IN THE SUPREME COURT OF FLORIDA

JOHNNY LEE HOSKINS,	)	
	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC05-28
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES CITED:

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STATEMENT OF THE CASE

Following a 1994 jury trial, appellant was convicted of the first degree murder by strangulation of Dorothy Berger; burglary of a dwelling (with a battery therein); sexual battery with physical force likely to cause serious bodily injury; kidnaping with intent to commit murder, sexual battery, robbery, or inflict bodily injury or to terrorize; and robbery (taking a motor vehicle). Appellant's first penalty phase proceeding before the original jury was subsequently set aside by the trial judge. The jury in the second penalty phase unanimously recommended death, which the trial judge imposed, finding two aggravating circumstances: (1) the murder was committed during the course of a sexual battery or a kidnaping;

and (2) the murder was especially heinous, atrocious, or cruel(HAC). The trial judge found that the evidence did not support the aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP). Additionally, the trial judge found no statutory mitigators but did find almost a dozen nonstatutory mitigating circumstances each of which he gave little weight. ***Hoskins v. State,*** 702 So.2d 202, 204 (Fla. 1997).

On direct appeal, this Court affirmed Hoskins' convictions of first-degree murder, burglary of a dwelling, sexual battery with physical force, kidnaping, and robbery as well as the respective sentences for all but the first-degree murder conviction. This Court held Hoskins' sentence of death in abeyance and remanded this cause for the limited purpose of a evidentiary hearing to determine whether a PET-scan showed brain abnormality, and if so, whether the results of the PET-scan would cause Dr. Krop to change his trial testimony. ***Hoskins v. State***, 702 So.2d 202, 210 (Fla. 1997).

On remand, the trial judge concluded that the PET scan did show an abnormality and that, as conceded by the state, Dr. Krop's testimony changed as a result of the PET-scan. As a result, this Court vacated Hoskins' sentence of death and remanded this cause for a new penalty phase proceeding. ***Hoskins v. State***,

735 So.2d 1281 (Fla. 1999).

By stipulation, the parties agreed that all evidence introduced at the previous guilt phase was still in evidence for purposes of the new penalty phase. (IX 557-63) Defense counsel adopted all prior motions filed since the beginning of appellant's proceedings which began in 1990. (I 17) Appellant filed numerous constitutional attacks on Florida's death sentencing scheme. The trial court denied them all.

During voir dire, the trial court refused to allow defense counsel to display a post-mortem photograph of the victim to the potential jurors. (VII 162-66)

During jury selection, appellant objected to the prosecutor's use of a peremptory challenge on the sole African-American juror. The trial court asked the prosecutor for a race-neutral reason. Defense counsel took exception to the genuineness of the prosecutor's stated reason. The trial court nevertheless allowed the peremptory challenge and Ms. Harp was excused. (IX 504-13)

The trial court overruled appellant's objections to victim impact evidence. The trial court also denied appellant's request to read a contemporaneous limiting instruction prior to the testimony of the victim's niece. (XI 829-40)

Appellant sought to modify the standard jury instructions at the penalty phase. The trial court rejected most of the special requests. (XIII 1290-1399; XIV

1400-17, 1541-49; VII 14-20)

Following deliberations, the jury recommended (11 to 1) that Johnny Hoskins should die for his crime. (VI 918) The jury unanimously found two aggravating factors (felony murder and witness elimination). Ten of the jurors agreed on the third (HAC). (VI 918) After a ***Spencer***[1] hearing, the trial court sentenced Johnny Hoskins to death. The trial court found three aggravating circumstances. The court rejected the two statutory mental mitigators. The trial court found that the evidence supported numerous mitigating factors, but gave the vast majority little weight. (VI 990-1030)

Appellant filed a timely notice of appeal on (VI 1032). This brief follows.

[1] ***Spencer v. State***, 615 So.2d 688 (Fla. 1993)

STATEMENT OF THE FACTS

State's Case-in-Chief

Johnny Hoskins, the appellant, stood before the jury already convicted of first-degree murder.[2] Therefore, the state presented an abbreviated version of facts on appellant's retrial.[3] Bob Sarver, the lead detective, and Dr. Kris Sperry, the pathologist who conducted the autopsy, were the only witnesses presented during the state's case-in-chief, other than one victim impact witness.

Dorothy Berger disappeared from her home one weekend in October of 1992. Police investigation revealed that Ms. Berger's bed sheets had a blood stain that matched Dorothy Berger. Despite a thorough search using the latest forensic devices, police found no other blood at the scene. (X 647-49) The same bed sheet had a semen stain that matched Johnny Hoskins. (X 638-49) A footprint at the side of the bed matched the size and design of Johnny Hoskins' tennis shoe. (X 651-53) At the time of Berger's disappearance, Hoskins lived next door. (X676-77)

Johnny Hoskins' parents and extended family lived in a small town in Crisp County, Georgia about ten miles from Cordele. (X 655-56) Appellant's father told

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[2] The court informed the jury of Hoskins' other convictions of sexual battery, kidnaping, burglary, and robbery (where Berger was also the victim).

[3] By stipulation, the trial judge read and considered the transcript of Appellant's first guilt/innocence phase, but did not read or rely on any of the prior

police that his son had arrived at their home near Cordele at approximately 5:00 a.m. on October 19, 1992 driving a car.[4] (X 655-56, 667) Hoskins' brother noticed what appeared to be blood dripping from the rear, driver's side wheel well. (X 668)

The appellant asked his mother to borrow a shovel. She complied with his request and Hoskins drove away. He was gone for approximately thirty minutes before returning. (X 670) The following Monday, the police stopped Hoskins for a traffic violation in Cordele. Hoskins was driving Berger's car at the time. (X 655-56) A search of the car revealed vegetation and blood stains in the trunk. (X 657-60) The blood in the trunk belonged to Dorothy Berger.

Police found Berger's body buried in a peanut field approximately one mile from Hoskins' parents' home. (X 670-73) Berger was wearing a green and white house dress. She had a cloth tied around her neck covering her face. Berger's hands were tied tightly behind her back. (X 673-75, 698) A subsequent autopsy indicated that Ms. Berger had been raped by Johnny Hoskins. (X 676, 671-77)

Dr. Harry Krop, a neuropsychologist, evaluated Johnny Hoskins on three

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penalty phase transcripts. (I 57-67, 113-14)

[4] The car belonged to Dorothy Berger. (X 655-56)

different occasions over a period of ten years.[5] (XII 1108-35) During the interviews, Hoskins told Dr. Krop about the crimes he committed that day. Specifically, Hoskins went next door to use Berger's phone to call his estranged girlfriend. Hoskins' girlfriend kept hanging up on him. Eventually, Berger asked Hoskins to leave. When he did not leave right away, Berger became angry and made a racial comment. Hoskins became enraged, knocked Berger down, raped her, tied her up and put her in the trunk of her own car. (XII 1171-74, 1178-79) Hoskins then drove to Georgia where he borrowed a shovel to bury Berger, whom Hoskins assumed was dead. When he opened the trunk, he found that Berger was still alive. She kicked at him. He responded by grabbing her by the throat, pulling her out of the trunk, and hitting her with a shovel. (XII 1174-76)

The autopsy revealed that Berger had blunt trauma about her face, head, and neck. She had contusions, lacerations, and abrasions on her face and head and a fracture to her cheek bone. (X 706-7) The scalp laceration and a tear to her ear, which would have caused massive bleeding, were caused by a blow from a narrow instrument. (X 704-5) These blows would likely have rendered the victim unconscious. (X 729-32)

[5] Dr. Krop testified during appellant's case-in-chief. However, Hoskins made admissions during Dr. Krop's most recent evaluation that surprised defense

The blow to the head which rendered Berger unconscious could have been the first blow dealt. While it could have resulted in the victim regaining consciousness within fifteen to twenty minutes, the medical examiner opined, that Berger could have remained unconscious throughout being bound and gagged, raped, and strangled. (X 782-85) If she was unconscious during the other injuries, she would not have felt any pain from those injuries. (X 785) The blood found in the trunk of the car could have drained from the body over the course of many hours after death. (X 827)

Berger had a black eye and bruises where the gag was tightly tied. (X 706-8) The bruises could have been caused, the doctor opined, by fists or feet. (X 715-16, 727-29, 732-35) There were wounds to her arms, hands, and knees which the doctor believed were defensive wounds. These wounds could have been the result of a simple fall, but the doctor thought that scenario highly unlikely. (X 750-57; XI 821-23)

Multiple areas of bleeding under the scalp indicated to the doctor that the injuries occurred while the victim was alive. The doctor could not tell the sequence of the blows, but stated that the victim would have lost consciousness upon receiving the blow to the head. (X 729-32, 745) The doctor also found

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counsel and bolstered the state's case.

evidence of manual strangulation, which he determined to be the cause of death. The strangulation occurred after the sexual battery and the beating. (X 735-40) If conscious at the time of the strangulation, Berger would have lost consciousness within ten or fifteen seconds of being strangled, the medical examiner opined. (XI 810) The victim also had fractures to seven ribs which the doctor believed were caused during the strangulation by pressure on the chest, like that of someone kneeling on the chest. (X 741-45)

Linda Peacock, Dorothy Berger's niece, told the jury how kind, generous, and elegant her aunt was. Despite the fact that she was eighty, Ms. Berger's appearance was extremely important to her. She was very careful about her make-up, her fingernails, and her hair. She was one of a circle of widows who lived in the neighborhood who watched out for one another. Ms. Peacock was very close to her aunt Dorothy and missed her terribly. Before she died, Dorothy and Linda would call each other every night and every morning. Linda would always love her aunt. (XI 853-54)

Appellant's Case for Mitigation.

A. Johnny's Childhood and Family Background.

Johnny Hoskins was a child of rural poverty. He was the oldest brother in a family of seven children. (XIII 1262-65) His two sisters died as teenagers. (XIII 1265) Johnny's father was a poor sharecropper The family lived in a shack without indoor plumbing and with only a wood stove for heat. (XIII 1248-49, 1257, 1271)

At school, Johnny was a loner. He lacked the social skills to relate to the other children. (XIII 1226) Despite his shortcomings, Johnny was not a troublemaker at school. He behaved in class. (XIII 1229-31)

It was not surprising that Johnny did not readily take to school work. He came to school without the skills, the culture, the education, and the economics that other children had. He was deprived. (XIII 1222) He did not have the proper nutrition or social support that would have allowed him to thrive. (XIII 1222-24)

Johnny's father had a drinking problem. This caused him to be abusive to Johnny's mother. Johnny, being the oldest and largest boy, would stand up to his father and protect his mother from further abuse. (XIII 1250, 1259, 1273)

Johnny had severe academic difficulties in the seventh grade. (XIII 1200, 1210) A guidance counselor referred Johnny to the school's special education unit

for assessment. The school psychologist administrated tests which showed that Johnny had a verbal scale IQ of 70, a performance IQ of 75, and full scale IQ of 71. (XIII 1211-12) Johnny's achievement test results corroborated the intelligence test results. (XIII 1211-13) Johnny's school grades also revealed that he was simply not performing as well as the other children. (XIII 1215-1216)

Based on the criteria in place at the time, Johnny was considered to be mentally retarded. As a result, he was placed in a class with other educable, mentally-retarded children. (XIII 1214) Johnny failed the seventh grade twice. (XIII 1218) He dropped out of school after he repeated the tenth grade twice. (XIII 1219)

Once Johnny quit school, he commenced work in farming, giving half of his earnings to put food on his family's table. (XIII 1247-48, 1257, 1267, 1276) Johnny served as a father figure to his younger siblings, playing sports with them and teaching them to drive. (XIII 1247, 1272) He had a very loving relationship with all members of his family, including his abusive father. (XIII 1248-51, 1259, 1262-66, 1272, 1277-78) Johnny also had a very special place in his heart for animals. He cared for the family pets like they were his own children. (XIII 1250-51, 1267-68, 1274-75)

B. Johnny's Brain Damage.

Dr. Joseph Wu is the clinical director of the University of California of Irvine College of Medicine Brain Imaging Center. (XI 893) Dr. Wu is also board certified in the field of psychiatry. (XI 894) Recognized as an expert in the field, Dr. Wu supervises a staff that conduct PET scans. During his career, Dr. Wu has been involved with over 5,000 brain PET scan studies of a neuropsychiatric nature. (XI 895) His primary responsibility is the interpretation of PET scans. (XI 895) Dr. Wu was offered and accepted as an expert witness allowed to express opinions in the area of PET scans and neuropsychology. (XI 896)[6]

PET is short for positron emission tomography. The PET scan is a way of getting color pictures of brain function as opposed to pictures of brain structure. (XI 897-98) Johnny Hoskins' PET scans were acquired at the Jacksonville facility by Dr. Frank Wood. (XI 897) Dr. Wu viewed these scans on the monitor at the Jacksonville facilities. As part of the evaluation, Dr. Wu also looked at Dr. Woods' normal control group at Wake Forest University. (XI 897)

In Dr. Wu's expert opinion, Johnny Hoskins' PET scan showed a pattern of

[6] Dr. Wu had testified on the subject in at least 40 to 50 court proceedings. (XI 896) Other than his salary from the University of California, Dr. Wu received no additional compensation for his testimony. His employer, the university, received that benefit. (XI 896-97)

hypofrontality. In other words, the relative pattern of activity in Hoskins' frontal lobe is low compared to other areas of his brain. (XI 902) One of the most important functions of the frontal lobe is the regulation of aggression. People with frontal lobe damage are more likely to have difficulty controlling their aggression. (XI 903) Dr. Wu found significant impairment in Hoskins' frontal lobe. (XI 903-4)

Dr. Wu's conclusions were consistent with Johnny Hoskins' history. Hoskins had suffered head trauma during a motorcycle accident. He also displayed a learning disability in his youth. (XI 922) Dr. Wu also explained that a history of child abuse interacts with an abnormal brain to increase the likelihood of difficulty regulating aggressive impulses. (XI 922-23)[7] Dr. Wu described Hoskins' brain as "very abnormal." (XI 927) His frontal lobe abnormality appears to have been present when he was a child. It may have been exacerbated by his motorcycle accident and other brain trauma. The imaging data shows decreased frontal lobe activity. These findings were consistent with psychological tests performed by other doctors. (XI 926-27)

Dr. Frank Wood is a professor of neurology and neuropsychology as well as an associate in radiology at Wake Forest University School of Medicine. As chief

of the neuropsychology section at Wake Forest, Dr. Wood's focus for the past twenty-five years has been understanding brain function and dysfunction. (XI 972-73) As a neuroscience faculty member, Dr. Wood is a specialist in developmental and behavioral neuroscience with a focus on brain imaging. (XI 973-74) Dr. Wood was accepted by the court as an expert and allowed to express opinions in the area of brain imaging and neuropsychology. (XI 986) At the request of Hoskins' lawyers, Dr. Wood administered a PET scan of Hoskins' brain at a hospital in Jacksonville. (XI 986-87) More precisely, a substance equivalent to radioactive sugar was injected into Hoskins. After approximately forty minutes, Hoskins was placed in a scanner where his brain functioning could be seen. (XI 986-90) Dr. Wood concluded:

> This brain is abnormal in the degree to which the front half or the frontal lobes are active; particularly the front half of the brain is underactive with respect to the back half of the brain against normal reference groups scanned in the same way with the same procedures.

(XII 1010)[8]

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[7] The frontal lobe controls impulse as well as planning. (XII 1064)

[8] When considered in association with his history, Dr. Wood described Hoskins as a "very unusual case." (XII 1034) Hoskins' reduced frontal activity results in poor judgment, lack of restraint and immaturity. (XII 1033) Hoskins' brain abnormality is in the bottom two percentile of the general population. (XII 1063)

Dr. Wood corroborated his findings by examining Johnny Hoskins' school records. Teachers reported that Hoskins sometimes displayed poor attention. Hoskins sometimes disturbed other children in his class. However, Hoskins demonstrated some degree of cooperation. He was not antagonistic toward authority but was rather submissive or indifferent. (XII 1025) Hoskins was of low intelligence, especially in arithmetic skills. His type of inattention was unusual and suggested something other than a garden-variety hyperactive child syndrome. (XII 1027-28) The school considered Hoskins for special placement in an educable mentally-retarded class. Even as a child, organic brain dysfunction was considered. (XII 1028-29)

Dr. Harry Krop, an expert witness in the areas of forensic psychology and neuropsychology, conducted a neurological assessment of Johnny Hoskins. Dr. Krop first evaluated Hoskins on October 18, 1993. (XII 1105) Dr. Krop conducted neuropsychological standardized tests in an attempt to assess Hoskins' impairment. (XII1106-7) Additionally, Dr. Krop reviewed police reports, depositions, school records, the PET scan, and consulted with other doctors involved in the case. (XII 1107-8) Additionally, Dr. Krop confirmed that Hoskins had suffered head injuries in the past and had contracted Rubella (mumps) as a child. (XII 1138)

Hoskins' school records indicate that he performed very poorly. Based upon

his scores and his low IQ (71, just barely above the mental retardation range of intelligence), there was a recommendation that he be placed in special classes for the educable mentally retarded.[9] (XII 1139-40) A psychological evaluation done in 1977 indicated that Hoskins' mental age was significantly lower than his chronological age of fourteen. (XII 1140) Even at that time, testing indicated some form of brain damage. (XII 1140)

After his examination of Hoskins in 1993, Dr. Krop concluded that Hoskins suffered from impairment to the frontal lobe. (XII 1144) The frontal lobe is the last area of the brain to develop. (XII 1145) Recent studies show that male teenagers as old as sixteen or seventeen possess frontal lobes that are not completely developed. (XII 1145-46) A person without full functioning of this area of the brain can have difficulty controlling behavior (violent or otherwise), once the behavior has commenced. (XII 1146-47) The subsequent PET scan corroborated Dr. Krop's opinion and conclusions. (XII 1147-49) People with this type of impairment also have problems with impulse control. (XII 1152)

Dr. Krop evaluated Hoskins again in July, 2003. Specifically, Dr. Krop

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[9] Hoskins scored an 84 (low or/average) on the IQ test administrated by Dr. Krop in 1993. Krop explained that Hoskins was older (29) and had more life experience. That score placed Hoskins in the eighth percentile of the population. Although his intelligence was fairly low, Krop concluded that Hoskins is not

wanted to administer newer more sophisticated psychological tests that were developed specifically to assess functioning in the frontal lobe. (XII 1154) These state-of-the-art psychological tests further corroborated Dr. Krop's original conclusion that Hoskins suffers from frontal lobe impairment. The tests also confirmed that Hoskins was not malingering. (XII 1154-56)

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mentally retarded. (XII 1140-41)

State's Rebuttal

Dorothy Berger's hands were bound behind her back using clothes line. Law enforcement searched but could not find any similar clothes line in Berger's house. (XIV 418-21)

Karen Palladino, a psychologist and school administrator from Brevard County, reviewed Hoskins' school records. Although Palladino had no connection or exposure to Johnny Hoskins personally, she saw nothing in his records to indicate that he was definitely a hyperactive child. (XIV 1422-31) Although there was reference to brain damage in Hoskins' school records, Palladino saw nothing to indicate frontal lobe impairment specifically. (XIV 1433-34, 1438-39) Palladino conceded that Hoskins' IQ was 71, which was in the borderline range of retardation, on his test date in 1977. (XIV 1440-42)

Helen Mayberg, a medical doctor, was accepted as an expert in psychiatry, neurology, neuropsychiatry, and PET scans. (XIV 1447-53) At the prosecutor's request, Dr. Mayberg examined Hoskins' PET scans. (XIV 1461) Dr. Mayberg took exception to the conclusions drawn by the three defense experts. Dr. Mayberg found Hoskins' actions during the criminal episode inconsistent with an individual with gross abnormality of the frontal lobe. (XIV 1496-1498) She also expressed disagreement with the doctors' methods of performing Hoskins' PET

scan and interpreting the results after comparing to the so-called "normals." (XIV 1474-82, 1511-35) Dr. Mayberg opined that Dr. Woods' conclusion was not supported by the PET scan findings.

Spencer Hearing

The only additional evidence presented at the ***Spencer***[10] hearing related to Johnny Hoskins' dramatic change in personality and character over the years following his first trial. Randy Moore was Hoskins' original lawyer at his first trial, as well as most of Hoskin's retrials. Moore conceded that, at the time of Hoskins' first trial, Johnny was one of the most hostile and uncooperative clients that Moore had ever represented. (I 1-74) He was a difficult client and had a very threatening demeanor. (I 73-74)

When Mr. Moore visited Johnny in prison following this Court's reversal on direct appeal, Mr. Moore found Johnny to be a changed man. (I 75-76) During the several years of representation that followed, Johnny Hoskins remained pleasant, engaging, and well-spoken. (I 76-77) Mr. Moore attributed Hoskins' marked change to his religious conversion to Islam. (I 76) Unlike during his first trial, Hoskins was compliant and polite with everyone; lawyers, judges, and law enforcement. (I 77-78)

The trial court agreed to take judicial notice of Hoskins' department of corrections records. (I 78-82) Hoskins' DOC records showed twelve disciplinary reports over a span of ten years. The violations were, for the most part, relatively

insignificant. (VI 1028)

Johnny Hoskins spoke at the ***Spencer*** hearing. He took the opportunity to apologize for taking Dorothy Berger's life. He apologized to Berger's family for removing their loved one from their lives. He asked for the family's forgiveness. He also apologized for the time and cost of the court proceedings over the years. Hoskins announced his willingness to accept whatever judgment that the court saw fit to impose. Hoskins had made his peace with God. (I 84-87)

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[10] ***Spencer v. State***, 615 So.2d 688 (Fla. 1993).

SUMMARY OF THE ARGUMENT

Appellant contends that an error in jury selection entitles him to a new penalty phase. Specifically, the prosecutor stated a pretextual reason for exercising a peremptory challenge to excuse juror Harp. Ms. Harp was one of the few, if not the only, African-Americans in the jury pool. Ms. Harp had a godson who was in prison for a violent felony. The prosecutor used that fact as a race-neutral reason. The stated reason was not genuine where other jurors with similar circumstances were acceptable to the prosecutor.

Appellant faced a retrial of his penalty phase before a new jury following reversal by this Court. His convictions were previously affirmed on appeal. As such, guilt was not an issue. Additionally, all of the evidence admitted during appellant's prior guilt phase was stipulated to be in evidence for the new penalty phase. During jury selection, defense counsel requested permission to show the potential jurors a photograph of the deceased victim during voir dire. The trial court improperly restricted appellant's voir dire by refusing to allow such a procedure. The photograph was already in evidence. Defense counsel should have been allowed to display the evidence to the potential jurors in order to determine their ability to deal with such horrific evidence. Many of the potential jurors expressed their uncertainty about viewing gory photographs, because they had

never in their lives viewed that type of photograph.

Although the victim impact evidence was brief, such evidence, by its very nature, is emotional and heart wrenching. Defense counsel timely requested a limiting instruction prior to the testimony. Section 90.107 entitles a party to a limiting instruction at the time the evidence is received. The failure to instruct the jury in a timely fashion entitles appellant to a new penalty phase. The jury was not told until a full seven days later how to treat the emotional testimony of Dorothy Berger's niece.

Appellant submits that the trial court erred in instructing the jury on the applicable law of the case. Appellant requested appropriate modifications of the jury instructions. The requested instructions were based on appropriate case law. The instructions as given did not adequately guide the jury and did not constitutionally narrow the class of defendants eligible for the ultimate sanction.

Appellant submits that the trial court improperly sentenced him to death. The trial court relied on aggravating factors which were not supported by the evidence. The trial court ignored or improperly weighed valid mitigating evidence. A proper assessment of the aggravation and mitigation should have resulted in a sentence of life imprisonment.

Appellant also challenges the constitutionality of Florida's death sentencing

scheme. Recognizing contrary precedent from this Court, appellant submits that Florida's statute violates the Sixth Amendment of the United States Constitution. Under ***Ring v. Arizona***, 536 U.S. 584 (2002), the jury should be the actual sentencer. Florida's statute and jury instructions unconstitutionally identify the trial judge as having sole responsibility for the imposition of the appropriate sentence.

ARGUMENTS

POINT I

IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE STATE'S USE OF A PEREMPTORY CHALLENGE TO AN AFRICAN AMERICAN JUROR WHERE THE REASON GIVEN BY THE PROSECUTOR WAS PRETEXTUAL AND NOT GENUINE.

An individual's right to an impartial jury representing a cross-section of the community is guaranteed by Article I, Section 16, of the Florida Constitution and Sixth and Fourteenth Amendments to the United States Constitution. The purpose of peremptory challenges used during jury selection is to promote the selection of an impartial jury. "It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury." ***State v. Neil***, 457 So.2d 481, 486 (1984); ***see also Batson v. Kentucky***, 476 U.S. 79 (1986).

During jury selection, the prosecutor used a peremptory challenge on Ms. Harp:

> MR. BROWN [the prosecutor]: Judge, we would move to strike

number twenty-four, Miss Harp.

MR. CHANG [defense counsel]: Judge, we would object and ask the State to show a race-neutral reason. Let the record reflect she's the only African-American person on the venire.

THE COURT: Well, she certainly is an African-American, and whether she's the only one or not, I'm not sure. But I'll still find that she is a member of a group and sufficient predicate has been laid for the challenge.

What's your reason here, Mr. Brown?

MR. BROWN: Judge, the reason on Miss Harp, she indicated her godson, who she indicated some bit of closeness, serving a long-term prison sentence, it was for a violent felony. She also indicated a number of other family members and friends who had been convicted, have been to prison.

Just the total number of them causes us concern when we're here on a sentencing proceeding. It's on that basis, Your Honor, we would move to strike her.

THE COURT : Mr. Mitnik, there may be an objection. Do you wish to be heard?

MR. CHANG: Judge, there are also a number member [sic] of jurors where they have family members or they, themselves, have convictions or contacts with the law; specifically I'm going from yesterday's list, juor number twenty, Mr. Mayhue said his sister-in-law had a conviction for retail theft; Mr. Ingraham is gone, we struck him, but he was otherwise acceptable to the State, so he had contact with someone from the church.

Let me find some others, Judge. But I think there are certainly others. Mr. Wilborn - - well, he was excused for cause, but had a DUI; Mr. Nopper, juror number eleven from yesterday's seating chart, has a nephew who's also been convicted of a DUI; I believe Mrs. Loftis, who is also still on the panel, has a son in college who had - - I believe it turned out to be traffic, but it's criminal traffic, actually did

some time in, I believe she indicated; Mr. Campione had a friend who has a felony conviction.

So there are a number of other persons on the potential jury panel that has [sic] convictions or family members that has [sic] convictions, and I don't think that rises to a sufficient level regarding Miss Harp.

She has otherwise answered to the Court on the States's inquiries that she supports the death penalty; that she can follow the law; that her family and nephews and that stuff, she could set all that aside and it absolutely would not affect her. She has told the State on every one of the questions that she could put that aside and follow the law.

THE COURT: Well, certainly it does not in any way rise to a challenge for cause and that's not what's being requested here.

The problem as I see it - - and Lisa, I hate to tell you this, but I'm going to ask you to go back and pick up some of that so I can be refreshed on that - - the problem is the sheer magnitude of her family's exposure and she expressed that, by my recollection, in terms of something like "I got more than I can count," if I'm thinking of the right person.

MR. CHANG: No, Judge, that was Miss Sauro, juror number six today, who indicated that.

THE COURT: Well - -

MS. STEWART [a prosecutor]: That was her brother.

MR. CHANG: That her brother had so many.

THE COURT: I remember that, her brother had so many she couldn't count, but in talking about the number of family members and number of contacts with law enforcement. But, you know, that was yesterday, today's today.

And Lisa, if you would, please, I'd like for you to find that and read it back.

* * *

(Thereupon, the following was read back by the Court Reporter:

MS. BROWN: Miss Harp, I couldn't remember if you had raised your hand or not.

MS. HARP: Yes. I have several people in my family, friends, that has [sic] been arrested. My godson right now is serving time in prison right now with several counts of felonies.

MR. BROWN: Okay. Any of those violent? Violent felonies?

MS. HARP: My godson.

MR. BROWN: Okay. Would that affect you sitting as a juror in this case?

MS. HARP: No.

MR. BROWN: Okay. Obviously you've heard the charges.

MS. HARP: Yes.

MR. BROWN: You know the Defendant's been found guilty.

MS. HARP: Definitely.

MR. BROWN: And you can tell from the charges.

MS. HARP: Yes.

MR. BROWN: Would that affect you at all?

MS. HARP: No.

MR. BROWN: Do you have any ill will or resentment from the law enforcement or prosecutors?

MS. HARP: I really don't, since it was out of state and I didn't really follow it close like that; just from hearsay about what was happening with him, so... .

MR. BROWN: Okay. And would the fact that you know someone - - you're obviously close to someone, it's your godson; they went to prison.

MS. HARP: Yes.

MR. BROWN: Would that make it uncomfortable - - any discomfort for you or uncomfortable at all for you to make a decision in this case for life or death or parole for twenty-five years?

MS. HARP: No.

MR. BROWN: Can you do it?

MS. HARP: Yes, I can.

MR. BROWN: Thank you. The only way I know is if I ask.

MS. HARP: That's right.(IX 504-10) After the read back by the court reporter, the argument continued:
MR. CHANG: Judge, my recollection that the Court Reporter just read back is about where my recollection where she explained to Mr. Brown in his line of questioning. Those are the points that Mr. Brown - - one was the godson, I didn't recall it was in another state, but she clearly indicates that it was, and that she didn't really follow it, most of what she learned was learned through hearsay, was her term, based on what other family members said.

MR. BROWN: Judge, if I may respond.

THE COURT: Yes.

MR. BROWN: Judge, what Defense Counsel has done in opposition and argument against this is pick out particulars who had one person and the number of them shoplifting, the DUI, the one's [sic] we've already addressed. You know, that's much lower magnitude than, first of all, somebody's who's in prison for a crime of violence and somebody as close as a godson.

And not only in addition to that, as Miss Harp indicated she has a number of family, friends, and family members in addition to the godson, so we're not talking about one person, to her it's a number, and she's got one in prison, she's close to in prison, for a violent felony.

When you put everything together, there's no one else that's even close to that, nobody else has more than a single person who's still on the panel, no one else that's even close to her, and it's for that basis - - it's certainly race neutral. We're here for sentencing and she's got obviously a number of family members and friends who have been sentenced that causes us some concerns and it's a valid use of a peremptory strike.

THE COURT: Well, certainly the proffered reasons are neutral and reasonable. I don't think that somebody else has got somebody else somewhere who's been arrested or another family member or friend that's been convicted of a crime and therefore this is not neutral and not reasonable, I think you've got to look at the overall picture.

Certainly the answers given by Mrs. Harp support the reasons proffered for the neutrality of the challenge and, you know, I just - - I can't find that the reasons given are pretextual; they're not, they're real. And if there's to be anything left of peremptory challenges, and I believe there is, that once the Court determines that the reasons proffered are both neutral and reasonable, which I've determined, and that the answers given in Voir Dire support those reasons, which they do, the Court Reporter has just read it back and confirmed it, and once the Court finds that the reasons are not pretextual as an excuse to excuse the juror for racial reasons, I think it's appropriate that the challenge be allowed and that the objection to the challenge be

> overruled.
>
> Had that same challenge been made of any other member of the venire who testified identically to Ms. Harp, without regard to black or white or Hispanic or any other kind of group, male, female, whatever, old, young, it would have passed muster with absolutely no problem; I don't see why it should be any different here.
>
> The challenge will be allowed. That will be Defense five - - I mean State five.

(IX 510-13) Appellant submits that the prosecutor's reason for excusing Ms. Harp was pretextual. Other veniremen with circumstances similar to Ms. Harp were not objectionable to the state. The only difference was that the other veniremen were not African-American. The prosecutor's purported "race-neutral" reason was not genuine. When considering peremptory challenges based on race, the standard of review on appeal is "clearly erroneous." ***Melbourne v. State***, 679 So.2d 759 (Fla. 1996).

In ***Melbourne v. State***, 679 So.2d 759 (Fla. 1996) this Court established the following three step procedure for analyzing the racial, ethnic, and/or gender neutrality and genuineness of a peremptory challenge:

> Step 1: A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venire person is a member of a distinct racial group, c) request that the court ask the striking party its reason for the strike.
>
> Step 2: At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation.

> Step 3: If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained.

679 So.2d at 764. This Court reiterated this test in ***Rodriguez v. State,*** 753 So.2d 29 (Fla. 2000). As this Court explained in ***Rodriguez***, in step 3, the court's focus is on the **genuineness** and *not* the reasonableness of the explanation. Further, the relevant circumstances that the court is to consider in determining whether the explanation is pretextual includes such factors as the racial makeup as the venire; prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged venire person; or singling out the venire person for special treatment. Hoskins' prosecutor's explanation was clearly pretextual where the reason stated for the challenge clearly applied to other jurors who were never challenged by the state. A trial court is required to proceed to step 3 of the ***Melbourne*** analysis and independently consider the genuineness of the reason, given all the circumstances surrounding the strike. Failure of the trial court to do this constitutes reversible error. ***Anderson v. State***, 750 So.2d 741 (Fla. 3rd DCA 2000)

The record reveals several reasons that demonstrate that the prosecutor was not genuine in his stated race-neutral reason. First and most importantly, the record on appeal does not support the prosecutor's and ultimately the trial court's

interpretations of Ms. Harp's answers during voir dire. Ms. Harp clearly stated that she had "several people" in her family and circle of friends that had been **arrested**. (VII 93; IX 508) The record also clearly reveals that the only arrest for a **violent** felony in her family or in her circle of friends was that of her godson. (VII 93-94; IX 508) Harp said he was serving time in prison "right now." She never volunteered and the prosecutor never asked the length of his sentence. Hence, the prosecutor's erroneous statement that Ms. Harp's godson was serving a "long-term prison sentence" is not supported by the record nor is the prosecutor's statement that Ms. Harp had "a number of other family members and friends who had been convicted, have been to prison." (IX 505) Ms. Harp clearly states that "several" people in her family and friends had been **arrested**. When asked if any of the arrests were for violent felonies, Ms. Harp clearly states that her godson is the **only** one. Hence, Harp's godson is the only family or friend who has been convicted; who has been charged with violent crime; or who has served **any** prison time. The prosecutor's "reasons" are not supported by the record on appeal.

In addressing this issue, the trial judge initially confused Ms. Harp's answers with those of Ms. Sauro. Then the court reporter read back Ms. Harp's answers. (IX 507-8) Ultimately, the trial court erroneously concluded that no one else on the panel had "somebody else somewhere who's been arrested or another family

member or friend that's been convicted of a crime and therefore this is not [sic] neutral and not [sic] reasonable, and I think, you've got to look at the overall picture." (IX 511-12)

Like the prosecutor, the trial court's recollection of the veniremen was faulty at best. Specifically, juror Shoeman's brother was arrested and pled to a felony, albeit not a violent one. Specifically, juror Shoeman's brother pleaded guilty to bribery as a police officer, and lost his job. The prosecutor did not ask if Shoeman's brother had to serve any prison time. (VII 85-86) Juror Shoeman ultimately sat on Johnny Hoskins' jury. (IX 514)

Ms. Campione had a friend who had been convicted a felony in Arkansas years ago. The state made no inquiry as to whether that felony was violent or not.[11] (VII 86-87) The state specifically found Ms. Campione acceptable and **she ultimately sat on Johnny Hoskins' jury**. (VII 360; IX 514)

Juror Cottrill's son was arrested for a felony and served at least some period of incarceration. The state asked no questions of Ms. Cottrill regarding the nature of her son's felony.

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[11] The failure of the state to inquire further is a factor to consider in determining the pretextural nature of the prosecutor's alleged race-neutral reason for excusing Ms. Harp. ***Slappy v. State***, 522 So.2d 18 (Fla. 1988) receded from on other grounds ***Melbourne v. State***, 679 So.2d 759 (Fla. 1996).

Ms. Cottrill: Yes, I had a son arrested.

Mr. Brown [prosecutor]: Okay. Was that here locally or was it somewhere else.

Ms. Cottrill: Here locally.

Mr. Brown: A felony? Misdemeanor?

Ms. Cottrill: Yeah.

Mr. Brown: Felony?

Ms. Cottrill: Felony.

Mr. Brown: Was it recent?

Ms. Cottrill: He was in jail - - he got out this past year.

Mr. Brown: Okay. Is it concluded?

Ms. Cottrill: As far as I know, yes, it is.

(VII 92) The prosecutor questioned Ms. Cottrill about her ability to be fair in spite of her son's felony conviction and resulting incarceration. **The prosecutor never questioned Ms. Cottrill regarding the nature of the felony**. The Defense counsel subsequently asked and ascertained that Ms. Cottrill's son served time for habitually driving with a suspended license. (VII 246-48) The prosecutor subsequently excused Ms. Cottrill for cause for reasons unrelated to her son's conviction and incarceration. (VIII 307)

Similarly, Mr. Ingraham, a church pastor, had a member of his congregation arrested for sexually abusing his own children. (VII 91-92) Acting as his spiritual advisor, Ingraham visited the felon in prison five or six times. (VIII 264-65) Despite these facts, Ingraham appeared to be perfectly acceptable to the state and was ultimately peremptorily challenged by defense counsel. (VII 130; VIII 316)

Mr. Salley had been arrested when he was eighteen for drinking underage. Additionally, his nephew was currently serving time in prison for burglary and drug offenses. (VIII 390-92) In spite of this, Mr. Salley was acceptable to the prosecution and **did in fact serve on Johnny Hoskins' jury**. (IX 542)

Ms. Sauro's brother had been arrested "more times than I can count and I couldn't even remember all the charges." (VIII 393) Despite this provocative statement by Ms. Sauro, the prosecutor never asked Sauro the nature of her brother's crimes nor their disposition. Nevertheless, Ms. Sauro was perfectly acceptable to the prosecution as the first alternate juror. (IX 514) However, Sauro did not serve in that capacity as the defense struck her.

Ms. Harp expressed no difficulty in following the law. She had no reservations about the death penalty. (VII 95, 121) She held no grudges against law enforcement. (VII 94-95) Ms. Harp accepted that Hoskins was already guilty of his crimes. (VII 107) She was indifferent to the age and race of the victim. She

was indifferent to the race of the appellant. (VII 139-41, 150-53) Harp was convinced that the justice system was fair to minorities in most cases. To the extent that it was not, she could set that aside. (VII 146-48) She was completely unbiased as to the issues at hand. The prosecutor's true reason for striking Ms. Harp was based entirely on her race. The circumstantial evidence is overwhelming. Because the state failed to play by the rules, this Court must order a new penalty phase. Amends. V, VI, VIII & XIV, U.S. Const.; Art.I, §§2,9,16 & 17.

POINT II

UNDER THE PECULIAR CIRCUMSTANCES OF THIS CASE, THE TRIAL COURT ERRED IN LIMITING APPELLANT'S VOIR DIRE EXAMINATION REGARDING THE POTENTIAL JURORS' ABILITY TO CONSIDER GORY PHOTOGRAPHS WHICH WERE ALREADY IN EVIDENCE.

Voir dire examination of prospective jurors by counsel is assured by Florida Rule of Criminal Procedure 3.300(b). ***Jones v. State***, 378 so.2d 797 (Fla. 1st DCA 1980). The purpose of voir dire, "Is to obtain a fair and impartial jury to try the issues in the cause." ***Keene v. State***, 390 so.2d 315,319 (Fla. 1980). "Subject to the trial court's control of unreasonable repetitious and argumentative voir dire questioning, counsel must have an opportunity to ascertain latent or concealed pre-judgments by prospective jurors which will not yield to the law as charged by the court, or to the evidence." ***Jones***, 378 So.2 at 798.

Wide latitude should be allowed during the examination of jurors during voir dire. ***Cross v. State***, 103 So.2d 636, 89 Fla. 212 (1925). Voir dire examination should be as varied and elaborate as is necessary to obtain fair and impartial jurors whose minds are free of all interests, bias or prejudice. ***Gibbs v. State***, 193 So.2d 460 (Fla. 2d DCA 1967). The scope of questioning is within the discretion of the

trial judge. ***Franqui v State***, 699 So.2d 1312 (Fla. 1996).

Appellant's trial judge limited defense counsel's voir dire in an area of critical importance. Prior to his individual questioning of the venire, defense counsel was considerate enough to warn the trial court and opposing counsel:

> Mr. Mitnik [Defense Counsel]: Your Honor, I'll be doing voir dire and I intend to show one of the photos that's already in evidence. It was admitted as State's 23, it's a picture of the victim's head and I'd like for the Jury to see that and ask them if they can be fair and impartial.
>
> It's one thing deciding to follow the laws and they won't be affected by photos and the like showing graphic or gory detail, it's another thing to actually look at them and say "I'm not affected or I can set that out of my mind in considering the case."

(VII 162-63) The trial court examined the photograph in question (State's 23), an autopsy photograph already admitted into evidence during the prior guilt phase.[12] The prosecutor conceded that the trial court had discretion to allow such a procedure. However, the prosecutor stated his concern that the photograph, without explanation by a witness, would have inappropriate and improper shock value. (VII 163-64) Defense counsel pointed out that the photograph was already in evidence. Counsel explained that he would present it to the venire and describe at as being a photograph of the victim. He would then ask if the photograph was

[12] The parties below stipulated that evidence introduced at the prior guilt

so gory that, it alone, would cause the juror to sentence Johnny Hoskins to die.[13] (VII 164) Defense counsel stated that, using this method, he would find out whether or not the jurors would be able to be fair and impartial.

> ...It's one thing to say that "Yes, I can be fair and impartial" and visually or verbally describe something and say "Yes, I will try." It's another to see what the actual reaction is. (VII 165-66) The trial court admitted that the jury would hear and see graphic testimony and photographs, including autopsy photographs, but ruled that counsel could verbally "warn the jury about this." The trial court concluded that it is not appropriate to use an individual piece of evidence at this stage of the proceeding. "The request to use that photograph will be denied." (VII 165)

As fate would have it, many of the potential jurors expressed great concern about their ability to objectively consider gory photographs in deciding the ultimate issue. Specifically, many of the potential jurors admitted that they had never seen anything of that sort and, as a result, expressed uncertainty about their ability to deal with that type of evidence.

The following are representative of potential jurors' reactions when asked about viewing gory photographs:

> Ms. Loftis: **I have never seen photos of that nature** before, so would it close my mind, no. But how I would react to it, **I can't tell you,**

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phase remained in evidence for purposes of the new penalty phase. (IX 557-63)

[13] Defense counsel's concerns were understandable. Juror Oden had worked in the medical field and had seen people literally faint at the sight of bloody injuries. (VII 171-72)

because I've never seen that....I don't think it would make me physically ill...

(II 175-76) * * *
[Defense Counsel]: ...Do you think you would have a reaction to that, seeing an older lady who - - in very graphic detail, seeing autopsy pictures and things like that?

Ms. Loftis: **I don't know...because I've never seen any, so I can't tell you that**.

(VII 182) * * *
[Defense counsel]: ...Have you had any experience with any kind of

gory, graphic images?

Mr. Shoeman: No, but my field of profession is analytical breakdown.

...I might feel remorse for the victim, that that's how they came to

their demise...

(VII 183-84) * * *

[Defense counsel]: Gory autopsy photos, you're not going to pass out or anything like that.

Mr. Smith: No, I don't **think** so.

(VIII 254) * * *
[Defense counsel]: Gory details, autopsy photos.

Ms. Fell: Well, they probably would be - - I would be a little bit

emotional about that, but, you know, I've seen some things like that before.

(VIII 295) * * *
[Defense counsel asks about murder photographs.]

MS. ARNOLD: Yeh, I would be able to listen. It would be difficult. **I have a weak stomach physically**, but emotionally I will be able to handle it.(VIII 298-99)
MR. BROWN[prosecutor]: ...is there anything...at all...that causes you any concern, any hesitation, any problems at all...about sitting on this case and being asked to make this decision? ...

MS. DANIELS-ARNOLD[after raising hand]: **Seeing those pictures makes me very nervous and uncomfortable. ...I don't like the sight of blood... I'm nervous about seeing them.** (IX 436-38)

* * *

MS. KOLPACK[after raising hand]: **Yes, I think I would be disturbed by the photos also, ...** Honestly, I'm a very emotional person, **so I don't know how I would react if I saw the pictures. I mean, it would probably freak me out and I'd start crying or something if they're that severe...**

(IX 439-40) * * *
JUROR [WOLFE]: Once again, I have a weak stomach and I'm very emotional also... Yes, I would be able to look at them, but I more so lean towards the death penalty no matter what just because the way I was raised.

(IX 441-42)

The photograph at issue was already in evidence. There was no question that the jury would soon view that photograph and subsequently did in fact do so. (IX 651) Gory and gruesome photographs are one of the most troubling aspects of

murder trials. The admissibility of such photographs is almost always an issue at trial, on appeal, and in post-conviction litigation. Great care should be taken prior to waving ghastly pictures in front of lay jurors who may never have seen anything similar before in their lives. The idea of a trial is not that jurors should regurgitate at the evidence, but that they should make a reasoned, informed decision as to guilt (or in appellant's case, penalty). That is the power of gruesome crime scene photographs.

The record on appeal clearly reflects that many of the jurors had no inkling of what to expect.[14] They admitted their uncertainty about viewing photographs of the deceased victim. They admitted apprehension and could not truly assess their future reaction when they had no idea what to expect. Court and counsel could have gauged the jurors' true feelings by displaying the photograph at issue **which was already in evidence**. It was only a matter of time before the jury saw the photograph. Verbally describing the horrific photograph is no substitute for actually viewing the picture. The trial court should have allowed its display during voir dire. Appellant submits that the trial court's restriction of appellant's voir dire resulted in a denial of his constitutional rights to a fair trial and to due process of

[14] Defense counsel was very concerned with the impact of the photographs. He even focused on the issue during opening statement. (IX 593)

law. The trial court's rulings constitute reversible error. The resulting death sentence violates appellant's rights guaranteed by the Eight Amendment to the United States Constitution.

POINT III

THE TRIAL COURT'S FAILURE TO GIVE THE REQUESTED LIMITING INSTRUCTION ON VICTIM IMPACT EVIDENCE AT THE TIME THE EVIDENCE WAS INTRODUCED VIOLATED HOSKINS' RIGHT TO A FAIR TRIAL.

Prior to the introduction of victim impact evidence at trial, defense counsel renewed his previous motions and objections regarding the admissibility of victim impact evidence. (XI 829-30) Once the trial court reiterated its previous rulings allowing admissibility, defense counsel requested that a special limiting instruction be read to the jury prior to the admission of the testimony. A discussion ensued as to the proper instruction to give. The trial court had already drafted examples that he intended to use during final jury instructions. (IX 556; XI 829-832) Once defense counsel's special requested instruction as written was denied, the parties discussed the appropriate time to instruct the jury regarding their treatment of victim impact evidence. Defense counsel insisted that the trial court should instruct the jury at the time that the testimony was introduced. Waiting until the conclusion of trial would result in the "burial" of the instruction in the general morass of jury instructions. (XI 834-40) The trial court ultimately decided this issue against the appellant stating on the record:

> THE COURT: I just don't think it's appropriate during the - - you know, with the - - the only thing I can think of that's at all similar to

> this request is a Williams Rule sort of thing. The Williams Rule, the Supreme Court has said when this is coming in, by golly, you can tell the Jury this up front, they put on the evidence and then you tell them again right then, and it seems to me that if they wanted that done with victim impact evidence, that they would have said so.
>
> They understand what it takes to draft an instruction like that and they haven't done it. And I just think we get on thin ice when we get outside of what they've told or suggested us to do.
>
> It's not wrong not to give it and it may be wrong to give it, so I'm not going to give it. I'll give the instructions in due course.

(XI 840)

The trial court was correct in its analysis, but incorrect in his conclusion. Section 90.107, Florida Statutes clearly states:

> When evidence that is admissible as to one party or one purpose, but inadmissible as to another party or for another purpose is admitted, **the court, upon request, shall restrict such evidence to its proper scope and so inform the jury <u>at the time it is admitted</u>.**

(Emphasis added.) It is thus abundantly clear that Florida law expressly provides for a limiting instruction when evidence of this type is admitted. It is also abundantly clear that the limiting instruction **should be read at the time the evidence is admitted.**[15] §90.107, Fla.Stat.

Contrary to the trial court's assertion, this provision of the evidence code is

[15] The standard of review for granting or refusing jury instructions is whether or not the trial court abused its discretion. ***Cole v. State***, 701 So.2d 845 (Fla. 1997).

not limited to ***Williams***[16] rule evidence.[17] There are a number of Florida cases that hold such an instruction necessary when requested. ***See, e.g., San Martin v. State***, 717 So.2d 462, 471 (Fla. 1998)(Error to refuse to give limiting instruction regarding the purposes for which ***Miranda*** sheets and fingerprint cards were admitted.); ***Roberson v. State***, 40 Fla. 509, 24 So. 474, 477 (1898)("If [the evidence]tended to prove an irrelevant or immaterial fact, as well as one material and relevant, the defendants would be entitled on request to an instruction from the court limiting consideration of such evidence by the jury to its legitimate purpose."); ***Varnadore v. State***, 626 So.2d 1386 (Fla. 5th DCA 1993)(When defendant was impeached with prior felony convictions, trial court committed error when it refused to give a limiting instruction requested by defendant that the convictions could not be considered as evidence of guilt.); ***Kingery v. State***, 523 So.2d 1199 (Fla. 1st DCA 1988)(Reversible error for trial court to fail to give limiting instruction requested by counsel concerning proper purpose for which the jury could consider deposition testimony which was admitted to impeach credibility but not as substantive evidence.) ***See also State v. Smith***, 573 So.2d

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[16] ***Williams v. State***, 110 So.2d 654 (Fla. 1959); §404.9, Fla. Stat.

[17] The record seems to suggest that the court was not familiar with this provision of the evidence code. At the very least, no one specifically refers to the provision by number.

306, 316 (Fla. 1990)(Because there was no contemporaneous request for a limiting instruction concerning prior inconsistent statements, the trial court did not err by failing to specifically instruct the jury.)

At the conclusion of all of the evidence as well as argument by both counsel, the trial court instructed the jury using the standard jury instructions for victim impact evidence. Long after the jury had heard the evidence, the trial court instructed them as to how they could consider that testimony.

> You have heard evidence about the impact of this homicide on the family, friends, and community of Dorothy Berger. This evidence may be considered by you to determine the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.
>
> However, the law does not allow you to weigh this evidence as an aggravating circumstance. Your recommendation to the court must be based only on the aggravating circumstances and the mitigating circumstances about which I have instructed you.

(XV 1660) The trial court instructed the jury above on July 28, 2004, a full seven days after hearing the emotional and moving testimony of Linda Peacock, Dorothy Berger's niece. (VI 955, 973; XI 853-55; XV 1660) Appellant submits that the cited instruction was "too little, too late."

Section 90.107, Florida Statutes, is crystal clear that the limiting instruction, when requested, should be given "at the time [the evidence] is admitted." Federal

courts as well as the most recognized treatise on Florida evidence, have pointed out that a limiting instruction is much more effective if given when the evidence is admitted.[18] ***See e.g. Lubbock Feedlots, Inc. v. Iowa Beef Processors, Inc.***, 630 F.2d 250, 265-66 (5th Cir. 1980) and ***C. Ehrhardt, Florida Evidence***, §107.1, n.10 (2005 Edition). By their very nature, limiting instructions should be given at the time the evidence at issue is admitted at trial.

Victim impact testimony is, by its very nature, powerful and emotional evidence. Such testimony invariably evokes a visceral response in every human being who hears it. Jurors who are emotionally vested in the trial cannot be faulted for allowing themselves to be substantially impacted.

A jury's legal duty in its consideration of victim impact evidence is a subtle legal concept, that many lawyers do not understand. Requiring a jury to listen to such emotional testimony without contemporaneous guidance is unrealistic and dangerous. The jury in this particularly treacherous case should have been given specific guidance at the time of the testimony, so they could have avoided the

[18] Several Florida cases discuss the failure to preserve this issue where defense counsel fails to request a limiting instruction at the time the evidence is received. ***See, e.g., Johnson v. State***, 747 So.2d 436 (Fla. 4th DCA 1999); ***Lightfoot v. State***, 591 So.2d 305 (Fla. 1st DCA 1991); ***Travers v. State***, 578 So.2d 793 (Fla. 1st DCA 1991); and ***Milton v. State***, 438 So.2d 935 (Fla. 3rd DCA 1983). Hoskins' defense counsel clearly requested the instruction in a timely manner.

emotional bogs the facts of this case produced.

POINT IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY ON THE APPLICABLE LAW AT THE PENALTY PHASE BY DENYING APPELLANT'S REQUESTED SPECIAL JURY INSTRUCTIONS.

Florida Rule of Criminal Procedure 3.390(a) states:

> The presiding judge shall charge the jury only on the law of the case at the conclusion of argument of counsel....

At the penalty phase, defense counsel requested, in writing, several special jury instructions. Although the trial court granted a few of appellant's request, the vast majority were denied. (XIII 1290-1399; XIV 1400-1417, 1541-49) This was error. The requested special instructions were accurate statements of the law and were not adequately covered in the standard jury instructions.[19]

Appellant sought to modify the standard jury instructions which commented on the evidence. Specifically, appellant sought to change the language from "the aggravating circumstances are ..." to the aggravating circumstances that you find". (XIII 1298-1300) The standard jury instructions contain at least two phrases that could be interpreted as a comment on the evidence by the trial court. Appellant's requests was justifiable and warranted. The trial court denied the requested

[19] The standard of review for granting or refusing jury instructions is whether or not the trial court abused its discretion. ***Cole v. State***, 701 So.2d 845

modifications, stating that he was afraid to deviate from the standard jury instructions. (XIII 1298-1300)

Appellant also sought to modify the portion of the standard jury instructions that tended to shift the burden of proof to the appellant. (XIII 1300-2) The standard jury instructions tell the jury that once they determine that sufficient aggravating circumstances exist, the jury should then determine whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found. Appellant challenged this standard instruction as an impermissible burden shifting that violated the constitution. The trial court denied the requested modification. (XIII 1300-2)

Additionally, appellant sought to clarify the heinous, atrocious, and cruel aggravating factor based on specially requested instructions. Counsel wanted the jury instructed that appellant must have the intent to torture the victim before this factor applies. (XIII 1303-6) Appellant pointed out that this particular instruction was especially critical in appellant's case. The trial court did not disagree with the requested language but concluded that the instruction was already covered by the standards. (XIII 1304-6) Similarly, appellant's other requested instructions dealing with the HAC factor were denied by the trial court. These included that the fact

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(Fla. 1997).

that the victim might have taken minutes to die does not in and of itself support HAC (XIII 1319-20); and the mere fact that a murder was committed does not necessarily support a finding of HAC (XIII 1320-21).

The trial court also denied appellant's request that the jury need not be unanimous in their finding of the mitigating factors (XIII 1341-44); an instruction explaining the definition of mitigating evidence[20] (IX 517-22; XIII 1344-45); and a more precise instruction on the effect of mental impairment as mitigation. (XIII 1346-47) Additionally, prior to the commencement of the penalty phase, appellant requested a modification of the standard jury instruction relating to the fact that Hoskins had been previously convicted and that the jury was here for a new trial on the appropriate penalty. (VII 14-20) Defense counsel correctly pointed out that the standard language suggested that Hoskins had previously been sentenced to death and was back in court on a technicality. Appellant's requested instruction informed the jury that Hoskins was previously convicted and that the trial at hand would focus on the appropriate sentence and that guilt was not an issue. (VII 16-17) The requested instruction also informed the jury that they should not be concerned as to what events resulted in this case being brought before them on the

[20] The trial judge told defense counsel he could explain mitigation during closing argument. (XIII 1344-45)

issue of penalty at this time. (VII 17) Instead, the court instructed the jury that Hoskins' case was "back here from an appellate court." The jury undoubtedly assumed the worst. (VII 104; IX 541-42)

All of the cited, requested instructions added to and clarified the standard jury instructions. Other than the unanimity instruction, all were accurate statements of Florida and federal law. Their denial resulted in an unconstitutional trial and resulted death penalty. Amends. V, VI, VIII & XIV, U.S. Const.; Art. I, §§2, 9, 16, 17, Fla. Const.

POINT V

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL.

The sentence of death imposed upon Johnny Hoskins must be vacated. The trial court found improper aggravating circumstances, gave the aggravators excessive weight, failed to consider (or unfittingly gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors.[21] These errors render Hoskins' death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments, and Article I, Sections 9, 16, and 17, of the Florida Constitution.

A. The Trial Court's Treatment of Valid and Substantial Mitigation Renders Appellant's Death Sentence Unconstitutional.

[21] Appellant submits that aggravating circumstances must be proved beyond a reasonable doubt. Review of those factors is by the competent, substantial evidence test. Where evidence exists to reasonably support a mitigating factor, the trial court must find that factor as mitigating. Review of the weight given to mitigation is subject to an abuse of discretion standard. ***See Cole v. State***, 701 So.2d 845, 852 (Fla. 1997). It is submitted that this Court's proportionality review,

This Court has stressed the importance of issuing specific written findings of fact in support of aggravation and mitigation in capital cases. ***Van Royal v. State***, 497 So.2d 625 (Fla. 1986); ***State v. Dixon,*** 283 So.2d 1 (Fla. 1973). The sentencing order must reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. ***State v. Dixon, supra*** at 10. Florida law requires the judge to lay out the written reasons for finding aggravating and mitigating factors, then to personally weigh each one in order to arrive at a reasoned judgment as to the appropriate sentence to impose. ***Lucas v. State***, 417 So.2d 250, 251 (Fla. 1982). The record must be clear that the trial judge "fulfilled that responsibility." ***Id***.

In a line of cases commencing with ***Lockett v. Ohio***, 438 U.S. 586 (1978), the United States Supreme Court held that a trial court may not refuse to consider, or be precluded from considering, any relevant mitigating evidence offered by a defendant in a capital case. The ***Lockett*** holding is based on the distinct peculiarity of the death penalty. An individualized decision is essential in every capital case. ***Lockett***, 438 U.S. at 604-605. The Supreme Court has consistently reiterated the ***Lockett*** holding. ***See, e.g., Hitchcock v. Dugger***, 481 U.S. 393 (1987); ***Skipper v.***

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being a question of law, is subject to *de novo* review.

South Carolina, 476 U.S. 1 (1986).

In ***Campbell v. State***, 571 So.2d 415, 419-20 (Fla. 1990), and ***Nibert v. State***, 574 So.2d 1059, 1062 (Fla. 1990), this Court held that, where uncontroverted evidence of a mitigating circumstance is presented, the trial court **must** find that the mitigating circumstance has been proved. This Court will not tolerate a trial court's unexplained rejection of substantial and/or uncontroverted evidence. ***See, e.g., Santos v. State***, 591 So.2d 160 (Fla. 1991) and ***Hall v. State***, 614 So.2d 473, 478-9 (Fla. 1993). While the relative weight to be given each mitigating factor is within the province of the sentencing court, a valid mitigating circumstance cannot be dismissed as having **no** weight. ***Dailey v. State***, 594 So.2d 254 (Fla. 1991). ***See also Eddings v. Oklahoma***, 455 U.S. 104, 114-15 (1982).

However, in ***Trease v. State***, 768 So.2d 1050, 1055 (Fla. 2000), this Court receded from its opinion in ***Campbell*** to the extent that ***Campbell*** disallowed trial courts from according no weight to a mitigating factor. This Court recognized that there are circumstances where a mitigating circumstance may be found to be supported by the record but entitled to no weight for additional reasons or circumstances unique to that case.

Since ***Trease***, counsel has noticed a disturbing trend in trial courts' sentencing orders. In dealing with mitigating factors, trial courts (as did the

sentencing judge in Appellant's case) frequently find that a mitigating circumstance exists, but unilaterally give the factor very little weight. Hoskins' trial judge concluded that sixteen mitigating circumstances had been proven by the greater weight of the evidence. (VI 1021-28) However, the trial court attributed virtually **no** weight to the plethora of mitigating factors. The court decided that the vast majority of the nonstatutory mitigating factors deserved only "little weight". Only one of the sixteen was entitled to at least "some weight". (VI 1025) In light of the minuscule weight which the trial court incorrectly and unconstitutionally allotted to the numerous, uncontroverted mitigating circumstances, it erroneously concluded that the aggravating circumstances outweighed the mitigating circumstances, thus warranting the ultimate sanction. (VI 1028-29)

Since ***Trease,*** however, this Court has made clear that the sentencer may not disregard substantial, uncontroverted mitigating evidence. ***See Crook v. State***, 813 So.2d 68, 76 (Fla. 2002); ***Harris v. State***, 843 So.2d 868-869 (Fla. 2003). Moreover, a sentencing court's conclusions may be sustained only if they are "supported by sufficient evidence in the record." ***Hurst v. State***, 819 So.2d 689, 700 (Fla. 2002). Here, the sentencing court disregarded substantial, uncontroverted mitigating evidence of Hoskins' mental deficiencies, and its conclusions about the weight to be given to proven mitigators are not supported by

the record. The trial court may not insulate decisions that amount to finding that a mitigating circumstance has not been proven by purporting to find a factor, but then offering no sufficient explanation for giving it little or no weight.

While the ***Lockett*** doctrine is clearly violated by the explicit refusal to consider mitigating evidence, it is no less subverted when the same result is achieved tacitly, as in this case. By refusing to give Appellant's uncontroverted, mitigating evidence any **substantial** weight, the trial court has vaulted this state's capital jurisprudence back to the unconstitutional days before ***Hitchcock v. Dugger***, 481 U.S. 393 (1987).

Prior to ***Hitchcock***, this Court adopted a "mere presentation" standard wherein a defendant's death sentence would be upheld where the trial court permitted the defendant to present and argue a variety of nonstatutory mitigating evidence. ***Hitchcock v. State***, 432 So.2d 42, 44 (Fla. 1983). The United States Supreme Court rejected this "mere presentation" standard, and held that the sentencer not only must hear, but also must not refuse to weigh or be precluded from weighing the mitigating evidence presented. ***Hitchcock v. Dugger, supra***. Since ***Hitchcock***, this Court has repeatedly reversed death sentences imposed under the "mere presentation" standard where there was explicit evidence that consideration of mitigating factors was restricted. ***E.g., Riley v. Wainwright***, 517

So.2d 656 (Fla. 1987); ***Thompson v. Dugger***, 515 So.2d 173 (Fla. 1987).

The recent trend of trial courts attaching no **real** weight to uncontested mitigating evidence, results in a *de facto* return to the "mere presentation" practice condemned in ***Hitchcock v. Dugger***. Appellant's trial court's refusal to give any **significant** weight to Appellant's uncontroverted mitigating evidence violates the dictates of **Lockett** and its progeny. By allowing trial courts unfettered discretion in determining what weight to give mitigating evidence, trial judges can effectively accomplish an "end run" around the constitutional requirement that capital sentencings should be individualized. Appellant's trial judge has effectively failed to consider mitigating evidence within the statutory and constitutional framework.

By giving only "little or no weight" to valid, substantial mitigation, trial judges can effectively ignore ***Lockett, supra***, and the constitutional requirement that capital sentencings must be individualized. The trial court's refusal to give any significant weight to valid mitigating evidence, calls into question the constitutionality of Florida's death penalty scheme. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17 Fla. Const.

B. The Trial Court Erred in Rejecting the Two Statutory Mental Mitigators.

The trial court considered but rejected the statutory mitigating factor that Hoskins was under the influence of extreme mental or emotional disturbance when

he committed the crime. (VI 1016-20) §921.141(6)(b), Fla.Stat. Based on the testimony of Dr. Wu, Dr. Wood, and Dr. Krop, the trial court concluded that Johnny Hoskins did indeed have a hypofrontal lobe abnormality.[22] The trial court further found that Hoskins' hypofrontal lobe abnormality could result in a reduced ability to control impulsive behavior. The court further found that the abnormality existed long before the murder of Berger and probably existed when Hoskins was in grade school. (VI 1017)

The trial court rejected appellant's brain damage as a mitigating factor, because the trial court concluded that the condition was not an "extreme mental or emotional disturbance". (VI 1017) The trial court also concluded that, although the brain abnormality probably was a factor in Berger's rape, it was not a factor in her subsequent murder. (VI 1017-20) Similarly, the trial court rejected the statutory mitigating factor that Hoskins' ability to conform his conduct to the requirements of the law was substantially impaired. (VI 1020-21) §921.141(6)(f), Fla.Stat. Although the court concluded that Hoskins' brain damage was a factor in his inability to conform his conduct as to the rape, his brain damage was not a factor in the subsequent murder. (VI 1020-21) Extreme emotional or mental

[22] The trial court apparently did not accept the state's rebuttal evidence on this issue. Dr. Mayberg took exception to the conclusions drawn by Dr. Wood

disturbance is a statutory mitigator. Once it has been established, the defendant does not have to demonstrate any further specific nexus between the disturbance and the crime. ***See Ford v. State***, 802 So.2d 1121, 1134n.28 (Fla. 2001) The trial court's attempt to parse the events surrounding Berger's rape and murder are arbitrary and untenable.[23] Brain damage is a chronic organic condition which affects every facet of an individual's life. It is not controlled like a light switch to be turned off and on at will.

The fact that Dorothy Berger was still alive when appellant opened the car trunk in Georgia came as a surprise to both the prosecutor and defense counsel at trial. Dr. Krop's testimony of this recent revelation landed in the courtroom like a concussion grenade. (XII 1108-35)[24] As such, the details of Hoskins' strangulation of Dorothy Berger in Georgia were not deeply explored at his most recent penalty phase. Nevertheless, appellant submits that the same factors were at play for the murder as those at the time of the victim's attack and rape in Brevard County.

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concerning the PET scan results.

[23] The trial court also used mitigating evidence (that Hoskins was not a troublemaker at school, that he was a loving family member, and that he protected his mother from physical abuse) to justify the rejection of the two statutory mental mitigators. (VI 1017-20) By using valid mitigation as essentially aggravation, the trial court has turned Florida's death sentencing scheme on its head.

[24] Although counsel cannot ethically raise this issue on direct appeal, defense counsel's late discovery of this critical information could be a fertile area

When appellant opened the trunk of the car and surprising found the victim still alive, this was a startling event. That factor coupled with the testimony that the victim kicked at him, could have easily provoked the same sort of uncontrollable rage that Hoskins' exhibited during the attack and rape in Brevard County.

The trial court's unwarranted dismissal of valid, uncontroverted mitigating evidence violated Hoskins' constitutional rights. Hoskins' brain damage is a chronic, organic, condition that affects every facet of his daily life. The trial court erred in essentially ignoring the two statutory mitigating circumstances relating to Hoskins' mental condition.

C. Mitigating Factors Are Present Which Outweigh Any Appropriate Aggravating Factors.

In this case, it is clear that the evidence of mitigating factors, which is essentially unrebutted, far outweighs any aggravating circumstance that could be proposed by the state. Clearly, under the formula set out in ***Campbell v. State***, the trial court was mandated to find in favor of the defendant. There is significant evidence of the following mitigating factors, which have been considered and utilized in other cases to reduce the sentence to life imprisonment:

The trial court found several mitigating factors relating to the defendant's

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in post-conviction if appellant's death sentence is affirmed.

heartening, family relationship, to-wit: the defendant had a loving relationship with his family, he was a father figure to his siblings, and, when he quit school, he got a job and gave half his pay to his family to help feed them. These factors, however, the court, without any explanation, gave only little weight in its consideration. (***See Point V, subsection A, supra***.) Instead they were constitutionally entitled to great weight; they have been utilized to support life sentences. ***See, e.g., Bedford v. State***, 589 So.2d 245 (Fla. 1988); ***Perry v. State***, 522 So.2d 817 (Fla. 1988); ***Carothers v. State***, 465 So.2d 496 (Fla. 1985); ***Jacobs v. State***, 396 So.2d 713 (Fla. 1981).

The evidence of the good relationship defendant had with his family and of the love, care, and money he gave them, is not inconsequential, but rather it was substantial and cannot be discounted without any justification.

Additionally, the court found the factor of the defendant's protection of his mother from his abusive father was established but entitled to little weight. (VI 1022) However, this factor has also been utilized to justify the reduction of a death sentence to life. ***Campbell v. State***, 571 So.2d 415 (Fla. 1990); ***Nibert v. State***, 574 So.2d 1059 (Fla. 1990); ***Livingston v. State***, 565 So.2d 1288 (Fla. 1990); ***Shue v. State***, 366 So.2d 387 (Fla. 1978). This factor has been shown in these cases and in the instant case to have affected the defendants' mental and emotional development

in their formative years, and thus is a serious factor in mitigation which cannot be dismissed as having only little weight.

The trial court rejected (giving no weight) or gave only little weight to the factors concerning the defendant low mental abilities and his brain abnormalities, finding that they were not entitled to greater weight simply because they did not rise to the level of statutory mitigating circumstances, they did not affect him during the actual killing of Berger, or that there is no evidence that Hoskins' brain damage caused any impairment at any time of Hoskins' "entire life." (VI 1022-24) To conclude that brain damage does not necessarily impact every part of an individual's life is patently absurd. This Court has held that simply because mental problems do not rise to the level of statutory mitigating is not a reason to reject such factors and afford them substantial weight. ***See State v. Sireci***, 502 So.2d 1221 (Fla. 1987); ***Amazon v. State***, 487 So.2d 8 (Fla. 1986); ***Penry v. Lynaugh***, 492 U.S. 302 (1989).

There was substantial unrebutted testimony that the defendant, who had had several incidents in his childhood and youth wherein he had received blows to the head, had brain damage to his frontal lobe which controls the start/stop mechanism of behavior, causing the person to have difficulty stopping behaviors once they are begun. (XI 903, 922-23; XII 1138, 1064, 1190-92, 1152) This would indeed apply

to violent behavior; it was described as a "rage reaction," causing the person to go way beyond what is necessary in terms of the violent acts, or into a frenzy.

A defendant's brain organic abnormality has been found to be mitigating and justification for a life imposition. ***See Carter v. State***, 560 So.2d 166 (Fla. 1990); ***Hall v. State***, 541 So.2d 1125 (Fla. 1989); ***State v. Sireci***, 502 So.2d 1221 (Fla. 1987). No justification exists for diminishing this mitigation, which could have been a major factor in the crime here (especially the violence involved). It should be given substantial weight.

Similarly, low mental abilities, such as those which were documented in the instant case (the defendant's low I.Q. of 71, and his poor performance on standardized tests and in school, even in a class for the educable mentally retarded), have been afforded weight sufficient to reduce a death sentence to life. ***See Hall v. State***, 541 So.2d 1125 (Fla. 1989); ***Morris v. State***, 557 So.2d 27 (Fla. 1990); ***Down v. State***, 574 So.2d 1095 (Fla. 1991); ***Neary v. State***, 384 So.2d 881 (Fla. 1980); ***Meeks v. State***, 336 So.2d 1142 (Fla. 1976).

Hoskins' impoverished background and the rough environment in which he grew up in rural Georgia with its race problems should be given great weight to reduce his punishment. In case after case, this factor has been shown to have substantial effect on a child which should decrease his sentence. ***See, e.g., Nibert v.***

State, supra; Livingstone v. State, supra; Hall v. State, supra; Thompson v. State, 456 So.2d 444 (Fla. 1984); ***Shue v. State, supra***.

Additionally, specific good deeds, such as that recounted in the judge's findings (caring for pets, woodworking, saving his mother from abuse, teaching his siblings) have also had substantial utilization in determining the appropriate sentence in a capital case. ***See, e.g., Bedford v. State, supra; McCrae v. State***, 582 So.2d 613 (Fla. 1991); ***Campbell v. State, supra; Hooper v. State***, 476 So.2d 1253 (Fla. 1985) (served in Salvation Army -- religious convert); ***Lockett v. Ohio***, 438 U.S. 586 (1978).

All of these totally unrebutted factors, when considered in light of the extensive evidence presented in mitigation, are entitled to more than the short shrift given them by the trial court. They militate against the death sentence, especially in light of the small number of aggravating circumstances present here. The death sentence should be vacated and a life sentence imposed.

D. The Trial Judge Considered Two Inappropriate Aggravating Circumstances.

(1) *Dorothy Berger's murder was not committed to avoid arrest.*

The trial court concluded that the evidence supported the finding of this aggravating circumstance. The trial court recognized that, standing alone, the fact

that the victim knew Hoskins was probably insufficient to establish this aggravating circumstance. The court did however consider it a significant factor in determining whether this circumstance was proven. The trial court relied heavily on the testimony of Dr. Krop. Although Krop summarized the motive for the sexual battery as a "rage reaction", Krop testified that Hoskins' subsequent actions were to "avoid detection and to get away from the scene as quickly as he could." (VI 1002-3) The trial court concluded that, "Whether Defendant may have thought Dorothy Berger was already dead before he opened the trunk of the car is of no matter; the reality when he opened the trunk was that she was very much alive, conscious and aware to the extent that she kicked at him." (VI 1003)

Appellant contends on appeal that the evidence did not support an instruction on this particular aggravator. By so instructing the jury, the trial court violated Appellant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Furthermore, Appellant contends on appeal that the trial court's finding of fact as to this particular aggravator was not supported by substantial, competent evidence. The trial court's finding renders Appellant's death sentence infirm. ***Amends. VIII and XIV; Art. I, Sec. 9 and 16, Fla. Const.***

The aggravator of killing with intent to avoid lawful arrest applies to witness

elimination. ***See Consalvo v. State***, 697 So. 2d 805, 819 (Fla. 1996). In such cases, "'The mere fact of death is not enough to invoke this factor....Proof of the requisite intent to avoid arrest and detection must be very strong....' [T]he evidence must prove that the sole or dominant motive for the killing was to eliminate a witness." ***Id***. (***quoting Riley v. State***, 366 So. 2d 19, 22 (Fla. 1978); ***See, e.g. Harvey v. State***, 529 So. 2d 1083, 1087 (Fla. 1988) (Holding that murders were committed for the purpose of lawful arrest where the murderers discussed in the victims' presence the need to kill them to avoid being identified).

This aggravating circumstance focuses on the motivation for the murder, and is usually found where the victim is a police officer. ***See, e.g., Mikenas v. State,*** 367 So.2d 606 (Fla. 1978). When the victim is not a police officer, however, in order to prove this circumstance, the evidence must prove beyond a reasonable doubt that the dominant or only motive was to eliminate the victim as a witness. ***Bell v. State***, 841 So.2d 329, 336 (Fla. 2002); ***Connor v. State***, 803 So.2d 598, 610 (Fla.2001); ***See also Alston v. State***, 723 So.2d 148, 160 (Fla.1998). "Mere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator. Likewise, the mere fact that the victim knew and could identify defendant, without more, is insufficient to prove this aggravator." ***Looney v. State***, 803 So.2d 656, 676

(Fla.2001); ***Bell v. State, supra***; ***Geralds v. State***, 601 So.2d 1157 (Fla. 1992). The state thus must prove by "very strong," positive evidence (rather than by speculation, default, or elimination) that the dominant motive was to eliminate a witness. ***Jackson v. State***, 502 So.2d 409 (Fla. 1986); ***Connor v. State***, 803 So.2d 598 (Fla. 2001) (other motives as likely); ***Riley v. State***, 366 So.2d 19 (Fla. 1978).

The finding of this aggravator is totally speculative on the trial court's part – simply because Berger knew the defendant is not the strong evidence required to find this factor. ***Id. See also Amazon v. State***, 487 So.2d 8 (Fla. 1986) (evidence inconclusive where the defendant killed his next-door neighbor as she called for help during the burglary, *even where the detective said the defendant told him he killed to avoid arrest*); ***Garron v. State***, 528 So.2d 353 (Fla. 1988) (victim shot while talking on the phone asking for the police held insufficient); ***Zack v. State***, 753 So.2d 9 (Fla. 2000) (fact that defendant planned to kill victim and take her property and the victim knew and could identify defendant was insufficient to support the avoiding arrest circumstance).

The trial court tried mightily to draw an artificial line in an attempt to analyze Hoskins' crimes. The trial court inappropriately viewed crimes as discrete increments. The judge's findings of this aggravator was based entirely on his erroneous conclusion that Johnny Hoskins killed Dorothy Berger to prevent her

from testifying about the sexual battery that Hoskins committed on her. The court's attempt to compartmentalize Hoskins' crime is an arbitrary attempt to justify this aggravating circumstance.

The record is clear that any attempts by Johnny Hoskins to "avoid detection" were the product of his plight from the state following his crimes. Johnny Hoskins had every reason to believe that Dorothy Berger was already dead. Dr. Krop's testimony confirms this fact. Hoskins was surprised when he opened the trunk of the automobile to find that Berger was still alive. In his mind, Hoskins believed that he had already killed Berger. His subsequent action in putting her in the trunk and fleeing the state was the product of fleeing prosecution for the murder, not the sexual battery. As such, this very particularized aggravator (witness elimination) is not supported by substantial competent evidence.

(2) *The Murder Was Not Especially Henious, Atrocious, or Cruel (HAC).*

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. ***Martin v. State***, 420 So.2d 583 (Fla. 1982); ***State v. Dixon***, 283 So.2d 1, 9 (Fla. 1973). The state has failed in this burden with regard to proving that Dorothy Berger's murder was especially heinous, atrocious, or cruel. The court's findings of fact, based in part on matters not proven by substantial, competent evidence beyond a reasonable doubt, do not

support this circumstance and cannot provide the basis for the sentence of death.

The trial court found this factor based solely upon the method of the killing. However, this factor must fall for two reasons -- there was no showing that the victim was conscious during most of the attack; and the defendant's mental impairment, affecting his impulse control, contributed to the violence and should, thus, diminish Hoskins' blame for the alleged heinousness. Because of the defendant's extreme mental impairment and state of rage, there can be no showing that the defendant intended for the victim to suffer or even intended the method for the killing.

This Court has defined the aggravating circumstance of heinous, atrocious, or cruel in ***State v. Dixon, supra*** at 9:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.Recognizing that all murders are heinous, ***Tedder v. State***, 322 So.2d 908, 910 (Fla. 1975), this Court further defined its interpretation of the legislature's intent that the aggravating circumstance only apply to crimes which are **especially** heinous, atrocious, or cruel.
> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

State v. Dixon, supra at 9.

Quoting from ***Sochor v. Florida***, 504 U.S. 527 (1992), this Court has previously held that, for this factor to apply, the crime must not only be unnecessarily torturous to the victim, but it also must be conscienceless or pitiless on the defendant's part. ***Richardson v. State***, 604 So.2d 1107, 1109 (Fla. 1992). Thus, as this Court has stated in ***Santos v. State***, 591 So.2d 160, 163 (Fla. 1991), and ***Cheshire v. State***, 568 So.2d 908, 912 (Fla. 1990), this factor is appropriate only in torturous murders which exhibit a **desire** to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. ***See, e.g., Douglas v. State***, 575 So.2d 165, 166 (Fla. 1991).

Recently, the Court seems to have settled on the position that the HAC circumstance does not included the defendant's intent as an element of the aggravator. ***See Barnhill v. State***, 834 So.2d 836, 849-50 (Fla. 2002)("HAC focuses on the means and matter in which death in inflicted and the circumstances surrounding the death, rather than the intent and motivation of a defendant"); ***Cox v. State***, 819 So.2d 705 (Fla. 2002). However, the Court has been inconsistent on the question of whether the "torturous murder" requirement includes, as a element to be proven, the defendant's intent to cause suffering or the defendant's indifference to the suffering of the victim. One line of cases stresses the

requirement of an intent element. ***See, Rogers v. State***, 783 So.2d 980 (Fla. 2001); ***Buckner v. State***, 714 So.2d 386 (Fla. 1998); ***Hamilton v. State***, 678 So.2d 1128 (Fla. 1996); ***Santos v. State***, 591 So.2d 160 (Fla. 1991); ***Shere v. State***, 579 So.2d 86 (Fla. 1991); ***Chershire v. State***, 568 So.2d 908, 912 (Fla. 1990). Another line of cases minimizes the relevancy of the defendant's intent to cause suffering, noting that it is not a necessary element the State must prove. ***See, Ocha v. State***, 826 So.2d 956, 963 (Fla. 2002)("the defendant's intent does not weight as heavily in the determination of the applicability of the HAC aggravator as does the victim's actual suffering"); ***Farina v. State***, 801 So.2d 44 (Fla. 2001) ([T]his aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's); ***Evans v. State***, 800 So.2d 182 (Fla. 2001)(ignores evidence of Evans' mental illness); ***Francis v. State***, 808 So.2d 110 (Fla. 2001)(Defendant's mental state "not a necessary element" of HAC); ***Hitchcock v. State***, 755 So.2d 638 (Fla. 2000); ***Guzman v. State***, 721 So.2d 1155 (Fla. 1998); ***Orme v. State***, 677 So.2d 258 (Fla. 1996); ***Michael v. State***, 437 So.2d 138 (Fla. 1983).

Under either view, however this Court has acknowledged that the defendant's mental state and condition is an important consideration in evaluating the HAC circumstance. Whether negating an intent element to be proven or mitigating the weight and impact of the HAC factor, the defendant's mental state is

an essential consideration in evaluating the aggravating circumstance. To the extent that this Court has eliminated the defendant's intent to cause suffering, appellant submits that the statute is unconstitutional under the state and federal constitutions. The elimination of this criteria fails to sufficiently narrow the class of death-eligible defendants. ***Amend. VIII & XIV***, U.S.Const.; ***Art. I, §§ 2, 9, 16, & 17***, Fla. Const.

In ***Clark v. State***, 609 So.2d 513 (Fla. 1992), the victim was shot in the chest from a distance of ten feet with a single-shot, sawed-off shotgun. Clark reloaded the weapon, walked to the victim and killed him with a shot to the head. This Court rejected the trial court's improper application of the HAC factor, explaining that simply because the victim was aware of his impending death and remained conscious for some period of time before being killed does not make the murder unnecessarily torturous to the victim. ***Clark, supra***.

While it is true in the instant case that death was not instantaneous, the medical examiner testified that upon receiving the lacerations to the top and side of the head, the victim would have lost consciousness. He had no way of telling beyond a reasonable doubt whether these blows came early in the attack, and whether the victim regained consciousness, testifying that either of the two blows could have caused her to remain unconscious throughout the rape, beating, and

strangulation, and, in conjunction with each, other could have caused a victim to lose consciousness for days. With the unconsciousness would have come a cessation of pain. (X 785-85) Thus, there is no showing beyond a reasonable doubt of prolonged suffering or anticipation of death. Under the holding in ***Elam v. State***, 636 So.2d 1312, 1314 (Fla. 1994), therefore, this factor must fall.

Appellant concedes that his penalty phase, the appellant had made additional admissions to Dr. Krop during his 2003 evaluation. Specifically, the evidence at the new trial revealed that Dorothy Berger was still alive when Hoskins opened the trunk of her automobile in Georgia. At that point, Hoskins hit her and strangled her to death. While the evidence reveals that the victim was conscious at that moment, there is still no evidence to support a finding that she remained conscious from the time of the attack at her house to the opening of the trunk in Georgia. The evidence is just as consistent that she remained unconscious for most of that time period. In any event, it was not Hoskins' intent that she suffer unnecessarily.

Additionally, though this factor has been approved in diverse factual situations, a consistent thread has been that the victim was **intentionally** made to suffer prior to being killed. ***See Omelus v. State***, 584 So.2d 563, 566 (Fla. 1991) ("we find that the heinous, atrocious or cruel aggravating factor cannot be applied vicariously."); ***Teffeteller v. State***, 439 So.2d 843 (Fla. 1983) ("The fact that the

victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies."). ***See also, Amoros v. State***, 531 So.2d 1256, 1260-61 (Fla. 1988).

In ***Porter v. State***, 564 So.2d 1060, 1063 (Fla. 1990), this Court rejected the trial court's application of the HAC factor where the evidence was "consistent with the hypothesis that Porter's was **a crime of passion, not a crime that was <u>meant</u> to be deliberately and extraordinarily painful."** (Emphasis in original). The facts here are comparable. To fail to apply this rationale of ***Porter*** to the instant case would be to invite arbitrariness and capriciousness back into the death penalty scheme.

"It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." ***Gardner v. Florida***, 430 U.S. 349, 358 (1977). There is no logical reason to apply a statutory aggravating factor in "strict liability" fashion simply because the way it occurred was an unintended consequence. If it can be shown that a particular person **intended** that a victim suffer, a rational basis exists for application of the HAC factor. ***See Cochran v. State***, 547 So.2d 928, 931 (Fla. 1989); ***Porter v. State, supra***.

There is no proof that Johnny Hoskins intended that the victim suffer unnecessarily, especially where the evidence conclusively shows that Johnny's actions were not intentionally brutal, but that he was merely reacting to his mental impairment, the brain damage to the frontal lobe of his brain, that he was unable to control his impulse, and lacked a start/stop mechanism. Doctor Krop testified that this type of damage applies to violent behavior; it was described as a "rage reaction." It is an explosive kind of behavior, where the person feels as if he cannot control himself. This diagnosis is consistent with the type of violent behavior present in the instant case, where the individual had difficulties controlling his impulses once they got started. This uncontroverted testimony shows the relationship between the aggravating factor of heinousness and the mental mitigation presented here: the defendant's organicity specifically negates any showing of the aggravator since he was incapable of **consciously** controlling his "rage reaction;" he simply could not stop because of his frontal lobe damage.

The facts here are thus short of establishing beyond a reasonable doubt that the murder was **intended** to be unnecessarily torturous, that is, that it was especially heinous, atrocious or cruel as that statutory aggravating factor has been consistently applied by this Court. Because the judge based the death penalty on

this improper consideration, and because the jury was permitted to consider it,[25] that sentence must be vacated.

When this court follows the formula set out in ***Campbell v. State, supra***, the only possible conclusion is that the state cannot support sentence of death. The proper mitigating factors (when given their due weight) clearly outweigh the appropriate aggravating factor(s). The punishment must be reduced to life imprisonment.

[25] Defense counsel unsuccessfully moved for a "judgment of acquittal" on the HAC aggravator requesting that the jury not consider nor be instructed on the circumstance. (XII 1161-66) Defense counsel also requested a modification of the instruction to include the "torturous intent" element, pointing out that it was critical in this particular case. The trial court denied the request. (XIII 1303-6)

POINT VI

FLORIDA'S CAPITAL SENTENCING PROCESS IS UNCONSTITUTIONAL BECAUSE THE JUDGE RATHER THAN JURY DETERMINES THE SENTENCE.

During the course of the lower court proceedings, defense counsel attacked the constitutionality of Florida's Capital Sentencing Statutes under the holding of the United States Supreme Court in ***Ring v. Arizona***, 536 U.S. 584 (2002). (I 10-17; V 825-28) Defense counsel repeatedly objected to portions of the jury instructions which incorrectly advised the jury regarding their role in the sentencing process. See, e.g., (VII 22-23) Defense counsel pointed out that, under ***Ring***, the sentencing decision no longer rests "solely" with the trial judge. Nevertheless, the trial court overruled appellant's objections. At the beginning of the penalty phase, the trial court instructed the jury that the sentencing decision "does rest solely" with the trial judge. Nevertheless, the jury would be asked for their recommendation. Prior to deliberation, the trial court instructed the jury:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge...

(VI 904)

Statutory construction and the constitutionality of statutes are subject to *de novo* review, since they are decisions of law. ***City of Jacksonville v. Cook***, 765

So.2d 289 (Fla. 1st DCA 2000). Review of statutes that impair fundamental rights explicitly guaranteed by the federal or state constitutions is governed by a strict scrutiny standard on appeal. ***T.M. v. State***, 784 So.2d 442 (Fla. 2000). Given the current state of Florida law, appellant acknowledges the futility of raising issues claiming that the United States Supreme Court's opinion in ***Ring v. Arizona***, 536 U.S. 584 (2002), and ***Apprendi v. New Jersey***, 530 U.S. 166 (2000) should give him sentencing relief.

Despite the United States Supreme Court's ruling in ***Ring v. Arizona***, 536 U.S. 584 (2002), this Court, as a court, has steadfastly refused to find the State's death penalty statute, in part or in total, in violation of the Sixth Amendment to the United States Constitution. ***Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002); ***Kormondy v. State***, 845 So.2d 41 (Fla. Feb. 13, 2003). Hoskins respectfully submits that such decisions did not consider the rule that statutes must be strictly construed in favor of the defense. As such, one is death eligible only on a finding of sufficient aggravating circumstances and insufficient mitigation. Further, so far as ***Bottoson*** stands for the proposition that a conviction for first degree murder without more makes the defendant death eligible, it renders Florida's death sentencing scheme unconstitutional under the Cruel and Unusual punishment and Due Process Clauses of the state and federal constitutions. Under ***Furman v.***

Georgia, 408 U.S. 238, 313 (1972), there must be a narrowing of the category of death-eligible persons. Cf. ***Jurek v. Texas,*** 428 U.S. 262, 276 (1976) (statute constitutional because by "narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered"); ***Gregg v. Georgia,*** 428 U.S. 153, 196-97 (1976); ***Lowenfield v. Phelps,*** 484 U.S. 231, 245 (1988) (constitutionally required "narrowing function" occurred when jury found defendant guilty of three murders under death-eligibility requirement that " the offender has a specific intent to kill or to inflict great bodily harm upon more than one person": "There is no question but that the Louisiana scheme narrows the class of death-eligible murderers").

At trial, the appellant also challenged the sufficiency of the indictment contending that it failed to charge capital murder where the aggravating factors were not included in the indictment. (II 250-86) The ***Ring*** decision essentially makes the existence of a death qualifying aggravating circumstance an element to be proved to make an ordinary murder case a capital murder case. The Court in ***Apprendi*** described its prior holding in ***Jones v. United States***, 526 U.S. 227 (1999).

The question whether Apprendi had a constitutional right to have a

> jury find such bias on the basis of proof beyond a reasonable is starkly presented. Our answer to that question was foreshadowed in ***Jones v. United States***, [citation omitted], construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and a notice of jury trial with guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." [citation omitted] The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi, 530 U.S. 466, 476. It is clear that in Florida as in Arizona, the aggravating circumstances actually define those crimes which are eligible for the death penalty.

> With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them - facts in addition to those necessary to prove the commission of the crime - whether the crime was accompanied by aggravating circumstances sufficient to require death or whether there were mitigating circumstances which require a lesser penalty.

State v. Dixon, 283 So.2d 1, 8 (Fla. 1973)

Because the Supreme Court applied the requirement that a jury find the aggravating sentencing factor beyond a reasonable doubt in capital cases, it would appear the Supreme Court ought to hold that the ***Apprendi*** requirement of alleging

the aggravating sentencing factor in the indictment also applies to capital cases once that issue is presented. Therefore, this Court should find that ***Section 921.141*** is unconstitutional on its face, because it does not require a death qualifying aggravating factor to be alleged in the indictment charging first-degree murder. In the absence of that allegation, an indictment does not charge a capital offense, and no death sentence can constitutionally be imposed for the charged murder.

The Trial Court's Modification of The Statute, Instructions, and Procedures Relating to Florida's Death Penalty Sentencing Scheme Violates the Separation of Powers Doctrine.

To the extent Florida's death penalty statute is substantive, it can be amended only by the legislature. ***See Morgan v. State***, 415 So.2d 6 (Fla. 1982)(rejecting argument that death penalty statute violates separation of powers because it is procedural). To the extent the statute is procedural, it has been adopted by this Court in ***Florida Rule of Criminal Procedure 3.780***. ***Id***. Trial courts cannot create new rules in criminal procedures; only this Court has the authority to promulgate rules of procedure.

Just two weeks before this Court decided ***Bottoson v. Moore***, 833 So.2d 693 (Fla. 2002), this Court reiterated that a trial court may not modify the standard jury instructions on statutory mental mitigators to omit the adjectives "extreme" and

"substantial" because, to do so would "in effect...rewrite the statutory description of mental mitigators, which is a violation of the separation of powers doctrine, ***Art. II, §3***, Fla. Const." ***Barnhill v. State***, 834 So.2d 836, 849 (Fla. 2002); ***accord Johnson v. State***, 660 So.2d 637, 647 (Fla. 1995); ***see also, State v. Elder,*** 282 So.2d 687 (Fla. 1980)("the court is responsible to resolve all doubt as to the validity of a statute in favor of its constitutionality,...The court will not, however, abandon judicial restraint and invade the province of the legislature by rewriting its terms"). Florida constitutional principles of separation of powers and statutory construction thus precluded the trial court from ignoring the plain and unambiguous language of Section 921.141, Florida Statues. In others words, the intent of the Florida Legislature is clear from the statute, and the judiciary is not free to rewrite it. ***See also, State v. Steele***, 30 Fla. L.Weekly S677 (Fla. October 12, 2005)(order requiring majority of jurors to agree on existence of particular statutory aggravating factor constituted essential requirements of the law).

As individual trial judges attempt to improvise their own remedies to the constitutional infirmities in the statute, capital defendants throughout the state are being sentenced to death under procedures that literally vary from judge to judge. This is the epitome of arbitrary and capricious imposition of the death penalty and a clear violation of the ***Eighth*** and ***Fourteenth*** Amendments to the United States

Constitution as well as ***Article I, Sections 9 and 17*** of the Florida Constitution. ***See Furman v. Georgia***, 408 U.S. 238, 248-49 (1972)("A penalty...should be considered 'usually' imposed if it is administered arbitrarily...")(Douglas J., concurring)(citations omitted); ***accord Id.*** at 310 (Stewart, J. concurring). Only the Florida Legislature can mend the constitutional defects in the statute. Until it does so, there is no constitutionally valid means of imposing a death sentence in Florida. The Appellant, therefore, respectfully asks this Honorable Court to declare Section 921.141 unconstitutional for any or all of the reasons presented here, and remand his case for imposition of a life sentence.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to vacate appellant's death sentence and remand for a new penalty phase as to Points I, II, III, and IV. As to Point V, appellant asks this Court to vacate his death sentence and remand for imposition of life imprisonment. As to Point VI, appellant asks this Court to declare Florida's death sentencing scheme unconstitutional.

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 Charles Crist, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Johnny L. Hoskins, #962032, Florida State Prison, 7819 NW 228th St., Raiford, FL 32026, this 21st day of December, 2005.

_____
CHRISTOPHER S. QUARLES
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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.

_____
CHRISTOPHER S. QUARLES
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