and Federal Constitutional rights?
21. Whether James Rose's sentence to death by electrocution violates the State and Federal Constitutions?

SUMMARY OF ARGUMENT

54 year old James Rose maintains that the trial court's recent imposition of a sentence of death should be overturned. After being under a death sentence for in excess of 23 years, James Rose contends 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)(1), Florida Statutes during the remanded penalty phase proceedings. Not only did the State rely upon this improper aggravator, it became the feature of the proceeding before the jury during the remanded penalty phase. Although the defense filed a written 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-sentence/pre-appeal, 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 of Lisa Berry's age was objected to, the jury was impermissibly tainted by the State's reliance upon the newly enacted improper 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), mandate reversal. Further, the trial court erred by permitting the State to elicit testimony designed to infer that a sexual assault had

occurred, when no such evidence existed. 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. The testimony, together with improper prosecutorial closing argument violated James Rose's State and Federal Constitutional rights to a fair trial and due process of law. 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.

Despite the State of Florida’s protestations to the contrary, James Rose’s death sentence should again be reversed and this matter remanded to the trial court for imposition of a life sentence or, alternatively, for a new penalty phase proceeding. This result is mandated based upon repeated violations of James Rose’s state and federal constitutional rights. Although the State takes the liberty of attempting to “restate” each of the Appellant’s arguments and sub-arguments, the errors below are so glaring even the state’s attempt to obscure the procedural and substantive improprieties herein from judicial review cannot hide the specifics of this case. One thing is clear: the resentencing jury was allowed to rely upon an illegal and improper aggravator, and no trial court harmless error analysis can overcome James Rose’s rights to have an advisory decision from a jury properly instructed concerning aggravators.

The state maintains, as the trial court held, that the murder at bar was accompanied by five (5) aggravating and no mitigating circumstances. In actuality, not all of the aggravating circumstances were present. However, the most glaring error below was clearly the prosecutor’s use of an improper aggravator based on

age pursuant to Hootman.¹ James Rose timely objected to the State of Florida's reliance upon the victim being 12 years old as an aggravating circumstance pursuant to Section 721.147(5)(1), Florida Statutes. Said law was enacted years after the offense James Rose was convicted of committing.

Contrary to the state's assertion in its Answer Brief, James Rose properly and timely objected to the jury's reliance upon an improper factor in arriving at its recommendation of death by a slight vote (AEB 9). Unfortunately, the state confuses the prejudice which occurs when the jury is told that it can base the age of the victim as a basis for imposition of a recommendation that the death penalty be imposed as opposed to being permitted solely to learn of the victim's age as evidence in the case. This is precisely the ill which Hootman sought to cure.

Prior to the remanded penalty proceedings, the defense filed a written motion to preclude the state's use of Lisa Berry's age as an aggravator (R 93-5; 142-65).

Shortly after the remanded penalty trial was conducted, the Florida Supreme Court

¹The State ignored State v. Matute-Chirinos, 713 So. 2d 1006 (Fla. 1998), in its Answer Brief, save a fleeting reference to the fact that the trial court did not have the benefit of Hootman decision at the time the sentencing order was issued (AEB 10). In State v. Matute-Chirinos, 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 is 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 Florida and United States Constitutions. See Article X, Clause I, United States Constitution; Article I, Section 10, Florida Constitution.

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 advanced 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 punishment based on a new aggravator, reversal was required. The precise result from Hootman is necessitated herein.

Despite the state's argument in opposition, the same holds true herein with regards to Lisa Berry being under the age of 12. Because the aggravator was objected to pretrial, the jury was impermissibly tainted by the State's reliance upon the newly prohibited aggravator. It is impossible to determine the effect the impermissible aggravator had on the jury. Accordingly, neither the trial court nor this court's "harmless error analysis" can "second-guess" the jury's divided recommendation of death based upon the constitutionally prohibited aggravator.

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, James Rose asserts that the effect of the jury's reliance on the impermissible and unlawful aggravator at bar cannot be measured or fairly assessed. The state's suggestion that the erroneous aggravator be ignored is simply not a viable option where the ultimate penalty--death--is at stake. We shall never know the effect of the improper aggravator unless and until this Court remands for new penalty phase proceedings absent the impermissible aggravator pursuant to Hootman.

James Rose asserted in his Initial Brief, and maintains herein, that the trial judge erred in finding that this offense was especially heinous, atrocious, or cruel. The State seemingly ignores in its Brief James Rose's attack on his underlying sentence, instead arguing primarily that Hootman error is harmless herein because of the facts and circumstances. James Rose takes issue with the state's analysis, maintaining that an improper statutory aggravator was utilized, that the trial court made erroneous findings with regards to statutory and non-statutory aggravators and mitigators, and the proportionality of the death sentence herein.

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 the jury rendering a recommendation and to the court, 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

and Richardson v. State, 246 So. 2d 771 (Fla. 1971) caused reversible error.

Further, the trial court reversibly permitted the State to elicit testimony designed to infer that the child had been sexually assaulted by the Defendant. No evidence existed to form any good faith basis for such a sinister and prejudicial 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.

Finally, reversible error occurred as a result of the trial court's allowance of the introduction of improper victim impact testimony and the error was exacerbated by the 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.

The State asserts that several aggravating circumstances warrant imposition of the ultimate penalty in this case - death by electrocution, and that the trial court did not err in re-weighting the remaining aggravators and mitigators in light of Hootman and imposing a new sentence (AEB 8). In so asserting, the State ignores this Court's decision in Hootman and unconstitutionally diminishes the jury's role in rendering a recommendation in light of the entire Florida death penalty scheme. The

jury recommendation procedure is required, inter alia, to act as a buffer for the sentencing judge to utilize discretion. In this case, the recommendation by the jury was meaningless or worse - stilted - based upon the Hootman factor.

In the trial court's September 8, 1998 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 court addressed the 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 its application and/or consideration of the aggravating factor that "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) and recommended death.

Based upon Hootman and the timely bona fide objections below, the Appellant maintains that the trial court reversibly erred in allowing the State to rely upon an aggravating factor enacted into law after commission of the capital offense. Further, the court erred in allowing the recommending jury to consider the aggravating factor in recommending a sentence. 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 the violation of Hootman at bar violates the ex post facto provisions of the Florida and United States

Constitution.

Interestingly, in the State's Answer Brief, Hootman is only referenced in the argument section of the brief on one occasion (AEB 10). Instead of distinguishing Hootman and trying to explain any differences which might warrant anything other than reversal and remand for imposition of a life sentence or remand for new sentencing proceedings. Instead, the state relies upon cases wherein retroactive application of an aggravator was discussed, such as Zack v. State, ___ So. 2d (Fla. 2000)[2000 WL 14472] and Peterka v. State, 640 So. 2d 59, 71 (Fla. 1994).

While the trial court determined that striking one aggravating factor did not require resentencing in the case at bar, based upon the history of this case, the Appellant maintains that resentencing is required. 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." 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.

Further, while the trial judge believed he had not given disproportionate weight to the stricken aggravator, it is clear that the State made the aggravator a

feature of the trial. Common sense dictates that it was impossible for the jury not to have given disproportionate weight to the stricken aggravator. It was impossible for the trial judge to act as a “13th juror” when the recommendation of the primary 12 jurors was based upon a tainted instruction that Lisa Berry’s age could be used as an aggravator to justify a recommendation of death. For example, during the State’s closing argument the prosecutor stressed throughout the argument that the child was eight (8) years old (T 1594; 1595; 1597; 1598). The prosecutor stressed 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).²

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) The prosecutor inferred that even a “no-brain juror” should recommend the death penalty based

²See 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).

upon the victim's age alone. Thereafter, the judge specifically 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 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) vote prior to the erroneous Allen charge. The Appellant suggests that the latest sentencing jury, infected by the unlawful aggravator, would not have recommended death by a seven (7) to five (5) vote. 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 timely requested the trial court correct sentencing errors pursuant to Rule 3.800(b), Fla. R. Crim. P. (R 375-83; 394-412). The State responds by asserting "... that the trial court did not err in denying the Rule 3.800 (b) motion as capital cases are excluded from the application of the rule." (AEB 15) Such was not the law at the time and does not preclude James Rose from raising the trial court's error.

Pursuant to Rule 3.800(b), any defendant may file a motion to correct a sentence. While death sentences can be corrected as proscribed by Rule 3.800(b), the rule did not limit the types of cases in which relief could be sought at the time of James Rose's conviction. Only recently has this Court decided that capital cases are excluded from rule 3.800(b). See Amendment to Florida Rules of Criminal Procedure 3.11(e), 3.900 and Rules 9.020(h) and 9.600, Florida Rules of Appellate Procedure, ___ So. 2d ___ (Fla. 2000). To refuse to entertain James Rose's claims under Rule 3.800, Fla. R. Crim. P. would violate due process and constitute an ex post facto violation. Further, evidence surrounding the 3.800 motion bolsters the Appellant's claims that he contemporaneously objected and properly preserved the complained of errors for review. Sub judice, based upon allowance of an impermissible aggravator and numerous errors committed in determining and applying the aggravators and mitigators, this case is ripe for correction of the death sentence with remand for imposition of a term of life imprisonment.

James Rose's initial Motion to Correct Sentencing requested the court correct sentencing errors which were apparent in light of Hootman. 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. The State's synopsis of the priors make them seem far more sinister than they were (AEB 16-27; T 921-40). Further, the prior felonies were impermissibly doubled 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 in support of 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).

The Appellant does not quarrel with the State's position concerning each party's respective burden of proof with regards to aggravators and mitigators (AEB 16). Applying the appropriate standards, James Rose maintains, for the reasons and rationale set forth in his Initial Brief and herein that the State failed to prove each of the aggravators found by the court to exist beyond a reasonable doubt. Further, James Rose continues to assert that the mitigators were "reasonably established by the greater weight of the evidence." Campbell v. State, 571 So. 2d 415 (Fla. 1990)

Additionally, with regard to the third aggravating factor, that "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

maintains that the trial court gave said factor undue weight. James Rose relies upon the rationale set forth in this Initial Brief and argued at the trial court level in support of this argument.

Further, 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's expert testified that in his opinion death occurred within four (4) to eight (8) minutes, but did not rule out immediate loss of consciousness. See Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989). The State failed to establish any terror on behalf of the decedent, or any competent evidence that the offense was extraordinarily painful. Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990); Espinosa v. State, 112 S.Ct. 2926 (1992). The evidence was simply that Lisa Berry was found dead. There was no showing that the deceased did not immediately lose consciousness. Herzog v. State, 439 So. 2d 1372 (Fla. 1982). The evidence presented did not support the trial court's finding that the heinous, atrocious, and cruel factor was properly proven.

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.³

³See Argument IA, supra; Hootman, supra.

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. The State failed to refute it (AEB 23-7). The evidence would have supported a finding that he was suffering from extreme mental or emotional distress. The court could have and should have found said factor to be a statutory mitigator, and given it more weight.

The State does not now contest Dr. Jethrow Toomer's, expert opinion that James Rose suffered from a borderline personality disorder (AEB 24). The doctor testified that the disorder resulted in James Rose's ability to do well for short periods of time but based on his lack of coping skills and alcohol problems, was the cause of his criminal troubles (T 1220-50). Dr. Jethrow Toomer further testified concerning James Rose's neurological impairments. Via Dr. Toomer, the court was presented with uncontroverted evidence of several incidents of head trauma wherein 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 (AEB 23-7).

Coupling Dr. Toomer's testimony with James Rose's alcohol problem,⁴ a statutory mitigating circumstance was clearly established (T 1227). Such factors

⁴Even 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).

should have carried more weight with the court, would have carried great weight with the jury if evidence of the improper aggravator was not introduced by the State and instructed by the court.

Additionally, James Rose maintains 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.

One of the most glaring errors, glossed over by the State in its Answer Brief was the Appellant’s assertion that the trial court erred by failing to find the mitigating circumstance that “the defendant is an alcoholic and was intoxicated at the time of the murder.” Such a finding was clearly supported by the evidence. 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. Evidence was introduced that reports indicated James Rose had a problem with alcohol (T 833). Even Detective Ed King⁵ testified that Rose's breaking and entering priors were alcohol related (T 929).

During questioning of State witness Detective Al Van Sant, the detective admitted that when he apprehended James Rose 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 that evening. Finally, Officer Dennis Walker, the lead officer on the scene the night of the disappearance admitted that he has consistently testified that James Rose smelled like he had been drinking and appeared to be under the influence when apprehended (T 695-97). Officer Walker characterized Rose as intoxicated (T 702).

Importantly, Dr. Toomer's uncontroverted testimony detailed James Rose's history of alcohol abuse. Dr. Toomer linked James Rose's alcoholism with his lack

⁵In 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).

of coping skills and 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). James Rose maintains that with alcohol treatment and counseling, he can again lead a productive life free from criminal conduct.

James Rose asserts that the trial court erred in refusing to accord several of the remaining non-statutory mitigating circumstances greater weight. James Rose has 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. 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. Further, James Rose put out a fire in prison, exposing himself to risk while helping save others.

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 failing to give adequate weight and consideration to the non-statutory mitigators and

in refusing to vacate his sentencing order pursuant to Rule 3.800(b), Fla. R. Crim. P. In that the trial court failed to correct the illegal sentence, reversal and remand is required.

C. Reversible Error Permeated The Remanded Penalty Proceedings.

The state disagrees with James Rose's assertions 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.(AEB 27-28); See Bowles v. State, 716 So. 2d 769 (Fla. 1998). After the first sentencing proceedings, which were hopelessly deadlocked 6-6 prior to the Allen charge, and after the second sentencing proceedings which were subsequently overturned, there exists a real doubt in the reliability of the remanded sentencing proceedings based upon a plethora of grounds, requiring reversal and remand. See Hitchcock v. State, 673 so. 2d 859 (Fla. 1996).

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

The state asserts in its Answer Brief that the photographic evidence in this case was permissible under Section 921.141, Fla. Stat., despite the fact that said law came into effect over two decades after the first trial in this case (AEB 28). James Rose maintains that the State of Florida's use and misuse of the two photographs of the decedent requires resentencing under both state and federal constitutional law (T 518; 636-37; 648; 651; 652-54; 656); see Rule 403, F.R.E.; Section 90.403, Fla.

Stat. While the admission of photographic evidence was within the trial court's discretion, below the court reversibly erred in admitting unnecessary gruesome photographs which had no independent relevance and served only to inflame the jury over the death of a young girl. 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, neither of the photographs bore upon the issues of the nature or extent of the injuries or the nature or force of violence used. Accordingly, questions concerning premeditation or intent were not dependant upon or assisted by the photographs (T 636; 648). Grey at 1065; King v. State, 545 So. 2d 375, 378 (Fla. 4th DCA 1989). The overly gruesome photos, coupled with the erroneous Hootman aggravator, instruction and other errors commands reversal.

Further, the State misused the photographic evidence by failing to timely provide the defense with the evidence. Important autopsy photographs which might have assisted the defense 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 maintains 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). Interestingly, the State responds on appeal that the Appellant is procedurally bound from raising the untimely disclosure of the evidence and that his argument is meritless (AEB 31-40). The State is, simply put, wrong. First, 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 state implies that it was the obligation of the defense to obtain the ruling the court intended to issue or announce orally, rather than addressing the court's error in failing to issue a ruling on this important evidentiary matter which was certain to receive appellate scrutiny. The Appellant maintains that reversible error occurred surrounding the photographs. James Rose did not waive his right to a fair resentencing proceeding. Indeed, it is the goal of our entire system to ensure that the trial and sentencing proceeding are fair. No individual is a better example of that than James Rose, whose life has spiraled up and down the appellate system for coming upon three (3) decades. If nothing else, James Rose is entitled to a recommendation from a jury that is neither biased nor tainted. The recommendation should be based upon lawful aggravators. It should be based upon admissible evidence, after allowing the accused to discover all relevant evidence. Strict adherence to our procedural rules ensured James Rose's ability to receive a fair trial from a fair, cross section of the community. Nothing in our system, other than

reversal and imposition of a life sentence, or remand resentencing shall right the errors at bar.

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).⁶ The gruesome photographs were not necessary to prove or disprove or disprove any material fact.

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 maintains that the trial court reversibly erred by failing to rule following a Richardson hearing surrounding the State's discovery violation pertaining to the photographs.⁷ 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

⁶See Argument I(C)(i).

⁷See Argument I(C)(ii).

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 an important discovery violation surrounding medical examiner photographs (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 be 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 maintains 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 was 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. The comment was magnified by the court's instruction to the jury that the age of the victim can support

an aggravating circumstance warranting recommendation of a death sentence. The prosecutor's closing argument at bar was offensive, requiring reversal and remand.

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

James Rose maintains that the prosecutor engaged in misconduct by inappropriately discrediting the defense psychologist, Dr. Jethrow Toomer during cross-examination. The prosecutor improperly 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 in this case was prejudicial as it sought introduction of irrelevant 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 maintains 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.

No evidence whatsoever supported the State's inferences that James Rose had committed a rape or engaged in sexual assault (R 932-33). 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).

Further, 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 maintains 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). He relies upon the argument and authority set forth in his Initial Brief on Appeal as if set forth more fully herein verbatim in support of reversal.

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

For the reasons and authority set forth in his Initial Brief on Appeal, 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.

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

James Rose maintains 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 reasserts the argument lodged in support of this issue in his Initial Brief on Appeal.

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

James Rose maintains that the death penalty was unwarranted in this case. Nothing in the State's response persuades to the contrary. 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 initial six (6) to six (6) vote. Based upon the facts presented, and in light of the court's errors surrounding its findings concerning statutory aggravators and statutory and non-statutory mitigators, a death sentence is disproportionate. James Rose urges this Honorable Court to reverse the sentence heretofore imposed and remand for imposition of a life sentence for this offense.

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. He relies upon the argument and authority set forth in his Initial Brief on Appeal as if set forth more fully herein verbatim in support of this issue.

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

James Rose asserted in his Initial Brief on Appeal that imposition of a sentence to death by electrocution violates his State and Federal Constitutional rights. His position is unchanged despite the State of Florida’s assertion that the issue is moot (AEB 64). James Rose understands that the State of Florida elected to carry out electrocutions by lethal injection. See Chapter 00-2, Laws of Florida. Appellant asserts that the fundamental “cruel and unusual punishment” issue raised was properly preserved and even assuming arguendo, it was not, still requires strict constitutional scrutiny. This is so because death by electrocution in Florida by electrocution or by lethal injection constitutes cruel and unusual punishment in violation of both the Florida and Federal Constitutions. Reversal is required.

CONCLUSION

Based upon the foregoing grounds and authority and those raised in James Franklin Rose's Initial Brief on Appeal, James 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 Reply Brief of Appellant were mailed via United States Postal Service to the Clerk of the Florida Supreme Court on July 19, 2000, and on the same date to Robert A. Butterworth, Attorney General, c/o Assistant Attorney General Leslie T. Campbell, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Fl 33401-2299 was forwarded a true and correct copy of same.

Respectfully submitted,

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