IN THE SUPREME COURT OF FLORIDA

CONNIE RAY ISRAEL,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC95,873
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES CITED:

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STATEMENT OF THE CASE

Connie Ray Israel, hereinafter referred to as appellant, was charged with a four count indictment of Burglary of Dwelling with Battery; Kidnapping; Sexual Battery with Great Force; and First Degree Murder. (V I p15) During a pretrial hearing, appellant was found in contempt of court for inappropriate courtroom behavior and sentenced to 179 days in the County Jail. (V I p60) The trial court granted the Public Defender's Motion to Withdraw; then modified the order by appointing the Office of the Public Defender as stand-by counsel. (V I p61,47) The trial court entered an order allowing Israel to represent himself with a public defender as standby counsel. (V I p68)

The trial court granted the defense Motion to Appoint DNA Expert. (V I

p105) The Public Defender made a Motion to Withdraw from Standby Status for Failure to Cooperate. (V 1 p113) Israel informed the trial court that he does not want a DNA expert witness. (V I p113) The trial court denied the Public Defender's Motion to Withdraw from Standby Status. (V I p124) Standby counsel made a motion for a confidential DNA expert. (V I p135) Israel made a *pro se* motion for a DNA expert. (V I p137) The DNA expert will assist the defense in the depositions of state witnesses and testimony if necessary. (V I p143). Israel made a *pro se* motion for additional experts. (V I p165) The defense motion for additional discovery regarding DNA was granted. (V II p256) The defense made a request for the FDLE DNA procedure manual and an amended Motion for Appointment of DNA Expert. (V II p264, 265) The trial court granted the amended motion for a DNA expert. (V II p267)

On June 28, 1995 the Public Defender made a Motion for Continuance to give DNA experts additional time to review discovery materials. (V II p277) The motion was granted and trial was set for August 7, 1995. (V II p278) Israel made a *pro se* motion for speedy trial on July 18, 1995. (V II p282) The demand for speedy trial was withdrawn by Israel. (V II p286) The defense filed a Motion in Limine in Regard to Pictures. (V II p295) The defense made additional pre-trial

motions.[1] The defense filed a Motion for Sanctions for the state failing to provide DNA discovery information. (V II p322) The trial court deferred ruling on the Motion for Sanctions. (V II p326)

Judge Boyles recused himself and the State requested that the Governor appoint another state attorney. (V II p342) The Governor appointed Jerry Hill, State Attorney for the Tenth Judicial Circuit as prosecutor. (V III p539) The trial court granted the Public Defender's Motion to Withdraw and appointed private counsel Wayne Henderson. (V III p491)

The state filed a Petition for Status Conference to determine who represents Israel, and also what hearings need to be set. (V III p503) Israel made a *pro se* motion asking Judge Hammond to recuse himself. (V III p567) The trial court granted Wayne Henderson's Motion to Withdraw as Counsel based upon differences between the parties. (V IV p643, 644) Israel waived his right to be represented by counsel. (V IV p645) The trial court conducted a Faretta Hearing, and ruled that Mr. Israel could defend himself. (V IV p706) Clyde Wolfe is appointed stand-by counsel and Wayne Henderson is directed to assist stand-by

[1] Motion to Prohibit any Reference to the Advisory Role of the Jury at Sentencing (V II p302); Motion for Statement of Particulars RE: Aggravating Circumstances (V II p304); Motion in Limine RE: Penalty Phase (V II p306); Motion to Exclude Evidence to Create Sympathy for the Deceased (V II p308)

counsel. (V IV p706)

Israel made a *pro se* Motion to Continue because he required more time to prepare for trial. (V IV p714) Israel made a series of additional *pro se* motions.[2] The trial court granted stand-by Counsel Wolfe's Motion to Continue. (V V p929) Clyde Wolfe is appointed counsel for Israel. (V V p959) The court appointed an investigator for Israel. (V V p979) The trial court granted the defense request for an additional expert in the field of molecular biology. (V VIII p1466,68) The trial court granted the defense Motion to Provide Copies of Autoradiographs from FDLE. (V IX p1770,72)

The state made a plea offer to Israel that in exchange for a plea of guilty to second degree murder, he would be given a concurrent sentence to those he is already serving. (V IV p666) A jury was seated and sworn for this case on November 16, 1998. (V X p1938) On November 17, 1998 Israel made a *pro se* Motion for Continuance based upon health problems, including chest pains, ulcer, blurred vision, headaches and dizziness. (V X p1964) The jury could not reach a verdict and the trial court declared a mistrial and continued the re-trial to a later

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[2] Petition for Writ of Mandamus requesting the state to photocopy documents (V V p812); Motion to Subpoena Expert Witnesses for Deposition (V V p888); Motion to Suppress Statements (V V p907); Motion for Continuance for lack of assistance by stand-by counsel Clyde Wolfe. (V V p923)

date. (V X 2045) Israel waived speedy trial after the mistrial. (V XI p2107)

The day that the retrial began, defense counsel moved for a continuance in the trial because Israel was having vision problems and dizziness. (V XIV p2525) Israel stated that he had not received his medications from the Department of Corrections. (V XIV p2525) The records indicate that Israel was prescribed Remeron and Pepto Bismol. (V XIV p2525) Israel claimed he was prescribed Mildrin by a Department of Corrections doctor. (V XIV p2525) Over Israel's complaints of illness, the trial court denied the request for continuance. (V XIV p2525)

Just as the jury venire was being sworn, Connie Ray Israel stated "I'm sick, I am sick." (V XIV p2540) Israel then absented himself from the courtroom to the holding cell. (V XIV p2546) Nurse Bergen stated that Israel's two week supply of Mildrin had run out, and that Israel suffers from anxiety, depression and pylorus. (V XIV p2548) Israel remained absent from the courtroom while the court reviewed hardship challenges of the jury venire. (V XIV p2552) Israel asserted that he is not competent to proceed because he has been wrongfully deprived of his medication for headaches and dizziness. (V XIV p2552-53)

During jury selection Israel stated " I'm sick, sick man, I'm sick man, please take me back to the cell." (V XIV p2584) The trial court directed Israel to remain

seated. (V XIV p2584) Soon thereafter, Israel explained before the jury "I've got to get out of here, Judge, I'm sick, I've got to get out of here, I'm sick." (V XIV p2593) Israel exited himself from the courtroom, and the court decided to make an inquiry concerning the consequences of Israel absenting himself from the courtroom. (V XIV p2594) Israel refused to come back to the courtroom. (V XIV p2596) The jury venire continued to talk with the trial judge without Israel present. (V XIV p2599)

The trial court held an inquiry with Israel in the holding cell. (V XIV p2601) Israel stated that his medication was withheld and he is too ill to proceed. (V XIV p2603) The trial court ruled that Israel was free to return to the courtroom, and there was no basis to determine that Israel is under any real stress. (V XIV p2607) Israel elected not to participate in the trial. (V XIV p2608)

The trial court received a report of some scuffling and problems with Israel in the holding cell. (V XV p2610) Israel reportedly attacked one of the bailiffs with jurors in the nearby hallway. (V XV p2611) The trial court asked defense counsel whether Israel wished to join the trial. (V XV p2611) Without conferring with Israel, defense counsel stated "that would be my best guess." (V XV p 2611) It was disclosed that while a nurse came to attend to Israel, Israel got agitated and struck one of the bailiffs. (V XV p2612) Israel was then shackled and handcuffed,

and the bailiff suffered injury to his eye. (V XV p2612) The nurse reported to the court that Israel did not show any evidence of cardiovascular problems. (V XV p2614) The trial court ordered that Israel be handcuffed and shackled while in the courtroom. (V XV p2613) Israel told the court that he did not want to be present in the courtroom. (V XV p2617)

Defense counsel made a motion to strike the jury venire because the jury room is next to the holding cell where Israel's fight with the bailiff occurred. (V XV p2618) The trial court denied the motion to strike the venire, and directed defense counsel to question jurors about possible prejudice. (V XV p2612-20) The trial court announced that Israel still did not want to be in the courtroom. The court ordered Israel fingernails trimmed because his nails could be used as a weapon. (V XV p2697) Juror Stewart advised that he heard Israel yelling in his cell and a nurse and bailiff left the cell area with blood on them. (V XV p2753, 55) The area was full of prospective jurors at the time it happened. (V XV p2756) Juror Sellars heard profanity by Israel in the holding cell and a bailiff came out of the cell area on a stretcher. (V XV p2757)

The trial court asked Israel whether he wished to be in the courtroom. (V XV p2759) Israel stated that he felt sick, and did not respond to the trial court as to whether he would remain in the courtroom and left the courtroom. (V XV p2767)

At the break, the trial court inquired as to whether Israel wanted to join the trial and Israel wished to stay in his holding cell. (V XV p2837; XVI p2880, 2968) Israel continued to stay in his holding cell and asked to go back to UCI for his medication. (V XVI p2996)

Israel requested to impeach everyone that was in the courtroom when he got sick. (V XVI p3048) Israel requested to re-enter the courtroom and elected to wear his jail pants. (V XVI p3048) Israel complained that he got charged with battery on a law enforcement officer and will make a sneak attack against the bailiff if he gets the chance. (V XVI p3049) A nurse reported to the court that there was nothing wrong with Israel. (V XVII p3049)

The trial court ruled that Israel must remain in his chair and make no sudden movements, and remain shackled with a waist chain while in the courtroom. (V XVII pR3051, 53) The defense counsel objects to Israel being shackled in the courtroom. (V XVII p3053) Those members of the jury venire who either witnessed seeing people rushing in and out of the holding cell or heard a commotion and surmised that the defendant had a problem have been excused. (V XVII p3055) Israel reported that he was feeling better. (V XVII p3060)

Defense counsel renews the motion to strike the jury panel for exposure to a prejudicial newspaper article. (V XVII p3199) The trial court will excuse those

jurors that have been exposed to the newspaper article. (V XVII p3199) Israel announced that he did not want to be in the courtroom for opening statements by the attorneys. (V XVIII p3332) Israel further complained that jurors that were called for voir dire on the first day of jury selection knew about Dale Holbrook grabbing the defendant by the throat after complaining of chest pains and dizziness. (V XVIII p3333) Israel further complained that he was not properly included in jury selection. (V XVIII p3334) Finally, Israel complained that the state systemically excluded black African American males from participating in voir dire examination. (V XVIII p3334)

Israel claimed that he had not received his proper medication from Union Correctional Institution and as a result he is dizzy and wishes to stay in the holding cell. (V XVIII p3337) After the opening statements, the trial judge asked Israel whether he wanted to return to the courtroom and Israel declined. (V XVIII p3371) After the morning session of trial, the court asked defense counsel if Israel wished to return to the courtroom and counsel said no. (V XVIII p3425) The trial morning of February 26, 1999 counsel for Israel indicated that he did not want to be in the courtroom until the close of the state's case and Israel will testify on his own behalf. (V XIX p 3569)

The state sought to declare witness Pittman unavailable for purposes of

testifying at this trial in using previous testimony made at a previous trial. (V XIX p3576) A subpoena for witness Pittman was issued six weeks prior to trial and returned unserved. (V XIX p3576) Ms. Pittman had failed to appear for her parole appointment and was classified as an absconder and charged with a violation of supervision. (V XIX p3577) The state sought to enter a transcript of Pittman's testimony at the last trial because defense counsel had a full opportunity to cross-examine Pittman, and this is a retrial of the exact same issues. (V XIX p3578) Defense counsel objected to the application of Pittman's former testimony based upon the sixth amendment confrontation clause. (V XIX p3579) The Palatka Police and the Putnam County Sheriff's Office were out in the community looking for Pittman. (V XIX p3586) The trial court is going to allow the former testimony of Pittman over a defense objection. (V XIX p3588)

During the testimony of Arthur McComb he stated: "So he starts to tell me about his case and it was a first-degree murder case. And he told me that he had more than one; at the time I can tell you in great detail about two cases." (V XIX p3672) The defense counsel moved for a mistrial on the grounds that McComb revealed to the jury that Israel had been charged with an additional murder. (V XIX p3673) The state claimed that it intentionally sought McComb's testimony concerning additional murders and it was a proper inquiry because the defense

failed to file a Motion in Limine to exclude such inquiry. (V XIX p3674) The trial court denied the motion for mistrial and the defense counsel asked the court to admonish the jury not to consider the last response from the witness. (V XIX p3675) The trial court denied the request of defense counsel to admonish the jury ruling that he did not want to bring any additional attention to that particular matter. (V XIX p3677) McComb further testified: "Israel's attitude is very callous, it was like he had a right to do and he was mad at the judicial system for putting him in jail." (V XIX p3687) The defense objected on the grounds that McComb's testimony was speculation and commenting upon the character of the defendant. (V XIX p3687) The court overruled the objection, however cautioned the state to limit the testimony to those things that were said and leave out the interpretations. (V XIX p3688) During a trial break the trial court asked defense counsel whether Israel would like to return to the courtroom and defense counsel stated there was no change and that Israel wished to return after the state finishes their case. (V XIX p3607)

The state rests. (V XIX p3707) The defense made a motion for acquittal as to count II of kidnapping based upon the decision in Kent v. State, 702 So.2d 265 5th DCA 1997. (V XIX p3713) The trial court denied the motion for judgment acquittal as to count II. (V XIX p3714) The defense also made a motion for

judgment of acquittal on the remaining three counts, I, III, and IV and argued that the state had not proved a prima facie case sufficient to present to the jury. (V XIX p3715) The trial court denied the motion for judgment of acquittal as to count I, III, and IV. (V XIX p3715) The defense rests. (V XIX p3748)

The jury found Connie Ray Israel guilty as charged on all four counts. (V XX p3828, 29) The jury recommended a sentence of death by a majority vote of 11 to 1. (V XX p3963) Israel made a motion for a new trial. (V XX p3894) The motion for a new trial was denied. (V XX p3901) Israel requested a new trial because he was not able to participate in jury selection. (V XX p3904) Israel had instructed his attorney Clyde Wolfe that once jury voir dire ended he wanted to come into the courtroom and participate in jury selection. (V XX p3904) Israel also complained that he did not get a fair trial because he was not given an independent DNA expert to review the evidence. (V XX p3905)

The trial court sentenced Israel as follows: Count I, life concurrent with any other sentence he is presently serving, Count II, sentenced Israel to life consecutive to Count I and any other sentence he is presently serving; Count III sentenced Israel to life consecutive to Count II. The trial court found that four aggravating factors outweighed the two statutory mitigating factors and sentenced Israel to death. (V XX p3562)

STATEMENT OF THE FACTS

Thelma Hughes worked with Esther Hagans at the Putnam Medical Center since 1967. (V XVIII p3519) In late December 1991, Ms. Hagans did not show up for her morning shift at work. (V XVIII p3520) Someone from the hospital was sent to check on Ms. Hagans. (V XVIII p3520) Hagans would carry large sums of money in her bosom because she did not carry a purse. (V XVIII p3521) Hagans would sometimes carry twenties and she had been seen with hundreds of dollars on her. (V XVIII p3521) Whether Hagans had money at her home at the time of her death was unknown. (V XVIII p3522)

Shirley Bartley was Ester Hagans next door neighbor for several years. (V XVIII p3427) The day before her murder, Bartley saw Hagans come home from work. (V XVIII p3428) The next day, an employee from the hospital came to Hagans' house looking for her. (V XVIII p3429) When there was no answer at the house, the employee came to Bartley's house and found that Hagans' whereabouts were unknown. (V XVIII p3429) Bartley then went to Hagans' house and called her from the gate, and there was no answer. (V XVIII p3430) Bartley did not go up to the door of the house because Hagans had three dogs loose in the yard. (V XVIII p3430) Bartley's mother then called Hagans house with no success, and then Bartley called the police. (V XVIII p3433)

Robin Edwards is a member of the Palatka Police Department and was involved in the investigation of the death of Esther Hagans. (V XVIII p3528) Edwards arrived at the Hagans' home at 9:54 a.m. and talked to the next door neighbor Shirley Bartley. (V XVIII p3529) Edwards was initially prevented from entering the home because there was a bull dog in the yard that would not allow Edwards to get into the house. (V XVIII p3530) Officer Steve Huckleberry arrived shortly afterwards and scared the dog off to another area of the yard so Edwards could enter the home. (V XVIII p3530) When Edwards got to the front door it was ajar about two inches. (V XVIII p3530) Edwards searched for Hagans and found her deceased in the bedroom. (V XVIII p3531) The point of entry was through a window. (V XVIII p3545)

Ricky Wright was a detective with the Palatka Police Department assigned the investigation of the murder of Esther Hagans. (V XIX p3651) Wright found Hagans' body in her bedroom and her hands were tied behind her back and she had apparent injuries on her face and about her head and it appeared somebody had killed her. (V XIX p3654) Within days Connie Ray Israel, Vernon Young and Clayton Hughes were developed as murder suspects. (V XIX p3655) The investigation of this murder became what was known as a "cold case," and the Florida Department of Law Enforcement was asked to assist in the investigation.

(V XIX p3657) During that investigation, they obtained a blood sample from Israel and based on tests Israel was found to be the contributor of some semen stains that were found in the home of Esther Hagans. (V XIX p3658)

Balubali Patel managed the William Penn Motel back in December of 1991. (V XIX p3608) Connie Ray Israel registered in room 33 on December 30, 1991 for one week and he paid $112.36 in cash. (V XIX p3610) Israel only stayed one night, and got a cash refund of $91.60. (V XIX p3610) Andrew Cropley was the guest service manager and office manager at the Holiday Inn in Palatka in December of 1991. (V XIX p3620) Connie Ray Israel registered in room 101 of the Holiday Inn on December 28, 1991. (V XIX p3620) Israel paid for a two night stay for December 28th and 29th and paid a total of $99.64. (V XIX p3622) Israel checked out on the morning of December 30, 1991. (V XIX p3622)

Mary Ann Pittman was working as a prostitute on the corner of 10th and 11th Street in Palatka in December of 1991. (V XIX p3626) At approximately 3:00 to 4:00 in the morning Pittman was met at that street corner by Connie Ray Israel. (V XIX p3626) Israel took Pittman to the nearby Holiday Inn to have sex and do drugs. (V XIX p3627) On the way to the hotel the two were met by a person known as "Spook." (V XIX p3627) The three entered Israel's hotel room and smoked crack together. (V XIX p3628) After Spook left, Pittman and Israel

continued to get high smoking crack. (V XIX p3629) At some point, Pittman went into the bathroom to take a shower but she could not stand in the tub because Israel had a shirt and pants in the tub and the water in the tub had a reddish color. (V XIX p3631) Pittman noticed a black purse under the hotel room. (V XIX p3632) Israel also had a wallet in the room and it contained money including 10's, 1's and 20's. (V XIX p3633) Over the course of two days, Pittman and Israel did not have sex because Israel was too high. (V XIX p3634) Israel told Pittman that he got all the money to buy crack by winning the lottery.[3] (V XIX p3635)

Melvin Shorter knew Connie Ray Israel 25 to 30 years. (V XIX p3643) At the time of Esther Hagans murder Shorter sold crack cocaine. (V XIX p 3644) Shorter saw Israel at the Holiday Inn in the early morning and sold him crack cocaine and smoked it with him. (V XIX p3645) Shorter sold crack three or four times that day to Israel. (V XIX p3645) Israel told Shorter that he got the money to buy crack cocaine from his lottery winnings. (V XIX p3647) Each crack cocaine sale to Israel was for $20.00. (V XIX p3648)

Miller Norton was a evidence technician with the Palatka Police Department

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[3] The Florida Lottery records do not reflect a prize payment to Connie Ray Israel. (V XVIII p3547) The parties stipulated to the following "please be advised the lottery can only track prizes over $600.00. If Mr. Israel or anyone else won $600.00 or less, they could collect their winnings at any outlet, and the lottery would have no record of it." (V XVIII p3548)

and assisted in the investigation of the murder of Esther Hagans on December 27, 1991. (V XIX p3599) Norton was assigned to trace some shoe prints that had been found at the scene and leading away from the scene. (V XIX p3600) It appeared that it was one person making an athletic shoe impression. (V XIX p3601)

Steve Leary of the Florida Department of Law Enforcement investigated the death of Ester Hagans on or about December 27, 1991. (V XVIII p3374) Leary found the victim lying on her bed with her legs spread, no clothing and her hands tied behind her back. (V XVIII p3382) Leary also observed footprints on the porch steps, and a screwdriver found outside the window of the house, and the screen removed. (V XVIII p3384) Leary concluded the point of entry into the house was the bedroom window. (V XVIII p3384) Leary also collected what appeared to be bodily fluids at the crime scene. (V XVIII p3387)

Joyce Meadows is a forensic serologist for the Florida Department of Law Enforcement. (V XVIII p3394) Bodily fluid recovered from the Esther Hagans' crime scene was determined to be semen. (V XVIII p3400) The blood type from the semen was type A or a mixture of type A and type O. (V XVIII p3403) The reddish brown stains on the carpet in the victim's bedroom tested positive for human blood. (V XVIII p3408) The semen found on the beige pillow case and on

the slip came from a person with the same blood type. (V XVIII p3408) Semen was also discovered on the bedspread. (V XVIII p3411) There is also semen found on the vaginal swabs taken from the victim. (V XVIII p3412) The blood tested by Meadows was consistent with the victim's blood. (V XVIII p3421)

Paul McCaffrey was a forensic serologist and a DNA analysis for the Florida Department of Law Enforcement lab in Jacksonville. (V XVIII p3439) In 1993, McCaffrey received some items delivered by the Palatka Police Department and a blood sample from Connie Ray Israel. (V XVIII p3445) McCaffrey was requested to do DNA testing from particular cuttings submitted by the Palatka Police Department. (V XVIII p3446) McCaffrey prepared four DNA probes for this case. (V XVIII p3466) The results of the PH-30 probe, TBQ7 probe, H-24 probe and MS-1 probe was that Connie Ray Israel is included in donating the male fractions of those stains. (V XVIII p3473-77) Based on the four probe match, the probability of a person in the Caucasian population having a DNA profile matching the slip stain is 1 in 510 million Caucasians. (V XVIII p3482) The probability of selecting an individual at random from the black population having the same DNA profile is approximately one in 289 million. (V XVIII p3483)

Dr. Karen Steiner was the medical examiner that performed the autopsy on the victim Esther Hagans. (V XVIII p3496) At the time of Hagans' death, she was

77 years old. (V XVIII p3496) Hagans had trauma on the left side of the head including a half inch tear on her left temple. (V XVIII p3503) Hagans' right eye was swollen from trauma on the side of the face, and she hemorrhaged into the white of the eye. (V XVIII p3504) Hagans' also had abrasions and rub marks on the right side of her face and chin. (V XVIII p3504) One side of Hagans' head had blunt trauma injury that could have been caused by a small object. (V XVIII p3506) Dr. Steiner also examined the vaginal area of Hagans during the course of the autopsy. (V XVIII p3506) The external vagina area of Hagans showed signs of injury. (V XVIII p3506) Hagans had recent hemorrhaging or bruising right at the opening of the vagina that was consistent with some type of sexual assault. (V XVIII p3507) The cause of death was a weak heart being subjected to multiple episodes of trauma to her body and sexual assault. (V XVIII p3510) Hagans had chronic ulcerations on her lower right leg due to sluggish blood which was an indicator of having a weak heart. (V XVIII p3512)

Connie Ray Israel was placed in cell 3022 on August 17, 1994 and Arthur McComb was placed in cell 3022 on August 18, 1994 which was a two man cell. (V XIX p3664) The two stayed in the same cell for five days at New River Correctional Institute. (V XIX p3665) Arthur McComb was serving a sentence for attempted first degree murder. (V XIX p3667) In August of 1994, McComb had

eight months to serve of a six year sentence. (V XIX p3668) A fellow inmate got mad at McComb because he was a short timer and they got into a fight and McComb was sent to the confinement cells. (V XIX p3669) In the confinement cell McComb met Connie Ray Israel. (V XIX p3669)

Israel learned that McComb had a great deal of experience with legal procedures, and asked him to help him with his cases. (V XIX p3672) Israel then told McComb about the murder of Esther Hagans. (V XIX p3679) Israel "straight out told me, I tried to knock that bitch's head off." (V XIX p3679) Israel tried to knock her head off with a stick that he had when he broke in to the house. (V XIX p3680) Israel also told McComb that he sexually assaulted Esther Hagans. (V XIX p3680) Israel went into the Hagan's house because it was rumored that she had a lot of church money in the house. (V XIX p3680) Israel said that after he completed the burglary he looked back at Hagans and she started looking good, so he returned and sexual assaulted her. (V XIX p3681)

There were obstacles in getting into Hagans' house including a fence and a dog. (V XIX p3682) Israel told McComb at least three difference stories about the dogs. (V XIX p3682) In one version they killed the dogs, one version they let the dogs go, and one version the dogs were put in the trunk of the Cadillac. (V XIX p3683) Israel told McComb that "Spook" was Hagan's grandson and was involved

in the crime. (V XIX p3683) Israel did not say whether or not Spook went into the house. (V XIX p3683) Israel had entered Hagan's house through her bedroom window because he knew she had guns. (V XIX p3684)

During the rape Hagans resisted Israel. (V XIX p3684) She couldn't hit him, so she tried to bite him: "the bitch tried to gum me" because she had no teeth. (V XIX p3685) When her resistance failed she spat in his face and started cursing him out calling him an animal and a beast and that infuriated Israel to the point that he said "I tried to knock, literally was his words, I tried to knock that bitch's head off." (V XIX p3685) The money taken from a purse in the house was $7,000.00 to $10,000.00 and was church money. (V XIX p3685) Israel told his friends that he got the money from the lottery. (V XIX p3685) McComb got upset after listening to Israel's story and demanded to be removed from the cell because of Israel's attitude towards killing. (V XIX p3687) Israel's attitude is very callous, it was like he had a right to do what he did and he was mad at the judicial system for putting him in jail. (V XIX p3687) McComb thought he could not benefit from telling the jury that Israel admitted killing the lady. (V XIX p3691) The testimony against Israel could only harm him if anything. (V XIX p3692)

Connie Ray Israel was born on April 9, 1957 in Palatka, Florida. (V XIX p3719) Israel knew Detective Wright of the Palatka Police Department and he also

knew Wright's brother. (V XIX p3719) On September 22, 1992, Israel went to the Palatka City Police Department to file a missing car report. (V XIX p3719) After waiting two and one half hours for somebody to take the missing car report, Lt. Bob Blair arrested Israel on another case and arrested Israel later for the unresolved murder of Esther Hagans. (V XIX p3720) Other suspects arrested for the murder of Hagans included Vernon Young ("Spook"), Mark Grobmeyer, Clayton Hughes, Samuel Williams, and Johnny Major. (V XIX p3720) Israel was held in the county jail in an isolation tank for the next 17 months from September 22, 1992 until February 1, 1994 to prevent Israel's suicide. (V XIX p3720)

In March of 1992, Israel was questioned by Detective Ricardo Wright concerning the murder of Esther Hagans. (V XIX p3721) Detective Wright asked Israel whether he would provide hair and blood samples and his tennis shoes. (V XIX p3721) Israel stated he would be glad to give some hair samples and blood samples and his pair of shoes and further asked Wright to tell him what was going on. (V XIX p3722) Wright thought Israel murdered Esther Hagans, and that he would get blood samples and his shoes and there was nothing that Israel could do about it. (V XIX p3722) Some of the Palatka police officers that Israel grew up with told him that the officers that responded to the Esther Hagans' crime scene found $5,000.00 in the house and kept the money and never reported it. (V XIX

p3723) The officers further said that since she was already dead these officers tried to make to appear like Hagans was beaten to death. (V XIX p3723) At the time of Hagans' death, vicious dogs were roaming the fenced yard of the Hagans' home and whoever jumped the lady's fence and entered the house had to be known by the dogs. (V XIX p3723)

Mark Grobmeyer was questioned by police pertaining to an auto theft investigation and was subsequently arrested. (V XIX p3725) The stolen vehicle in this case was abandoned by Grobmeyer approximately 150 feet from the Esther Hagans' residence at the time frame that the homicide of Hagans was committed. (V XIX p3725) Grobmeyer made a written statement where he identified Vernon Young ("Spook") as being with him when he abandoned the stolen vehicle in the vicinity of the Hagans' home. (V XIX p3726) Israel denied any involvement in the stolen car that involved Grobmeyer or Young. (V XIX p3731) Israel denied having any involvement into the burglary of the Hagans' house. (V XIX p3731) McComb claimed that he was a jail house lawyer so Israel trusted him with the case. (V XIX p3731) Israel told McComb about the case, and let him read the accusations in the paperwork for himself. (V XIX p3731) Israel also let McComb read all the newspaper clippings and depositions and all the things that were written up about the case. (V XIX p3732) Israel denied telling McComb that he

had anything to do with the accusations of this case. (V XIX p3732) Israel claimed that Detective Wright took his blood samples and planted them on the slip, pillowcase and bedspread of Esther Hagans. (V XIX p3744) Detective Wright setup Israel like he had said he would. (V XIX p3744)

PENALTY PHASE

The state introduced a certified copy of a judgment and conviction of Israel for burglary of a dwelling with battery, kidnapping, robbery and two counts of sexual battery. (V XX p3875) Viola Britt was victimized by Connie Ray Israel in September of 1992. (V XX p3876) Israel came through the window of her bedroom while Britt was laying on her bed. (V XX p3876) Israel jumped on Britt and went to beating her and then tore up a spread and tied up her hands behind her back. (V XX p3877) Israel then searched the house to see what he could take. (V XX p3878) Israel then tried to sexually assault Ms. Britt. (V XX p3879) Israel then left the house taking Britt's VCR, a watch, a pocketbook, cigarettes, records, tapes and a stereo. (V XX p3879)

The state introduced a certified copy of a judgment and sentence dated April 27, 1978 of Israel's conviction for burglary of a structure. (V XX p3883) Fannie Mae Harris was also a victim of Israel. (V XX p3884) Israel entered the Harris' house through the kitchen window. (V XX p3885) Israel struck Harris in the head

with a stick and also held a pair of scissors to her throat and attempted to tie her up with some remnants of clothing. (V XX p3885) Israel subsequently attempted to have sexual intercourse with Harris and Harris foiled the assault by putting her hands on Israel's genitals which caused Israel to leave the scene. (V XX p3886) Israel was arrested for this crime, and Israel gave a confession and admitted that he battered the woman with his fists. (V XX p3887) The state also offered a certified conviction of battery on a law enforcement officer and resisting an officer with violence. (V XX p3889)

DEFENSE CASE

Dr. Harry Krop is a licensed psychologist and earned a "diplomat" status in forensic examination. (V XX p3914, 15) Dr. Krop met with Connie Ray Israel many times starting back in 1993 and 1994 on a prior case that he had been involved in. (V XX p3918) Initially, Krop did not obtain a lot of information from Israel because he was generally non-cooperative. (V XX p3919) On the prior case, Dr. Krop saw Israel four or five times and in the present case he had saw him on seven occasions. (V XX p3920) Dr. Krop also reviewed several psychological evaluations that had been done by other professionals. (V XX p3919)

Israel had been seen by Dr. Robert David, Dr. William Lennon, and Dr. Umesh Mhatre. (V XX p3921) Dr. Mhatre said that there was no psychiatric

illness detected. (V XX p3921) The other two doctors gave him a diagnosis of polly substance dependence.[4] (V XX p3921) One of the reports also diagnosed him as having a paranoid personality disorder, and the other report diagnosed him as having an anti-social personality disorder. (V XX p3922) Israel eventually performed some psychological testing. (V XX p3922)

Dr. Krop spoke to Israel's mother by phone and she indicated that he had a head injury when he was young and had seizures. (V XX p3923) Israel was given a battery of tests including the Wexler Adult Intelligent Scale, 3rd Edition, an individual intelligence test; the Wexler Memory Scale, 3rd Edition which is an individualized test to measure a person's memory in different areas, and he was also administered the Trail-Making Test, the Finger Tapping Test, the Aphasia Screening Test and the Booklet Categories Test. (V XX p3924, 25) Israel refused to do the MMPI test. (V XX p3925) Israel performed better on the intelligence tests than Dr. Krop had expected based upon the prior interviews and school records which he reviewed. (V XX p3926) In the school records there was indications of problematic behavior from the time he was 9 and 10 years old. (V XX p3926) The school records indicate that when he was 10 or 11 years old he

[4] This condition is characterized by drug abuse and dysthymia or serious depression. (V XX p3921)

had a head condition which hindered him. (V XX p3927) Israel jumped out of a rolling car and scraped his head and suffered seizures after that from the age of 7. (V XX p3927) The school records referred to his head condition and Israel appeared to be emotionally disturbed for hours at a time. (V XX p3927) When Israel was 13 years old, his mind seemed to wander and appeared to be in a daze. (V XX p3928) Based upon the testing, Israel had a verbal IQ of 84, a performance IQ of 81 and a full scale IQ of 81 which placed him in a low average range of intellectual ability. (V XX p3928)

Israel had difficulty with various levels of memory, and showed deficiencies in almost all tests. (V XX p3929) Impairment is not reflective of a head injury, but more suggestive that this person has organic or neurological impairment all of his life, possibly through the birth process or possibly genetic. (V XX p3929) Israel's impairment is pretty much diffused throughout the brain and there is various types of cognitive impairment, problems with impulse control, and problems with judgment. (V XX p3929) Based on all of Dr. Krop's neuro-psychological testing Israel suffers from brain damage. (V XX p3929)

Israel did not show signs of being psychotic but rather he suffered from a personality disorder with different types of features particularly anti-social features, paranoid features and hypochondriacal. (V XX p3931) According to Dr.

Krop, Israel was under the influence of extreme mental or emotional disturbances in December of 1991because of his personality disorder. (V XX p3931) Dr. Krop also concluded that Israel's ability to appreciate the criminality of his conduct and conform his conduct to the requirements of the law were impaired because Israel had problems with judgment, problems with impulse control, and probably did not think about the consequences of his actions. (V XX p3933)

SUMMARY OF ARGUMENT

POINT I:

The trial court erred in conducting portions of the trial where Israel was involuntarily excluded resulting in a denial of his constitutional right to due process under the Sixth and Fourteenth Amendments to the United States Constitution and the Florida Constitution. Specifically, Israel informed his counsel that he wished to participate in jury selection, then was involuntarily excluded from jury selection, and then made a timely objection to the trial court.

POINT II:

Immediately before trial Israel was provided medication for dizziness and headaches by a Department of Corrections doctor. At the start of trial Israel informed the trial court that his medication had been depleted (Mildrin) and that without his medication he was too ill to proceed. The trial court ignored Israel's repeated requests for medication, causing Israel's illness to be a feature of the trial and causing Israel to be absent from most of the proceedings. The trial court abused its discretion in denying appellant's motion for continuance of trial.

POINT III:

There was substantial and competent evidence that Israel was a drug abuser, had brain damage that impaired his judgement and behavior and he had low intellectual functioning. The trial court erred in ignoring the evidence of these non-statutory mitigating circumstances that were proven by competent

uncontroverted evidence.

POINT IV:

The trial court's denial of Israel's Motion for Mistrial after the state intentionally sought Arthur McComb's testimony that "he [Israel] told me that he had more than one [first degree murder change]." This testimony was highly prejudicial comment on Israel character that resulted in an unfair trial.

POINT V:

Appellant's death sentence is disproportionate, excessive, and inappropriate, and is cruel and unusual punishment in violation of Article 1, Section 17 of the Florida Constitution and the Eight and Fourteenth Amendments to the United States Constitution.

POINT VI:

Connie Ray Israel's death sentence which is grounded on a split jury vote of (11-1) is unconstitutional under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT VII:

The trial court ordered Israel to be in shackles and handcuffs during trial because of conduct in the holding cell. The jurors observed Israel being handcuffed and shackled which carries the message that the state and the judge think the defendant is dangerous. This is highly prejudicial and this court must reverse his sentences.

POINT I

THE TRIAL COURT ERRED IN CONDUCTING PORTIONS OF THE TRIAL WHERE ISRAEL WAS INVOLUNTARILY EXCLUDED RESULTING IN A DENIAL OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

Florida Rule of Criminal Procedure 3.180 states that "the defendant shall be present... at any pretrial conference, unless waived by the defendant in writing. A defendant's absence with no express waiver is error." See Garcia v. State, 492 So.2d 360 (Fla. 1986). This Court has held that a defendant's involuntary absence may be harmless error where his presence would not have assisted the defense in any way. Id.

> [The defendant] has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence.

Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982) [citations omitted]. In Coney v. State, 653 So.2d 1009 (Fla. 1995), this Court extended Francis and held that a defendant has a right to be physically present at the immediate site (in that case, at sidebar) where pretrial juror challenges are exercised.

Connie Ray Israel was involuntarily absent from jury selection. (V XVIII p3334) At the lunch break on Tuesday, February 23, 1998, Appellant asked his

counsel if he was still interviewing jury members and Attorney Wolfe replied yes. (V XVIII p3333) Israel then confirmed with counsel that no jurors had been selected and advised his counsel that he wished to participate in jury selection. (V XVIII p3333) After the trial recessed that afternoon, Israel was informed that 9 jurors were selected without his participation. (V XVIII p3334) The following morning, Israel objected *pro se* to the trial court that he was wrongfully excluded from jury selection. (V XVIII p3334)

A defendant has an absolute right to be present at all stages of his capital trial where fundamental fairness might be thwarted by his absence. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934). See also Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated[5].

This Court in Coney v. State, 653 So.2d 1009, 1013 (Fla.1995), ruled that

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[5] This rule expressly provides:

(a) Presence of Defendant. In all prosecutions for crime the defendant shall be present:

(4) At the beginning of the trial during the examination, challenging, impaneling, and swearing of the jury;

(b) Presence; definition. A defendant is present for purposes of this rule if the defendant is physically in attendance for the courtroom proceeding, and has meaningful opportunity to be heard through counsel on the issues being discussed.

under the then-current rules of procedure, the defendant had a right to be present at the bench when pretrial juror challenges were exercised.[6] This Court then held in Carmichael v. State, 715 So.2d 247 (Fla.1998), that the defendant must timely raise this issue. In the present case, Israel was absent from the courtroom because of illness. Although feeling ill, Israel specifically instructed his counsel that he wished to participate in jury selection. When given the first opportunity, Israel objected to being excluded from the jury selection.

This court should reverse appellant's convictions and sentences and remand for a new trial. Israel was involuntarily excluded from jury selection. The practice smacks of unfairness. Defendants have a right to be present at all stages of their capital trials.

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[6] Coney has since been superseded. See Amendments to Florida Rules of Criminal Procedure, 685 So.2d 1253, 1254 n. 2 (Fla.1996) ("This amendment supersedes Coney v. State, 653 So.2d 1009 (Fla.1995)."). Coney is applicable only to those cases falling within a narrow window--i.e., where jury selection took place after April 27, 1995 (the date Coney became final), and before January 1, 1997 (the date the corrective amendment to rule 3.180 became effective). See State v. Mejia, 696 So.2d 339 (Fla.1997); .

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE OF TRIAL.

When the trial began, Defense counsel moved for a continuance in the trial because Israel was having vision problems and dizziness. (V XIV p2525) Israel stated that he had not received his medications from the Department of Corrections. (V XIV p2525) The records indicate that Israel was prescribed Remeron and Pepto Bismol. (V XIV p2525) Israel was also given a two week supply of Mildrin by a Department of Corrections doctor. (V XIV p2525) Over Israel's complaints of illness, the trial court denied the request for continuance. (V XIV p2525) Israel's illness then became a feature of trial.

Just as the jury venire was being sworn, Connie Ray Israel explained "I'm sick, I am sick." (V XIV p2540) Israel then absented himself from the courtroom to the holding cell. (V XIV p2546) Israel's supply of Mildrin had been depleted. (V XIV p2548) Israel suffers from anxiety and depression and has a history of pylorus. (V XIV p2548) Israel remained absent from the courtroom while the court reviewed hardship challenges of the jury venire. (V XIV p2552) Israel informed the trial court without further complained that he is not competent to proceed because he had been deprived of his medication for headaches and

dizziness. (V XIV p2552-53)

During jury selection Israel stated " I'm sick, sick man, I'm sick man, please take me back to the cell." (V XIV p2584) The trial court directed Israel to remain seated. (V XIV p2584) Soon thereafter, Israel explained before the jury "I've got to get out of here, judge, I'm sick, I've got to get out of here, I'm sick." (V XIV p2593) Israel exited himself from the courtroom, and the court decided to make an inquiry concerning the consequences of Israel absenting himself from the courtroom. (V XIV p2594) Israel refused to come back to the courtroom. (V XIV p2596)

The trial court held an inquiry with Israel in the holding cell. (V XIV p2601) Israel stated that his medication was withheld and he is too ill to proceed. (V XIV p2603) The trial court ruled that Israel was free to return to the courtroom, and there was no basis to determine that Israel is under any real stress. (V XIV p2607) Israel elected not to participate in the trial. (V XIV p2608)

The trial court's ruling on a motion for continuance is addressed to the sound discretion of the trial court. Magill v. State, 386 So.2d 1188 (Fla. 1980). Moreover, the trial court's ruling will not be disturbed unless a palpable abuse of discretion is demonstrated to the reviewing court. Jent v. State, 408 So.2d 1024, 1028 (Fla. 1981). In the instant case, the denial of the motion for continuance was

a palpable abuse of discretion because Israel was too ill to proceed and participate in his trial.

In Quinton v. Horvath, 690 So.2d 755 (Fla. 3rd DCA 1997), Quinton's lead attorney was taken seriously ill shortly before trial was originally scheduled to begin in March. The trial court granted a continuance until April 14. In early April, the lead attorney's associate was also taken seriously ill. Both attorneys are under the care of cardiologists and are precluded from participating in the litigation. Quinton moved for a continuance of the April 14 trial date; the trial court denied the motion, and in so doing, abused its discretion and departed from the essential requirements of law. See Courtney v. Central Trust Co., 112 Fla. 298, 150 So. 276 (1933) (abuse of discretion to deny motion for continuance when trial counsel unable to proceed because of family emergency); Thompson v. General Motors Corp., 439 So.2d 1012 (Fla. 2d DCA 1983) (abuse of discretion for trial court to deny motion for continuance when trial counsel became ill).

In Silverman v. Millner, 514 So.2d 77 (Fla. 3rd DCA 1987) the trial was scheduled to begin on Tuesday, December 16, 1986, at 2 p.m. On Sunday evening, December 14, Silverman became ill and was hospitalized Monday morning, December 15. Shortly thereafter, Silverman's attorney contacted Millner's attorney and informed him of the possible need for a continuance. Millner was scheduled to

fly in from out of state prior to trial. When Silverman's attorney called that morning, he was told that Millner was already en route. That same morning, the court was also informed of the defendant's unexpected illness and of the possible need for a continuance. The trial judge instructed her secretary to inform Silverman's attorney that he could present his motion for continuance during the morning calendar on December 16th; the judge indicated she would not entertain the motion during the parties' scheduled trial later that day.

Monday afternoon, Silverman's doctor concluded that Silverman had suffered a stroke. Silverman was confined to the hospital, therefore, it became evident he could not testify at trial the next day. Silverman's attorney then drafted a motion in which he explained the nature and seriousness of the defendant's condition and sought a continuance until the defendant was physically able to appear in court.

In reversing the trial court, the appeals court held that special circumstances sometimes exist in which the denial of a motion for continuance creates an injustice for the movant. In these circumstances, this court's obligation to rectify the injustice outweighs its policy of not disturbing a trial court's ruling on a continuance, Ford v. Ford, 150 Fla. 717, 8 So.2d 495 (1942); Courtney v. Central Trust Co., 112 Fla. 298, 150 So. 276 (1933); Outdoor Resorts At Orlando, Inc. v.

Hotz Management Co., 483 So.2d 2 (Fla. 2d DCA 1985), in particular, in cases where the opposing party would suffer no injury or great inconvenience as a result of a continuance.

In Silverman, the defendant's illness and consequent unavailability for trial were unforeseeable, just as in the instant case. As a result, Israel was absent from most of the trial including jury selection. Wherefore, Appellant submits that the denial of the motion for continuance was a palpable abuse of discretion which violated Appellant's due process right to be present during the trial.

POINT III

THE TRIAL COURT ERRED IN IGNORING NON-STATUTORY MITIGATING CIRCUMSTANCES THAT WERE PROVEN BY COMPETENT UNCONTROVERTED EVIDENCE.

Judge Hammond wrongfully ignored non-statutory mitigation that was proven by competent uncontroverted evidence. In his sentencing order, Judge Hammond concluded that:

> Other evidence the Court has considered in mitigation are aspects of the Mr. Israel's character, his record and other circumstances of the surrounding offense. In the Court's opinion nothing about this catch-all mitigating factor applies to Mr. Israel. His record is bad, his character worse, and the offense itself is horrible. The Court assigns no weight to this mitigating factor. (V XIII p2441)

During the Penalty Phase there was uncontroverted evidence of non-statutory mitigation evidence presented as follows:

Drug Abuse

Israel was diagnosed by Dr. Robert David and Dr. William Lennon with polly substance dependence.[7] (V XX p3921) This was supported at trial by testimony that Israel smoked crack for days after the murder.

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[7] Polly substance dependence is drug abuse and dysthymia or serious depression. (V XX p3921)

Brain Damage

Israel had a head injury when he was young and had seizures. (V XX p3923) The school records indicate that when he was 10 or 11 years old he had a head condition which hindered him. (V XX p3927) In fact, Israel appeared to be emotionally disturbed for hours at a time. (V XX p3927) By age 13, Israel's mind seemed to wander as if he is in a daze at times. (V XX p3928) Based on all of Dr. Krop's neuro-psychological testing Israel suffers from brain damage. (V XX p3929)

Low Intellectual Functioning

Israel had a verbal IQ of 84, a performance IQ of 81 and a full scale IQ of 81 which placed him in a low average range of intellectual ability. (V XX p3928) There was uncontroverted evidence that Israel had difficulty with various levels of memory, and showed deficiencies in almost all tests. (V XX p3929) Impairment is not reflective of a head injury, but more suggestive that this person has organic or neurological impairment all of his life, possibly through the birth process or possibly genetic. (V XX p3929) Israel's impairment is pretty much diffused throughout the brain and there is various types of cognitive impairment, problems with impulse control, and problems with judgment. (V XX p3929)

This Court has repeatedly stated that "[w]henever a reasonable quantum of

competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved." Spencer v. State, 645 So.2d 377, 385 (Fla.1994) (citing Nibert v. State, 574 So.2d 1059, 1062 (Fla.1990)). A trial court may only reject the proffered mitigation if the record provides competent, substantial evidence to the contrary. Kight v. State, 512 So.2d 922, 933 (Fla.1987). Substance abuse is a strong non-statutory mitigating circumstance. See Mahn v. State, 714 So.2d 391 (Fla. 1998); Clark v. State, 609 So.2d 513, 516 (Fla.1992); Penn v. State, 574 So.2d 1079 (Fla.1991) Having brain damage that effects behavior and causes emotional problems is also a strong non-statutory mitigating circumstance. See Hawk v. State, 718 So.2d 163 (Fla. 1998); Larkins v. State, 739 So.2d 90 (Fla. 1999) Having low intellectual functioning is also a strong non-statutory mitigating circumstance. See Sinclair v. State, 657 So.2d 1142 (Fla. 1995); Woods v. State, 733 So.2d 980 (Fla. 1999).

This court should find that the trial court erred in failing to give Israel's uncontroverted history of drug abuse, brain damage and low intellectual functioning appropriate weight as a nonstatutory mitigating circumstance. This case should be reversed and remanded for resentencing.

POINT IV

THE TRIAL COURT'S DENIAL OF ISRAEL'S MOTION FOR MISTRIAL AFTER ARTHUR McComb TESTIFIED THAT "HE [ISRAEL] TOLD ME THAT HE HAD MORE THAN ONE [FIRST DEGREE MURDER CHANGE]," RESULTED IN AN UNFAIR TRIAL.

Connie Ray Israel was placed in cell 3022 on August 17, 1994 and Arthur McComb was placed in cell 3022 on August 18, 1994 which was a two man cell. (V XIX p3664) The two stayed in the same cell for five days at New River Correctional Institute. (V XIX p3665) Arthur McComb was serving a sentence for attempted first degree murder. (V XIX p3667) In August of 1994, McComb had eight months to serve of a six year sentence. (V XIX p3668) A fellow inmate got made at McComb because he was a short timer and they got into a fight and McComb was sent to the confinement cells. (V XIX p3669) In the confinement cell McComb met Connie Ray Israel and for the first time heard about Palatka, Florida. (V XIX p3669)

Israel learned that McComb had a great deal of experience with legal procedures, and asked him to help him with his cases. (V XIX p3672) Israel then told McComb about the murder of Esther Hagans. (V XIX p3679) McComb then testified:

> So he starts to tell me about his case and it was a first-degree murder case. And he told me that he

had more than one; at the time I can tell you in great detail about two cases." (V XIX p3672)

The defense counsel immediately approached the bench and moved for a mistrial on the grounds that McComb revealed to the jury that Israel had been charged with an additional murder. (V XIX p3673) In response the state argued that they intentionally sought McComb's testimony concerning additional murders and it was proper inquiry because the defense filed no Motion in Limine to exclude such inquiry. (V XIX p3675) The trial court denied the motion for mistrial and the defense asked the trial court to admonish the jury not to consider the last response from the witness. (V XIX p3675) The trial court denied the request of defense counsel to admonish the jury stating that he did not want to bring any additional attention to that particular matter. (V XIX p3677)

Section 90.404(1), Florida Statutes, clearly states that the prosecution may not offer testimony during its case-in-chief of the accused's past character to prove that the accused committed the crime in question. The reason for this rule is the great danger that a jury will convict a defendant for his prior activity, instead of focusing on the issue before them, i.e. whether the particular crime in question was committed by the defendant. Ehrhardt, Florida Evidence §404.4(1992 Edition). This Court is well aware of the prevailing attitude of Florida's citizenry that criminals are being coddled by the court system. When the jury heard that Israel

had an additional murder charge they undoubtedly assumed the worst. The trial court's denial of defense counsel's request for curative instruction further compounded the error. The curative instruction was defense counsel's attempt to "unring the bell." Without the curative instruction, the jury wrongfully considered the testimony McComb. The State will undoubtedly set forth its usual harmless error contentions in its answer brief, but a review of the record reveals that Israel had a hung jury in his first trial so therefore Israel case is a fairly close one.

"[A] defendant's character may not be assailed by the State in a criminal prosecution unless good character of the accused has first been introduced." Young v. State, 141 Fla. 529,195 So. 569 (1939) This Court has reversed a case where the prosecution was permitted to show that the prior jury had convicted the defendant of the same crime for which he was being tried. See Jackson v. State, 545 So.2d 260 (Fla. 1989).

Hardie v. State, 513 So.2d 791 (Fla. 4th DCA 1987) appears precisely on point. Five Metro-Dade police officers were allowed to express their opinions as to the identity of the persons depicted in a videotape recording of the commission of the crime. Although the Fourth District Court of Appeal rejected Hardie's argument that the officers' testimony constituted inadmissible opinion evidence, the court reversed because the officers' testimony created the impression that

Hardie had been involved in other criminal activities or had a prior record. The officers based their identifications of Hardie on their prior knowledge and contacts with him. Hardie v. State, 513 So.2d at 792. The district court concluded that the officers' testimony that they were acquainted with Hardie, as well as direct references to "other investigations", made it inconceivable that the jury would not have concluded that Hardie had been involved in prior criminal conduct. The same conclusion can be reached in Israel's case. The jury undoubtedly concluded that Israel has committed multiple murders. See also Wilding v. State, 427 So.2d 1069 (Fla. 2nd DCA 1983) [error to admit testimony concerning defendant's arrest for unrelated crimes].

Even a reference to "mug shots" can be grounds for a new trial. See e.g. Russell v. State, 445 So.2d 1091 (Fla. 3rd DCA 1984). The First District Court of Appeal acknowledged that a police officer's statement that he had had other occasions to "run across [the defendant]" arguably did carry an inference of prior criminal conduct. Coit v. State, 440 So.2d 409 (Fla. 5th DCA 1983). This Court has held that the erroneous admission of irrelevant collateral crimes evidence "is presumed harmful error because of the danger that a jury will take the bad character or propensity of the crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 396 So.2d 903, 908 (Fla. 1981). Accord Peek v.

State, 488 So.2d 52, 56 (Fla. 1986).

Even if this Court finds the error harmless at the guilt phase, substantially different issues arise during the penalty phase of a capital trial that require an analysis de novo. Castro v. State, 547 So.2d 111 (Fla. 1989) The State cannot demonstrate beyond a reasonable doubt that there is no reasonable possibility that the error below affected the jury verdict of guilt and the resulting death recommendation. See State v. Lee, 531 So.2d 133 (Fla. 1988).

POINT V

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, AND INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE 1, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court has described the "proportionality review" performed in every capital death case 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), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). Accord Hudson v. State, 538 So.2d 829 at 831 (Fla. 1989); Menendez v. State, 419 So.2d 312, 315 (Fla. 1982).

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, Sec. 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. Tillman v. State, 591 So.2d 167 (Fla. 1991). 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, Sec. 9, Fla. Const.; Porter v. State, supra.

Proportionality review also arises in part by necessary implication from the mandatory, exclusive jurisdiction this Court has over death appeals. Art. V, Sec. 3(b)(1), Fla. Const. The obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty law. See Tillman at 169.

In imposing the death penalty, Judge Hammond found that the State had proved four aggravating circumstances.[8] In mitigation, the trial court found two statutory mitigating factors,[9] and improperly rejected weighty non-statutory mitigating circumstances (see Point III). Appellant contends that the death penalty cannot stand since it is disproportionate to the crime and constitutes cruel and

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[8] Defendant had previously been convicted of another felony involving the use or threat of violence to a person; The crime for which the defendant is to be sentenced was especially heinous, atrocious and/or cruel; The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of a felony; and The capital felony was committed for pecuniary gain.

[9] That the defendant was under the influence of an extreme mental or emotional disturbance at the time the crime occurred; and capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

unusual punishment.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity, "Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring), that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1, 17 (Fla. 1973) cert. denied sub nom., 416 U.S. 943 (1974). See also Coker v. Georgia, 433 U.S. 584 (1977) (the requirement that the death penalty be reserved for the most aggravated crimes is a fundamental axiom of Eighth Amendment jurisprudence). This Court, unlike individual trial courts, reviews "each sentence of death issued in this state," Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), to "[g]uarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case at hand "warrant the imposition of our harshest penalty." Fitzpatrick 527 So.2d at 812. Appellant's case is neither "most aggravated" nor "unmitigated." Indeed, it is the least aggravated and one of the most mitigated of death sentences ever to reach this Court. The "high degree of certainty in ... substantive proportionality [which] must be maintained in order to insure that the death penalty is administered evenhandedly, "Fitzpatrick, 527 So.2d at 811, is missing in this case, and the death penalty is plainly inappropriate on this

record.

LEAST AGGRAVATED; MITIGATED

This is not "the sort of 'unmitigated' case contemplated by this Court in Dixon." Fitzpatrick, 527 So.2d at 812. Two weighty statutory mitigating circumstances were found by the sentencing judge and three nonstatutory mitigating circumstances were supported by evidence. The combined mitigating circumstances rendered the death sentence disproportionate. The sentencer ignored the non-statutory mitigating circumstances of drug abuse; low level intellectual functioning and brain damage.

Without question, this case is not a proper one for capital punishment. The state obviously agrees because they made a **plea offer to Israel that in exchange for a plea of guilty to second degree murder, he would be given a concurrent sentence to those he is already serving**. (V IV p666) A look at reversal on proportionality grounds does, however, reveal that since more aggravated and less mitigated cases than appellant's are not proper for the ultimate penalty, surely Connie Ray Israel must be spared.

In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), this Court accepted the sentencing judge's findings of five statutory aggravating circumstances, including those that showed culpable intent (pecuniary gain/arrest avoidance). Mr.

Fitzpatrick had been convicted of the murder of a law enforcement officer. Mr. Fitzpatrick shot the officer while holding three persons hostage with a pistol in an office. Mr. Fitzpatrick had been previously convicted of violent felonies. Mr. Fitzpatrick established the existence of three statutory mitigating circumstances - - extreme mental or emotional distress, substantially impaired capacity to conform conduct, and age. Id. at 811. Israel established two statutory mitigating circumstance and three non-statutory mitigating circumstances. Mr. Fitzpatrick's crime was significantly more aggravated than Israel, yet this Court found Mr. Fitzpatrick's actions to be "not those of a cold-blooded, heartless killer," since "the mitigating int his case is substantial." Id. at 812.

Additionally, in Huckaby v. State, 343 So.2d 29 (Fla. 1977), this Court affirmed two especially powerful aggravating circumstances (heinous, atrocious or cruel, and great risk of harm to many persons), but held that two statutory mitigating factors rendered death improper (extreme mental or emotional disturbance/substantive impairment). Turning to cases with heinous, atrocious or cruel, as a single aggravating circumstances, cannot sustain a death sentence when the crime "was probably upon reflection, of not long duration," and where drug addiction (alcohol) is a contributing factor to one's "difficulty controlling his emotions." Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985).

In Songer v. State, 544 So.2d 1010 (Fla. 1989), this Court faced a death penalty imposed by a trial judge based on one statutory aggravating factor, viz, the murder of a highway patrolman committed while Songer was under the sentence of imprisonment. Due to the presence of several mitigating factors, this Court overturned the death sentence and remanded for imposition of a life sentence despite a jury recommendation of death. The reasoning of this Court is instructive:

> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders, State v. Dixon, 283 so.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). To secure that goal and to protect against arbitrary imposition of the death penalty, we view each case in light of others to make sure the ultimate punishment is appropriate.
>
> Our customary process of finding similar cases for comparison is not necessary here because of the almost total lack of aggravation and the presence of significant mitigation. We have in the past affirmed death sentences that were supported by only one aggravating factor, (see, e.g., LeDuc v. State, 365 So.2d 149 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed. 2d 114 (1979), but those cases involved either nothing or very little in mitigation. Indeed, this case may represent the least aggravated and most mitigated case to undergo proportionality analysis.
>
> Even the gravity of the one aggravating factor is somewhat diminished by the fact that Songer did not break out of prison but merely

> walked away from a work-release job. In contrast, several of the mitigating circumstances are particularly compelling. It was unrebutted that Songer's reasoning abilities were substantially impaired by his addiction to hard drugs. It is also apparent that his remorse is genuine.

Songer v. State, 544 So.2d at 1011.

In Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), this Court noted that "Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Despite the presence of five statutory aggravating factors and three mitigating factors, Fitzpatrick's death sentence was reversed and the case remanded for imposition of a life sentence on the premise that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." Fitzpatrick, 527 So.2d at 811 (emphasis in original). Fitzpatrick equates with the instant case; neither is the most aggravated and unmitigated of serious crimes.

In Penn v. State, 574 So.2d 1079 (Fla. 1991), this Court approved the trial court's findings that the murder was heinous, atrocious, or cruel. In mitigation, the court found that Penn had no significant history or prior criminal activity and that he acted under the influence of extreme mental or emotional disturbance. This Court then concluded:

> Generally, when a trial court weighs improper

> aggravating factors against established mitigating factors, we remand for reweighing because we cannot know if the result would have been different absent the impermissible factors. Oats v. State, 446 So.2d 90 (Fla. 1984), receded from on other grounds, Preston v. State, 564 So.2d 120 (Fla. 1990). However, one of our functions "in reviewing a death sentence is to consider the circumstance in light of our other decisions and determine whether the death penalty is appropriate." Menendez v. State, 419 So.2d 312, 315 (Fla. 1982). On the circumstances of this case, including Penn's heavy drug use and his wife's telling him that his mother stood in the way of their reconciliation, this is not one of the least mitigated and most aggravated murders. See State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295(1974). Compare Smalley v. State, 546 So.2d 720 (Fla. 1989) (heinous, atrocious, cruel in aggravation; no prior history, extreme disturbance, extreme impairment in mitigation); Songer v. State, 544 So.2d 1010 (Fla. 1989) (under sentence of imprisonment in aggravation; extreme disturbance, substantial impairment, age in mitigation); Proffitt v. State, 510 So.2d 896 (Fla. 1987) (felony murdering aggravation; no prior history in mitigation); Blair v. State, 406 So.2d 1103 (Fla. 1981) (heinous, atrocious, cruel in aggravation; no prior history in mitigation). After conducting a proportionality review, we do not find the death sentence warranted in this case.

Penn, 574 So.2d 1079, 1083-4. See also McKinney v. State, 579 So.2d 80 (Fla. 1981)[Death sentence disproportionate given only one valid aggravator, and mitigation show that defendant had no significant criminal history, had mental

deficiencies, and alcohol and drug history].

In the instant case Dr. Krop, an expert in the field of brain dysfunction, testified without equivocation that in his opinion, Israel committed the murder under the influence of extreme mental or emotional disturbance, and that his capacity to control his behavior was substantially impaired. Dr. Krop supported those conclusions with a battery of psychological examinations conducted over a four year period; with interviews of Israel and his family; and with Dr. Krop's examination of the record evidence in this case. Moreover, there was proof that Israel has suffered from chronic and extreme drug abuse, that the burglary was undoubtedly motivated by a need to get money to buy crack cocaine; and that, after the murder Israel ingested crack cocaine for days. This court has held that such evidence is relevant and supportive of the mitigating circumstances of extreme mental or emotional disturbance and substantial impairment of a defendants' capacity to control his behavior. See Ross v. State, 474 Sp/2d 1170, 1174 (Fla. 1985)(trial court erred in not considering in mitigation, among other things, that defendant had drinking problems and had been drinking when he attacked the victim); cf. Carter v. State, 560 So.2d at 1166 (Fla. 1990) (jury override vacated upon considering evidence of defendant's extreme emotional disturbance, impaired ability to appreciate criminality of his conduct, amenability to rehabilitation, and

defendant "suffered the ill effects of chronic alcohol and drug abuse at the time of his offense").

In this case, there was no competent, substantial evidence in the record to refute the mitigating evidence. Rather, the record shows that Israel has low intellectual functioning; brain damage, and chronic drug abuser who lacked substantial control over his behavior on the day of Hagan's murder.

The state made a plea offer in this case that would have permitted Israel to plea to second degree murder with a concurrent sentence. Despite physical evidence (DNA) and a jailhouse confession, Israel refused the plea offer. Moreover, this case involves substantial mitigation, and this Court has held that substantial mitigation may make the death penalty inappropriate even when the aggravating circumstance of heinous, atrocious, or cruel has been proved. Smalley v. State, 546 so.2d 720 (Fla. 1989) (substantial mitigation made death penalty disproportional despite proof of heinous, atrocious, or cruel, in murder of twenty-eight-month-old-girl who died after defendant struck the child repeatedly, dunked her head in water, and banged her head on the floor); Blakely v. State, 561 So.2d 560 (Fla. 1990) (death sentence was disproportional in domestic dispute despite finding two aggravating circumstances; heinous, atrocious, or cruel; and cold, calculated, and premeditated.

CONCLUSION

A comparison of this case to those in which the death penalty has been affirmed leads to no other conclusion but that the death sentence must be reversed and the matter remanded for imposition of a life sentence. The jury vote was by a bare majority vote of 11-1. This Court should find that the circumstances here do not meet the test that this Court laid down in State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), "to extract the penalty of death for only the most aggravated, the most indefensible of crimes."

POINT VI

CONNIE RAY ISRAEL'S DEATH SENTENCE WHICH IS GROUNDED ON A SPLIT JURY VOTE OF (11-1) IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Eighth and Fourteenth Amendments requires a heightened degree of reliability when a death sentence is imposed. Lockett v. Ohio, 438 U.S. 586, 604 (1978). A jury's recommendation of life or death is a crucial element in the sentencing process and must be given great weight. Grossman v. State, 525 So.2d 833, 839 n.1, 845 (Fla. 1988). In the overwhelming majority of capital cases in Florida, the jury's recommendation determines the sentence ultimately imposed. See Sochor v. Florida, 504 U.S. 527 (1992) (Stevens, J., joined by Blackmum, J., concurring in part and dissenting in part).

Appellant recognizes that this Court has previously rejected arguments challenging the imposition of death sentences based on split vote jury recommendations. See e.g., Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990). However Appellant maintains that allowing a split vote of the jury to determine Israel's fate violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 2, 9, 16, 17, 21, and 22, of the Florida Constitution.

In addressing the number of jurors[10] in noncapital cases, the United States Supreme Court noted that no state provided for fewer than twelve jurors in capital cases, "a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." Williams v. Florida, 399 U.S. 78, 103 (1970). In a concurring opinion, Justice Blackmum agreed that a substantial majority (9-3) verdict in non-capital cases did not violate the due process clause, noted, however, that a 7-5 standard would cause him great difficulty. Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring).

Florida's scheme violates constitutional guarantees due to its failure to require unanimity in order to find that a particular aggravating circumstance exists, or that any aggravating circumstance exists. Unless a capital jury finds that the State has proven at least one aggravating circumstance beyond a reasonable doubt, a death sentence is not legally permissible. Thompson v. State, 565 So.2d 1311, 1318 (Fla. 1990). Florida's procedure currently allows a death recommendation even where five of the twelve jurors find that the State proved no aggravating factors beyond a reasonable doubt, as long as the other seven jurors conclude

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[10] Counsel recognizes that the cited cases wrestle with the appropriate number of jurors to determine guilt/innocence rather than penalty. Appellant cites them as persuasive authority by analogy.

otherwise.

Additional constitutional infirmity is noted when one realizes that the seven jurors voting for death could each find a different aggravating factor. Such a realization makes it abundantly clear that Florida's death sentencing scheme is rife with constitutional infirmity. Connie Ray Israel's death sentence, which is based on a split (11-1) vote of the jury, is unconstitutional. This Court should vacate appellant's death sentence and remand for imposition of a life sentence without possibility of parole. Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 2, 9, 16, 17, 21, and 22, Fla. Const.

POINT VII

BECAUSE JURORS SAW APPELLANT IN SHACKLES AND HANDCUFFS, THIS COURT MUST REVERSE HIS SENTENCES.

The trial court received a report of some scuffling and problems with Israel in the holding cell. (V XV p2610) Israel reportedly attacked one of the bailiffs with jurors in the nearby hallway. (V XV p2611) The defense counsel objected to Israel being shackled in the courtroom. (V XVII p3053)

The trial court erred by denying Israel's objection to being shackled in the courtroom. The U.S. Supreme Court has recognized that "the sight of shackles ... might have a significant effect on the jury's feelings about the defendant." Illinois v. Allen, 397 U.S. 337, 344 (1970); see also Dickson v. State, 822 P.2d 1122, 1127 (Nev. 1992) (reversing conviction because defendant was exposed to jurors while he was in shackles); Marquez v. Collins, 11 F.3d 1241, 1243 (5th Cir. 1994) ("We agree ... that the appearance of a defendant in shackles and handcuffs before a jury in a capital case requires careful judicial scrutiny. Shackling carries the message that the state and the judge think the defendant is dangerous ..."); cf. Estelle v. Williams, 425 U.S. 501 (1976) (recognizing that due process may be violated if a criminal defendant is exposed to the jury in jail attire).

Seeing Appellant in shackles and handcuffs sent a message to the jurors that

Appellant is dangerous and should be killed. Thus, the error cannot be deemed harmless, and Appellant's sentences must be reversed.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to:

As to Point I, II, IV and VII reverse and remand for a new trial;

As to Point III reverse and remand for a new sentencing;

As to Point V and VI vacate Connie Ray Israel's death sentence and remand for the imposition of a sentence of life in prison without possibility of parole

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Connie Ray Israel, DC #065135, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 28th day of September, 2000.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

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GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER