IN THE SUPREME COURT OF FLORIDA

GARY MICHAEL HILTON,

Appellant,

v. **CASE NO. SC11-898**

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

GARY MICHAEL HILTON,

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_____ /

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The record on appeal consists of 43 volumes and 5,596 pages. Volumes 1 through 16 contains the various pleading, documents, and transcripts of motion hearings, including sentencing. These volumes are referenced with the prefix "R" in this brief. Seven volumes of transcripts are of the jury selection. These volumes are doubled numbered as 1 through 7 with page numbers 1 through 1083 and as volumes 17 through 23 of the appellate record. For clarity, references in this brief will be to the 1 through 7 volume numbers with the prefix "JS". The 14 volumes of the guilt phase of the trial are also doubled numbered as 1 through 14 with pages 1 through 1609 and record volumes 24 through 37. This brief will use the 1 through 14 volume references with the prefix "T". The penalty phase of the trial is contained in six volumes of transcript numbered 1 through 6 with pages 1 through 758 and as

record volumes 38 through 43. These volumes will be referenced with the 1 through 6 numbers with the prefix "P". A copy of the trial court's sentencing order is attached as an appendix to this brief and reference with "App."

STATEMENT OF THE CASE AND FACTS

Procedurual Progress Of The Case

On February 28, 2008, a Leon County grand jury indicted Gary Michael Hilton for first degree murder for the death of Cheryl Dunlap between December 1st and December 15th, 2007, (Ct. I); kidnaping (Ct.II); grand theft of a motor vehicle (Ct.III) and grand theft of currency (Ct. IV). (Rl:37-38) Hilton pleaded not guilty on March 14, 2008. (Rl:54) The State filed a notice on intent to seek the death penalty on July 28, 2008. (R2:225) Hilton proceeded to a jury trial commencing on February 2, 2011. (JS1-7; Tl-14;Pl-6) On February 15, 2011, the jury found Hilton guilty of first degree murder on both premeditation and felony murder theories (Ct.I), guilty of kidnaping (Ct.II), not guilty of theft of a motor vehicle (Ct.III) and guilty of grand theft of currency (Ct.IV). (R12:2297-2299; T14:1603-1606) At the conclusion of the penalty phase of the trial on February 21, 2011, the jury recommended a death sentence by a vote of 12 to 0. (R12:2315;P6:752-754) The trial court held a Spencer hearing on April 7, 2011, where the State presented victim impact evidence, and the State and the defense made arguments regarding aggravating and mitigating circumstances. (R15:2781- 2826) On April 21, 2011, Circuit Judge James C. Hankinson sentenced Hilton to death for the murder (Ct. I), life in prison for the kidnaping (Ct. II), and five years imprisonment for theft (Ct. IV). (R12:2331-2365; R15:2850-

2853)

In the written order in support of the death sentence, the trial judge found six aggravating circumstances: (1) Hilton was previously convicted of anther capital felony based on his conviction for murder in Georgia (great weight); (2) the capital felony was committed during a kidnaping (great weight); (3) the capital felony was committed to avoid arrest (moderate weight); (4) the capital felony was committed for financial gain (some weight); (5) the capital felony was especially heinous, atrocious or cruel (great weight); the capital felony was committed in a cold, calculated and premeditated manner (great weight). (R12:2343-2356)

The court's order addressed two statutory and ten non-statutory mitigating circumstances. Hilton asserted two statutory mitigating factors – (1) that Hilton's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, and (2) Hilton was under the influence of extreme mental or emotional disturbance at the time of the crime. Regarding the first factor, the court rejected as not proven that Hilton suffered from an impaired capacity to appreciate or conform his conduct. (R12:2355-2356) The court found and gave some weight to the second factor that Hilton was under influence of extreme emotional or mental disturbance. (R12:2357-2358) Ten non-statutory mitigating factors were addressed in the order: (1) Hilton grew up in and emotionally abusive and

neglectful home (some weight); (2) Hilton abused drugs, including Ritalin, over a long period of time (some weight); (3) Hilton had no relationship with his biological father (moderate weight); (4) Hilton is already serving a life sentence (some weight); (5) Hilton served his country in the military (little weight); (6) Hilton suffered maternal deprivation and lacked bonding of a mother and child (some weight); (7) Hilton was placed in foster care as an adolescent (some weight); (8)Hilton grew up financially poor (not proven); (9) Hilton suffered traumatic brain injury as child (some weight); (10) Hilton suffers from severe mental defects (mental defects not proven severe). (R12:2358-2363)

Hilton filed his notice of appeal to this Court on May 4, 2011. (R12:2366)

Facts – Guilt Phase

On Saturday, December 1, 2007, Cheryl Dunlap and a friend, Kiona Hill, spoke around 10:30 in the morning and agreed to have dinner together that evening. (Tl:66-67) Michael and Vikki Shirley went hiking at Leon Sinks near the Leon and Walkulla County line that Saturday afternoon.(Tl:69-71, 90-91) They arrived around 12:30 p.m. (T1-.72) About an hour later, their hike brought them to Hammock Sink where they saw a woman seated alone reading a book on a platform off the boardwalk. (Tl:73-74, 91) She wore jeans and a sweater. (Tl:75, 94) She later walked past them carrying her hardback book. (Tl:75) Michael later recognized Dunlap's photograph

in the newspaper in connection with her disappearance. (Tl:76-78) Dunlap did not show for dinner that evening with Hill, and she did not call. (Tl:67) Another friend, Tanya Land, missed Dunlap at church the next day. (Tl:60) She went to Dunlap's residence and found her dog there, but her car was missing. (Tl:60) Land called the police. (Tl:60)

Steven Ganey with the Wakulla County Sheriff's Office received the missing person report on December 3, 2007. (Tl:105-106) Dunlap's car had been identified as a white, Toyota Camry, and it was located on the side of a highway in Leon County parked near the woods. (Tl: 61-62, 106-108) The right rear tire was flat with a puncture in the sidewall. (Tl:109) This puncture location was inconsistent with being caused by running over an object. (Tl:109) Ganey thought the puncture was deliberate. (Tl:110) Before the missing person report, Florida Highway Patrol Trooper Brian Speigner had placed a disabled vehicle ticket on the Camry on December 1, 2007, giving a time for removal of the car. (Tl:117-121) The car was registered to Cheryl Dunlap. (Tl:121) Ganey's search of the immediate area revealed no useful information. (Tl:111-115) Later testing of the car for biological evidence and fingerprints revealed nothing of evidentiary value. (T4:457-461, 471-474; T12:1283-1286, 1342)

A review of Cheryl Dunlap's bank account at Ameris Bank in Crawfordville revealed withdrawals during the first week of

December 2007. (T2:190-194) The video showed Dunlap cashed a check in the drive-through teller at 11:17 a.m. on December 1st (T1-.193-194) There were ATM withdrawals on Dunlap's account made at the ATM at Hancock Bank on December 2, 3, and 4, 2007, totaling $700. (T2:180-192) The custodian of the records at Ameris Bank said that the ATM transactions would have required the PIN for Dunlap's account. (T2:192) Video from the security camera at Hancock Bank recorded the transactions.(T2:197-201) A video analysis expert printed some images from the Hancock Bank security video, and the images show a person making a transaction wearing a blue and white patterned, long-sleeved shirt, glasses, a hat and some type of mask made from tape.(T3:308-327)

On Saturday, December 15, 2007, Ronnie Rentz found Dunlap's body while hunting in the Apalachicola National Forest. (T2:205-2 09) The body was near a dirt, forest road, and it had been covered with some brush and limbs. (T2 :206-207; T4:478) Investigator Amy George with FDLE described the area as about twenty feet in the woods off of National Forest Road 381. (T4:479) The head and both hands were missing from the body. (T4:478) George also attended the autopsy the next day and various samples were obtained for DNA testing. (T4:485-487) Through DNA testing, the body was identified as Cheryl Dunlap. (T4:487)

After Hilton became a suspect, witnesses reported having seen him at various places in the area of the Apalachicola National

Forest. Ethan Davis said Hilton stopped him sometime in November on L.L. Wallace Road, a forest fire road, and asked for help jump starting his vehicle. (T4:394-397) Hilton wore jeans, a flannel shirt, boots, and he had a backpack. (T4:396) Davis declined to help because he was in a borrowed truck and did not want to drive it down the trail to get to Hilton's vehicle. (T4:397) Hilton acted "real weird'[7] as if there was an emergency. (T4:397) Hilton tried to sell a camp stove to Davis. (T4:398) George Ferguson said he encountered Hilton in November on L.L. Wallace Road. (T2:246-248, 255) Hilton was walking with his dog, an Irish Setter, in the middle of the road. (T2:249) He flagged Ferguson down and asked for help starting his van. (T2:249-250) Ferguson described Hilton as dressed like a woodsman with a small backpack and his pants tucked in his boots. (T2:251-253) He also had a small folding shovel, and Ferguson saw a small knife scabbard under Hilton's jacket, although no knife was visible. (T2:254) Hilton lead Ferguson down a path-like road off of L.L. Wallace to his white Chevrolet van. (T2:256) There was a campsite and Ferguson noted a lot of camping equipment in the van. (T2:259-260) After starting Hilton's van, Hilton offered to give Ferguson a small camp stove.(T2:258-259) Hilton was very talkative and insisted on giving him instruction on the operation of the stove. (T2:258-259, 265-267) Hilton seemed agitated and had a back and forth movement, but he was very polite. (T2:264, 269)

On December 7th, Brian Bauer encountered Hilton in the Apalachicola National Forest in the woods off Joe Thomas Road. (T4:422-423) Bauer was there to set up his hunting blind for deer season that began the next day. (T4:424) Hilton asked if he knew a place he could camp and if there would be a lot of hunters the next day. (T4:424-425) The next day, Bauer saw Hilton's white van located at the same area where Bauer parked to hunt. (T4:425-426) Steven Prosser met Hilton in the forest during the first week of hunting season on either December 11th or 12th in the Joe Thomas Road area. (T4:428, 434-436) Prosser was about to release his hunting dogs and saw Hilton with his dog standing in front of a van. (T4:430-431) As a courtesy, Prosser walked to Hilton to warn him about the dogs. (T4:431-432) Hilton was talkative and seemed a little nervous. (T4:434) A few days later in the same week, probably December 14th, Prosser, with his hunting group, saw Hilton again about one-half mile from where he first saw him. (T4:436)

Witnesses saw Hilton various times during the month of December 2007. On December 1, 2007, Celeste Hutchins saw a man, she later said was Hilton, standing by a white Camry stopped on the side of Crawfordville Highway. (T2:149-156) He moved from the door area of he car to the trunk that was partially open. (T2:151-153) Loretta Mayfield spoke to a man she later identified as Hilton in the parking lot of a convenience store on December 10th. (T2:210-213) They talked about his dog that had long reddish brown hair.

(T2:213-214) He drove a white van. (T2:215-216) The man wore a blue and white shirt and khaki pants. (T2:216) When shown a photograph from an ATM camera of someone wearing a blue shirt, Mayfield said the shirt was similar. (T2:217) About three hours later, Mayfield was participating in looking for Cheryl Dunlap, and she drove some dirt roads in the Apalachicola Forest. (T2:221) She saw Hilton in his van traveling in the opposite direction on one of these roads. (T2:221-223) On December 18th , Teresa Johnson talked to Hilton in a convenience store about the discovery of Cheryl Dunlap's body twenty miles from the store. (T2:234-240)

Investigators examined and collected evidence from two campsites — one near L.L. Wallace Road and one near Joe Thomas Road. (T2:271, 277-294; T4:443-453, 461-464, 490-513) At the L.L. Wallace campsite, a number of discarded items were collected. (T2:271-294, 461-463) These items included instructions for a camp stove, dog food cans, an empty Top Tobacco pouch, Bugler brand cigarette rolling papers, a empty blister pack for Kroger brand allergy medication, a Kroger coffee jar, a plastic filter, several old newspapers dating back to October, parts of an egg carton, pieces of duct tape, rubber bands, a nicotine gum pack, some pink colored security tape, pieces of paper towels, pieces of masking tape, plastic bags, empty containers for latex gloves and for rubber bands. (T2:271-294) The campsite near Joe Thomas Road was processed. (T4:490-502) This campsite had a fire pit that contained

human hand and skull bones the medical examiner identified on site. (T4:450, 494, 497-499; T5:563-565) The fire pit area also contained pieces of a zipper, a metal clip and pieces of snap, white batting material and some burned fabric. (T4:495, 499-500) A hand rolled cigarette butt was found, and later DNA testing of the cigarette revealed a a partial DNA profile matching Hilton's. (T4:503-504; T12:1290-1292) One plastic bead found at the site prompted investigators to retrieve sixteen plastic beads from the back floorboard of Dunlap's car that were initially deemed irrelevant. (T4:475-478, 500-501) A portion of a blister pack for allergy medication was also found. (T4:447-448 504-505) Other items included a plastic grocery bag containing feces, a newspaper, a rubber band and a paper towel. (T512-513) The newspaper was a Tallahassee Democrat dated December 11, 2007. (T4:446, 513) The paper towel had "home sweet home" and a blue green pattern. (T4:514)

Dr. Anthony Clarke, an associate medical examiner, performed an autopsy on Dunlap's body on December 16, 2007. (T5:532-535) The body had changes due to decomposition. (T5: 539-540) Initial x-rays of the body did not reveal any foreign objects or bone fractures other than the area where the neck, head and hands were missing. (T5:539-541) Although there were soft tissue defects due to decomposition and insect activity, Clarke identified a scalloping wound edges and some scoring of the bones where the neck

and head were removed. (T5:542-545) These findings were consistent with a sharp-bladed instrument being used. (T5:542-545) The area where the hands had been removed were consistent with them having been cut off, but Clarke did not find any tool markings. (T5:545-546) Clarke concluded the body was dismembered after death. (T5-.549) A significant pre-mortem bruise was located on the middle to lower back. (T5:550-552) The bruise was inconsistent with a normal fall injury, since the area is not one readily exposed to injury. (T5:552) However, the injury could occur if the person fell back onto a large object such as a rock. (T5:552) This bruise appeared to have occurred hours or perhaps days before death. (T5:553) Clarke could not determine the mechanism of death, but he thought it might have been related to the missing neck and head. (T5:559) Based on circumstances, Clarke opined death was caused by homicide. (T5:559-560) Clarke could not determine a certain time of death. (T5:563) He gave a rough estimate that the body could have been in the woods seven to ten days, but he also said the time could have been up to fifteen days. (T5:563, 567) A sexual assault test revealed no useful DNA evidence. (T5:560-561; T12:1301-1330) At a later time, Clarke observed charred bones found in fire pit in the Joe Thomas Road area. (T5:563-564) He concluded that these were human hand and skull bones of the type missing from the body. (T5:564-565)

Anthony Falsetti, a forensic anthropologist, examined the

charred hand and skull bones. (T8:795-807) He concluded the bones were from a small adult, either male or female, over the age of sixteen or eighteen years. (T8:807-808) The seventh cervical vertebra bone present showed seven cut marks. (T8:810-815) Four carpel bones from a wrist had cut marks. (T8:811-816) These marks were consistent with the cutting of the hands. (T8:816) The bones were badly charred, but Falsetti selected ones with the best chance of providing a DNA sample for testing. (T8:809) No DNA could be obtained from the bones. (T8:826-837)

Hilton was arrested in Georgia. (T10:1091) In an interview with Agent Clay Bridges with the Georgia Bureau of Investigation, Hilton gave information on where to find his bayonet on a hiking trail in North Georgia. (T10:101096-1097) The bayonet was located on a hiking trail on Blood Mountain in North Georgia. (T10:1098-1100) Jeff Foggy, a tool mark expert with FDLE, examined the bayonet and compared it to the puncture marks on the tire from Dunlap's car. (T10:1101-1119) Foggy opined that the bayonet made the cuts found in the tire. (T10:1120-1121)

After Hilton's arrest, Georgia law enforcement gathered many items from Hilton's van and some items Hilton was seen discarding in a dumpster at a convenience store. (T5:574-626; T7:696-703, 728-T8:793) From the dumpster, officers found a U.S. Forestry citation issued to Hilton for unauthorized camping. (T5:590, 603-604) Other items included a knife and sheath, High Tech boots, some chain, a

padlock, gloves, a jacket, a folding police baton, a blue backpack. (T583-626; T7:696-703, 731-732, 738) A search of Hilton's van revealed clothing, jackets, gloves, camping equipment, duffle bags, two sleeping bags, High Tech boots, a camera, tobacco rolling papers, Hilton's Georgia drivers license, tape, paper towels, maps, two BB pistols, a book purchased at a Tallahassee book store, and dog food. (T7:728-T8:793) Many of these items were tested for possible biological evidence. (T12:1270-1342) Hilton's DNA was present on several items. (T12:1270-1342) The High Tech boots found in the dumpster had a mixture of DNA of at least two people including Hilton. (T12:1295)(State exhibit 175) A stain on the shoe lace of the right boot contained a mixture of DNA that included Dunlap as a major contributor. (T12:1295, 1338) A black duffle bag from the van had a DNA mixture including Hilton, and Dunlap was a possible contributor. (T12:1297-1298,1340)(State exhibit 207) On a purple sleeping bag, there was a DNA mixture, and Dunlap could not be excluded as a contributor. (T12:1303, 1334)(State exhibit 210) A DNA mixture found on a blue sleeping bag included Dunlap as a major contributor. (T12:1303-1305, 1336)(State exhibit 212) Another mixture of DNA found on some blue pants included Dunlap as a major contributor. (T12:1306-1307) (State exhibit 220)

The State introduced two portions of statements Hilton made to law enforcement over defense objections. On February 12, 2008, Sergeant David Graham and Detective Dawn Dennis with the Leon

County Sheriff s Office executed a search warrant on Hilton while he was in custody in Georgia. (Til:1164-1165) Mitchell Posey, an agent with GBI, assisted in the collection of buccal swabs, hair and fingerprints from Hilton. (Til:1166) Although Hilton was not questioned, the entire execution of the warrant was recorded. (Tll:1167-1168) (State's Exhibit 200) Portions of the recording were played for the jury over defense objections. (Til:1175-1194) During the process, Hilton talked about a number of things about the weather to drought conditions. (Til:1175-1180) At one point, Hilton said he would give a complete statement for immunity. (Til:1180) Later, Hilton said that he "started hunting in September" of last year, and there was nothing before that time. (Tll:1184)

On June 6, 2008, Sergeant Graham, along with two other law enforcement officers, transported Hilton by car from Georgia to Florida. (Til:1194-1195) Hilton was not questioned during the drive. (Til:1195) Hilton talked in a rambling monologue about a vast number of subjects from his clothes, his health, his lack of family, lack of employment, the wars, his military training, the economy, the interest rates, the housing crisis, credit card debt, volcanos, the oil supply, the assassination of President Kennedy, hurricanes and Tallahassee traffic. (Til:1204-1207) Graham acknowledged that Hilton made a number of outrageous comments during the trip. (Til: 1207) An audio recording of the trip was

made. (Til:1195-1196)(State Exhibit 298) The State played portions of the recording at trial. (Til:1199-1203) In the statement, Hilton said,

> MR. HILTON: I'm not all bad. I mean, you got to understand, I mean, I'm sure you can see. I mean, I'm a fucking genius, man. I'm not a — I'm not all bad. I just, you know, lost my mind for a little bit. Lost a grip on myself, man. What can I tell you?
>
> FBI and everybody else is trying to scratch their head, hey, guys don't get started doing my shit at 61 years old. It just don't happen, you know. Like there's a retired FBI (indecipherable) named Cliff Van, Clifford Van Zandt, that keeps getting himself in the news, talking about me. And he said, this guy didn't just fall off the turnip truck, he said. You know, in other words, he's been doing this. But like I told you before, you know, when I saw you before, I said, remember, I said I'd give you one for free. Nothing before September, okay? I mean, I'm not joking, okay?
>
> I just, I got old and sick and couldn't make a living and just lost, flat lost my fucking mind for a while, man. I couldn't get a grip on it.

(Tll:1199-1200)

While in the Leon County Jail, Hilton had conversation with another inmate, Fred Summers. (Til:12410 Correctional Officer Caleb Wynn was able to overhear the conversation through an intercom system that allows officers to monitor individual cells. (Til:1239-1240) On August 21, 2008, Wynn heard Hilton talking to Summers who was standing at the door of Hilton's cell. (Til:1241) Wynn activated the intercom system and heard Hilton's comments. (Til: 1242) No recording was made, but Wynn took notes about what he heard. (Til:1246) Hilton talked about the murder, and he said that he could answer all of the State Attorney's questions if the State

would give him a life sentence. (Til:1244) Hilton laughed and said he would tell where the head was located and that the family would want to know. {Til: 1243) Additionally, he said his bayonet was used in Dunlap's car tire. (Til: 1244-1245) Hilton also said he could tell how he "pulled it off" on the busy Crawfordville Highway. (Til: 1245) Hilton said he spent a few hours or a few days with Dunlap. (Til:1245-1246) He said it felt like a warrior going into and destroying a village. (Til:1246) Hilton expressed no regrets besides getting caught. (Til:1244) *Facts — Penalty Phase*

The State presented one witness during its case-in-chief for penalty phase, Agent Clay Bridges of the Georgia Bureau of Investigation who testified about and presented Hilton's confession to the murder of Meredith Emerson in Georgia in January 2008. (PI:44-86) Hilton presented four expert witnesses who testified regarding Hilton's psychological condition: Dr. Joseph Wu, a psychiatrist and clinical director of the Brain Imaging Center at the University of California, Irvine (PI:97-P2:158); Dr. Charles Golden, a clinical neuro-psychologist performing neuro-psychological testing and examinations (P2:158-214) ; Dr. Abbey Strauss, a psychiatrist with special expertise in psychopharmacology (P2:215-279); and Dr. William Morton, a board certified psychiatric pharmacist and professor. (P3:298-353) Hilton presented nine lay witnesses who were friends, family members,

employers and others who had known or come in contact with Hilton at various times in his life. (P3:378-P4:567) The State presented one rebuttal witness, Dr. Gregory Prichard, a clinical psychologist. (P4:568-P5:684)

At the beginning of the penalty phase, Hilton moved to limit the introduction of his confession in the Georgia case since it contained statements about other crimes and bad conduct. (Pi:11-25) The trial court denied the motion and denied requests to redact portions of the statement. (PI:24-25) Hilton also requested that the jury be instructed that the confession was only relevant to the prior violent felony aggravating circumstance. (PI:25-30) The court also denied this request and ruled the evidence could also be used as evidence to establish other aggravating circumstances, specifically, the heinous, atrocious or cruel, cold calculated and premeditated and avoiding arrest circumstances. (PI:25-30)

The State asked that its expert, Dr. Gregory Prichard, be excused from the witness sequestration rule and that he be allowed to be present during the entire penalty phase to assist the State and as a possible rebuttal witness. (Pi:32-33) Due to the State's late notice of seeking the death penalty, the court had precluded the State's psychologist from examining Hilton. (RIO:1870-1881, 1931-1932) Defense counsel acknowledged that if Hilton personally testified at penalty phase, the State's expert could be in the courtroom during his testimony, but he objected to the State's

expert being allowed to be present for all witnesses if he was also going to testify in rebuttal. (Pi:33) The trial court granted the State's request and allowed Dr. Prichard to remain in the courtroom and to testify as a rebuttal witness. (Pl:33; P4:568)

Clay Bridges, an agent with the Georgia Bureau of Investigation, participated in the investigation of the disappearance and death of Meredith Emerson from a trial in North Georgia. (PI:44-46) Bridges interviewed Hilton on January 7 and February 4, 2008, pursuant to a plea agreement regarding the case. (PI:49, 55) On January 31, 2008, Bridges was present when Gary Hilton entered a plea to the murder of Emerson. (PI:48) The State introduced the Georgia judgment and sentence. (PI:47) State Exhibit No. 1.

The January 7th interview of Hilton occurred in a vehicle as Hilton was being transported. (PI:49-50) During a portion of the interview, Hilton's lawyer, Neal Smith, and Sheriff Scott Stephens of Union County Georgia were present in the vehicle. (PI:49) Initially, Hilton provided information and assistance at the scene in finding Emerson's remains. (PI:51) Emerson's partially nude and headless body was found under some brush and leaves. (PI:52) Hilton directed officers to the location of the head. (PI:52) Hilton advised that he stripped the body and washed it with bleach to destroy fiber and DNA evidence. (PI:52-53) A witness had seen Hilton and Emerson at different times on the trail. (PI:53-54)

Hilton carried on his side a law enforcement type baton and a bayonet. (PI:53) A baton was recovered, and Hilton told Bridges where to find the bayonet. (PI: 54-55) Emerson fought Hilton, and he had lost the bayonet in the woods. (PI: 54)

On February 4, 2008, Bridges conducted a videotaped interview of Hilton. (PI:55-83) Hilton complained about his prior employer, John Tabor, who had assisted law enforcement in identifying and arresting him. (Pi:60-65) He said Tabor was responsible for Emerson's death because he would not have killed her if he had known law enforcement had him identified for the kidnaping. (PI: 65) Hilton said killing was dreadful, but he knew that when you take someone, you either kill them or get caught. (PI:66-67) He got no satisfaction from killing. (Pi:66) However, he said he was able to kill because of his general rage against society. (PI:66, 69) Hilton said he acted like a soldier on auto-pilot, and the killing was a surreal experience. (PI:67-68) Just after he killed Emerson, Hilton learned he had been identified because of a newspaper article appearing that day. (PI: 63-64) He had held her for three days. (Pl:64, 85)

Hilton explained that the Blood Mountain day trail was a good place to hunt for someone to take because a large number of people use the trail for day hiking. (PI:69-70) He noted that same reason makes it a bad place because of the number of potential witnesses. (PI: 70) A number of people saw him on the trail the day he took

Emerson. (Pl:70) Another mistake he made was selecting Emerson because she fought him and almost won. (PI:70-71) He later learned she had a black belt in martial arts. (PI:71) She did not hesitate to grab weapons, and Hilton lost control of his bayonet and baton, losing the bayonet in the woods. (PI:71) He fought her for several minutes, two different times, before subduing her. (PI:71-72) When he tied her to a tree, she did not yell. (PI: 72) Hilton said there comes a time during a fight that the person submits. (PI: 72) He remained calm and reassured Emerson she would not be hurt if she quit fighting. (PI: 73) Hilton said that because he was an experienced fighter, he remained calm and maintained proficiency. (PI:73) He noted that the greater proficiency you have in fighting the less you have to hurt someone. (PI: 73-77) He remained calm, talked to Emerson as a person, and Emerson remained calm and cooperated. (PI:77-78, 79-81) Hilton did secure her with a line around her neck as they walked through the woods to the parking lot. (PI:77-78) He had a BB gun that looked like a real pistol, and he told her he would shoot her if she ran. (PI:78) Hilton said he started hunting in September when his rage against society started his rampage. (PI: 82-83) This was after he and his longtime employer, Tabor, had a disagreement. (PI:82)

The defense presented Dr. Joseph Wu, an expert in neuropsychiatry, who examined and performed a PET scan on Hilton.(Pl:97-P2:158) Dr. Wu explained the positron emission

tomography (PET) scan images the functioning of the brain through measures of energy activity as the brain consume sugars. (PI:102-117) These scans are used for a variety of evaluations of brain conditions. (PI:102-117) The PET scan of Hilton revealed that he had significant abnormalities including hypofrontality characterized by decreased metabolism in the frontal lobe. (PI:118-120) The abnormal scan was consistent with someone who had suffered a traumatic brain injury. (Pi:118-120) Dr. Wu said the scan results are consistent with Hilton's history of brain injury when a Murphy bed fell on him when he was ten-years-old in 1956. (PI:120) The steel portion of the bed hit his head, essentially scalping him, and required 200 stitches to treat him. (PI:120-121) Damage to the frontal lobe as a child has a greater impact on the person's ability to regulate impulses and exercise judgment than such an injury would present to a person later in life. (PI:121-122) Because the normal development of the frontal lobe and impulse control does not mature until a person's mid-twenties, an early brain injury impairs impulse control from ever properly developing. (PI:122-123) The person with an early brain injury is also more prone to develop psychiatric problems like schizophrenia and bipolar disorder. (PI:123)

Hilton started to have psychiatric difficulties when he was 20 years-old and in the military. (PI:124-125) He had some auditory hallucinations. (PI:124) The military hospitalized him for over

four weeks based on his symptoms of psychosis. (PI:125) Even though Hilton is very bright and had been considered for a Special Forces assignment to a secret tactical nuclear weapons unit, he was discharged as unfit for military service. (Pi:125) Hilton could not establish himself in a consistent job greater than as a telemarketer. (PI:125) He became addicted to alcohol and drugs, including LSD and Quaaludes. (PI: 125) Dr. Wu's opinion was that Hilton became depressed because of his impaired impulse control and used alcohol and drugs to self-medicate. (PI:125) Hilton ultimately lost his job and became homeless. (PI:125)

Hilton began having periods of extreme fatigue. (PI:126) Dr. Wu concluded that Hilton had likely become depressed as part of his deteriorating schizo-affective psychiatric problems. (PI:126) Dr. Harry Delcher, an endocrinologist, began treating Hilton in 2005, with Ritalin to give him energy. (PI:126) Although Delcher initially prescribed a low dose of 20 milligrams of Ritalin, he substantially increased the dose to 80 milligrams by 2007, even though Hilton displayed manic symptoms. (PI:126-127) Hilton deteriorated faster, and he became bizarre and manic. (Pi:126) Symptoms of mania can include hyper-aggressiveness, increased energy, grandiosity and impaired judgment.(PI:126, 130) Hilton's employer said that Hilton's problems at work started in 2005. (PI:127) Hilton's behaviors during this time included rambling, pressured speech, aggressiveness, and threatening. (PI:127-128)

Hilton was grandiose and delusional, accusing his employer, John Tabor, of cheating him, and Tabor said Hilton told him that he was involved in making a movie called "Deadly Run". (PI:128) Tabor, who had employed Hilton for many years, said Hilton became more bizarre, paranoid, demanding and talked non-stop. (PI:128)

Dr. Wu concluded that Hilton's mental condition became worse from 2005 to 2007, because Dr. Delcher was increasing the Ritilan dosage for Hilton during that time. (PI:128) Wu described the situation as "horrible clinical malpractice" and as "like you're pouring gasoline on fire." (PI:128) Hilton was already suffering from a brain injury, depression and was self-medicating. (PI:129) The increasing dosage of Ritalin made Hilton "crazier and crazier and more and more aggressive." (PI:129) Hilton's mania was exacerbated. (PI:129) Additionally, Wu stated that the increased mania precipitated by the increased Ritalin can become a self-sustained chemical reaction in the brain causing the mania to continue after the Ritalin is stopped. (Pi:130) Although Hilton's brain injury and a childhood history of emotional abuse caused him behavioral problems, including some aggressive behaviors, he did not exhibit this degree of bizarre and aggressive behavior until he was 60-years-old when the increased dosing of Ritilan started. (Pl:132-135; P2:143-146)

Dr. Charles Golden is a clinical neuropsychologist, and he conducted an evaluation of Gary Hilton that included a battery of

testing. (PI:158-162) The testing results allowed Golden to establish how Hilton's brain functions. (P2:170-171) Generally, Hilton scored well on intelligence tests with a verbal score of 120 and a nonverbal score of 105. (P2:163) He also scored within the top two to ten percent on memory ability. (P2:163-164) The tests for spacial analysis and learning also resulted in high scores. (P2:166) On tests measuring the ability to concentrate, attention and impulse control, Hilton scored very poorly. (P2:164-167) Testing for malingering showed that Hilton was not malingering and that he tried to perform well throughout the testing. (P2:167)

Golden administered several personality tests. (P2:167-170) At the time of testing, Hilton was in jail and being treated with medications. (P2:168) His self-report at that time was that he had some anxiety, some depression and drug dependency. (P2:168) The testing revealed that Hilton has almost no ability to control his emotions. (P2:169) He avoids emotions because he cannot control anything that is not linear and logical. (P2:169) When his emotions are aroused, his performance declines rapidly. (P2:169) He has poor interpersonal relationships because he does not understand how to interact with people except on a very basic level. (P2:169) His interaction with others is based on how he wants the interactions to be rather than on reality. (P2:169) Answers Hilton gave on how to handle emotional situations were like the ones an eight to ten year-old child would give, rather than an intelligent adult.

(P2:169-170) Even though medicated at the time of testing, Hilton's contact with reality was borderline – close to a psychotic situation. (P2:170) Two-thirds of his responses were extremely unusual when compared to the ones normally given. (P2:170) Hilton's view of life is survival and negative. (P2:170) He had no positive emotion, his best was the absence of the negative one. (P2:170)

Hilton has neurological deficits in the prefrontal and frontal areas of the brain that impair ability to control strong emotions. (P2:181) Hilton typically avoided other people because he was unconformable around others. (P2:187) With weaker emotions, Hilton would attempt to control them by damping them down and pretending they did not exist. (P2:181) Stronger emotions he would attempt to control using various forms of self-medication with street drugs or attempt to use logic. (P2:182-183) Once those defenses no longer work, his brain becomes overwhelmed and irrational, delusional and hallucinatory behaviors emerge. (P2:183)

Some of Hilton's self-medication provided some short-term relief. (P2:187-188) Small amounts of alcohol or marijuana could be helpful. (P2:188) However, the introduction of Ritalin, that works like an amphetamine, would make Hilton hyper-manic and hyper-aggressive. (P2:184-188) He became irrational, impulsive, suspicious, paranoid, and had trouble sleeping.(P2:189-190)

Dr. Golden diagnosed Hilton with schizo-affective disorder based on his history throughout his life of depression, compulsive

behaviors, manic periods, and delusions since childhood. (P2:190-192) Hilton's problems were compounded by rheumatic fever and brain injury as a child. (P2:191-192) Golden also found elements antisocial personality disorder based on his episodes of stealing from others and shooting at his stepfather when he was young. (P2:193) However, antisocial personality disorder diagnosis criteria excludes behavior caused by brain injury, such as Hilton has due to rheumatic fever and being hit on the head with the falling Murphy bed. (P2:193) Golden also could not exclude the possibility of brain dysfunction due to genetic causes. (P2:193-194)

Based on his evaluation, Dr. Golden concluded that Hilton knew right from wrong, but his capacity to conform his conduct to the requirements of the law was substantially impaired. (P2:195-196, 207-208) Golden also concluded that Hilton suffered from an extreme mental or emotional disturbance at the time of the murder. (P2:197)

Dr. Abbey Strauss, a psychiatrist with a special emphasis in psychopharmacology, evaluated Hilton. (PI:214-232) In reviewing Hilton's background, Strauss learned that Hilton had a horrible childhood. (P2:236) He described Hilton's relationship with his mother as a non-relationship, one of never having a bond. (P2:236-237) Gary Hilton's parents divorced when he was young, and his mother essentially rejected Gary emotionally for her boyfriend,

Nilo. (P2:237) Hilton always felt estranged, and he never remembered being hugged by his mother. (P2:238) Nilo was abusive to Hilton and his mother. (P2:238) When Hilton was 14-years-old, he tried to protect his mother and shot Nilo. (P2:238) Hilton's mother stayed with Nilo, and Hilton went to foster care. (P2:238-239) Unable to form relationships that worked, Hilton became a loner and turned to dogs for emotional connections. (P2:236) Other significant events in his earlier life included the head injury as a child and a psychological discharge from the military. (P2:243-246) Strauss diagnosed Hilton as having antisocial personality disorder and schizo-affective disorder. (P2:240, 260)

Medications made Hilton's mental problems worse. (P2:240-243; 260) The combination of Ritalin and Effexor, an anti-depressant, were inappropriate medications for Hilton. (P2:240) The Effexor, an antidepressant, increases serotonin to affect the serotonin to dopamine ratio in the brain. (P2:256) Ritalin increases norepinephrine in the brain and disrupts the norepinephrine to serotonin to dopamine ratios. (P2:256) This out of alignment can cause increased impulsive behaviors. (P2:256) When Hilton began taking these medications in 2005, his condition deteriorated. (P2:240) John Tabor, Hilton's employer of ten years noted the change to the point where Hilton left employment in 2007. (P2: 240-242) Although Hilton had some odd behaviors, he had been a loyal, hard-working employee, and presented no problems as long as nothing

alarmed him. (P2:242) In 2007, Hilton stopped performing at work and made excuses. (P2:241) His behaviors became more bizarre, he talked rapidly, his appearance changed , he became accusatory and threatening. (P2:242) He missed weeks of work stating he was ill. (P2:242) Strauss concluded the Ritilan and Effexor exacerbated Hilton's mental condition and "pushed him over the edge." (P2-.260-261)

Based on his evaluation of Hilton, Strauss rendered an opinion that Hilton's capacity to appreciated the criminality of his conduct or to conform his conduct was substantially impaired. (P2:260-261) The behaviors associated with antisocial personalty disorder and schizo-affective disorder were greatly increased with the Ritalin and Effexor, and Hilton's mental capacities suffered increased impairments. (P2:261) Strauss also found that these medication induced changes placed Hilton under the influence of extreme mental or emotional disturbance at the time of the crime. (P2:261)

Dr. William Morton, pharmacy professor with a specialty in psychopharmacology, testified. (P3:298-303) Morton reviewed documents, other materials and interviewed Hilton to determine if there were issues concerning Hilton's medications. (P3:305-307) He concluded that Hilton had been inappropriately prescribed Ritalin and Effexor in combination and in excessive doses. (P3:336-337) The drug combination would be expected to produce profound side effects

of mania, psychotic symptoms, irritability, aggression and rage. (P3:337) The continued high dosage of Ritalin for Hilton, after he exhibited side effect symptoms, was like "adding gasoline to a fire."(P3:338)

Pursuant to a stipulation, the order and findings of the Georgia State Board of Medical Examiners regarding the license of Dr. Harry K. Delcher was admitted and published to the jury. (PI:87-97) The Board disciplined Delcher for his improper treatment of Hilton with high doses of Ritilan.(PI:87-97)

Victorino Row lived next door to Gary Hilton and his mother, Cleo Dabag, in Tampa in the early 1950's.(P3:378-379) Hilton was a boy at the time, and Row remembered the incident when Hilton sustained a head injury from a falling Murphy bed.(P3:379-380) His mother ran outside screaming for help.(P3:380) Hilton's head was split open and appeared as if he had been scalped. (P3:380) Cleo Dabag was holding bloody towels to help him, and another neighbor drove them to the hospital.(P3:380-381) Hilton and his mother had moved in the neighborhood about a week earlier, and they left soon after Hilton's injury.(P3:382-383, 385)

Thomas L. Perchoux lives in Hialeah, and he and his wife, Margaret Perchoux, knew Cleo Dabag and her son Gary Hilton during the time Margaret and Cleo worked together during 1960 or 1961. (P3:390-391) They lived just a few blocks apart. (P2:400) Hilton came to live with Perchoux for a time as teenager because he was

having problems at home – he did not get along with his stepfather, Nilo Dabag. (P2:393-395) Perchoux only met Nilo one time. (P2:394) Cleo Dabag was typically quiet about personal matters, but she said Hilton had been seeing a psychiatrist. (P2:393, 395) Perchoux was in the military at the time, and he insisted on discipline. (P2:396) He said Hilton was a little stubborn and pushed the limits some, but Perchoux thought his behavior was within the norm for a teenager. (P2:396-399) Perchoux spent time with Hilton, took him fishing and went to see his band perform. (P2:396-400) Hilton respected him. (P2:397) The entire time Hilton stayed with Perchoux, neither Cleo Dabag nor Nilo Dabag came to see Hilton, even though they lived a few blocks away. <P2:400-401)

An interview of Hilton's mother, Cleo Dabag, conducted by an agent with the Georgia Bureau of Investigation was presented since Cleo Dabag died before the trial. (P4:411) She related portions of Hilton's life history. (P4:418-500) Hilton never knew his biological father, William Hilton. (P4:419) He lived with them only three months before he went overseas with the military. (P4:419) On his return, Cleo learned that he had another wife. (P4:419) William Hilton never provided child support, and Cleo had difficulty finding him to get a divorce. (P4:419-420) Cleo moved with Gary from Atlanta to Tampa on a job transfer, and after some child care difficulties, Gary settled in at the Boy's Club. (P4:422-426) The

incident where a Murphy bed fell on Hilton's head requiring 200 stitches to repair his scalp occurred while they lived in an apartment in Tampa. (P4:443-445)

While in Tampa, Cleo married Nilo Dabag when Gary was eight-years-old. (P4:420-421, 427) Nilo worked with racehorses. (P4:427) They traveled a great deal with the horses. (P4:427, 434) Hilton sometimes helped care for the horses. (P4:429) Nilo grew up in Argentina in a very strict environment. (P4:429) Although he never physically abused Hilton, there was a lot of emotional abuse. (P4:429-430) Nilo demanded perfection. (P4:429) Nilo was also jealous of Gary because of attention Cleo might give to him. (P4:429) When Gary was nine or ten, Nilo suggested that Gary leave school and work as he had done as a child. (P4:430) Nilo yelled, and Gary obeyed him. (P4:430-431) Once Nilo disciplined Gary by tearing up a beautiful jacket Nilo had given him. (P4:431-432)

Since they moved every three or four months, Gary attended many different schools. (P4:434-435, 439-441) Because of frequent moves, they rarely had a pet. (P4:432) However, one time they had a Dalmatian that Gary loved. (P4:432-433) Finally, when Hilton was in the sixth grade, they settled in Hialeah, Florida. (P4:442) He started to develop some friends at that point. (P4:442) However, Gary was a quiet person and did not go out much. (P4:433) He did enjoy playing the drums. (P4:

Later when Hilton was a teenager, Nilo and Cleo separated for

a time, but Nilo continued to come around begging Cleo to return. (P4:484) During one of these times, Gary confronted Nilo with a shotgun a friend had left at the house, and he told Nilo to leave or he would call the police. (P4:484) Hilton threatened to shoot Nilo if he did not leave. (P4:484) Nilo pulled a mattress off the bed, held it in front of him and dared Hilton to shoot him. (P4:484) Gary shot him. (P4:484) Gary went to live with another family for a time. (P4:485) Cleo and Nilo reunited. (P4:485) Gary soon left school and joined the Army. (P4:486)

Hilton married while stationed in Germany, and he and his wife lived in North Miami for a time. (P4:458-463) The marriage lasted two or three years. (P4:462) Cleo thought Hilton's wife was using narcotics. (P4:461-462) Hilton was a pilot and attended school to become a flight instructor. (P4:464-465) He gave up that goal after his wife left, and he worked various jobs before moving to Atlanta. (P4:468-469) While living near Stone Mountain, Hilton met and married a woman who had two children. (P4:4 69-470) They separated after a short time. (P4:470-471) There came a time when Hilton stopped calling Cleo when she and Nilo refused his request for $10,000 to help bond him from jail after an arrest. (P4:476-477)

Maria Dabag Castelli, was the sister of Hilton's stepfather Nilo Dabag. (P4:505-507) She came to visit from her home in Argentina, and lived in the house for three months when Hilton was sixteen. (P4:507) Castelli said her brother, Nilo, was a strong

personality and aggressive. (P4:507) Based on her time in the house with them, she knew that Nilo did not want to associate with Hilton and he did not care for him. (P4:507-508) She also concluded that Cleo Dabag was not a loving mother – she never saw her display any affection to Hilton. (P4:508) However, Cleo and Nilo got along very well. (P4:507-508, 510) Castelli said Hilton was always grateful to her when she would take care of him is some way. (P4:509)

Sandy Herman Carr knew Gary Hilton in 1960 and 1961 when they were both 14-years-old in junior high school in Miami. (P4:513) She described the relaionship as friends and "kind of boyfriend and girlfriend." (P4:514) Carr was attracted to him because he was funny, outgoing and smart. (P4:516) They went to school together and studied together after school. (P4:514) She remembered Hilton as outgoing, liked history and read a great deal. (P4:515) However, she thought he was an underachiever. (P4:515) He played the drums and performed in a band. (P4:515) She was around Hilton's mother three or four times, and she thought Hilton and his mother seemed close. (P4:514) Hilton did not get along at all with his stepfather. (P4:514) Carr remembered when Hilton had an altercation with his stepfather and went into foster care. (P4:516) Hilton seemed more relaxed when he was in foster care. (P4:516) Once Carr had a difficult time with one of her parents being verbally abusive, and Hilton supported her and helped get her to a safe place. (P4:517) She saw Hilton again when she was a senior in

high school, and he told her he had dropped out of school to join the Army. (P4:517) Carr never again saw Hilton. (P4:517)

Roy Cave and Hilton were high school friends and played in the same band.(P4:518-520) After Cave finished high school, he and Hilton enlisted in the Army and went to boot camp together. (P4:520) They separated after boot camp, and Cave only saw Hilton one more time in Germany in 1966. (P4:520-521)

Stefanie Durham is the daughter of Constance Wagner who had a two-year relationship with Gary Hilton starting in 1981, when Durham was 13-years-old. (P4:523-524) Hilton lived with Durham and her mother, and Hilton became a father-figure for Durham. (P4:524) She said Hilton cared for her as a father would. (P4:524-525) He made sure she went to school, ate properly, drove her to extracurricular activities, helped her with homework, went to her ball games, gave her money, and cared for her when she was sick.(P4:525) Durham found Hilton to be eccentric, outgoing and funny. (P4:525)

Steve King, a Duluth City police officer, encountered Hilton when he responded to a suspicious person complaint at a housing subdivision in February 2006. (P4:529-533) He found Hilton with a dog in a white van a parked in the community house parking lot. (P4:533-534) King explained that he was on private property and would have to leave. (P4:534-535) In talking to Hilton, King realized that Hilton was agitated and confused. (P4:534-535) King

thought he might be "a little bit crazy", and perhaps off of his medications. (P4:535-537) Hilton complied with directions to leave.(P4:537)

In June of 2007, Scott Gillespie was on a trout fishing trip with a group at Cooper's Creek in North Georgia. (P4:539-540) He walked in to Hilton's campsite which was about 200 yards from the Gillespie's group's site. (P4:541) He saw Hilton sitting on a stump, slumped over, sharpening a knife and rocking back and forth. (P4:541) Gillepsie spoke to him, but Hilton did not respond – he continued to mutter or mumble something to his dog. (P4:541)

Mary Pat King, a Forest Service officer, encountered Hilton in Apalachicola National Forest on November 17, 2007.(P4:545) She saw him on Silver Lake Road at 7:40 p.m. while she patrolled the area. (P4:547) The encounter lasted five to fifteen minutes. (P4:547) She wrote in her personal log that he was a "'signal 20", the police code for a crazy person. (P4:548)

Jin Hee Lee owned and operated a laundry in Cambridge, Georgia. (P4:554-555) Hilton was a frequent customer over three or four years up to 2007. (P4:555-556) He came to wash his clothes about every two weeks, and he always used the machines at the front of the laundry. (P4:557) Hilton was quiet, but friendly. (P4:558) She remembered that Hilton always had his dog with him. (P4:557-558) Over time, she noticed that he changed physically. (P4:559) Once she saw him leaning against a machine and his face and eyes

were red. (P4: 559-561) She thought he was drunk, but he told her he was taking medications for multiple sclerosis. (P4:559)

Forensic psychologist, Dr. Gregory Prichard, testified for the State in rebuttal. (P4:568-572) After establishing Prichard's qualifications, the prosecutor asked Prichard his opinion on the accuracy of the diagnoses of the experts who testified for Hilton. (P4:573) Defense counsel objected on the ground that the evidence rules did not allow Prichard to render an opinion on whether he agrees or disagrees with other experts who have testified. (P4:574) The trial court overruled the objection and allowed Prichard to so testify because, in this case, the court had exempted Prichard from the witness sequestration rule because he was not permitted to examine Hilton. (PI:32-33; P4:574-576) Prichard was then asked to give an opinion on the accuracy of the diagnoses of the other experts. (P4:575) Prichard disagreed with the diagnosis that Hilton suffered a brain trauma that affected a personality change. (P4:575) Additionally, Prichard disagreed that Hilton suffered from schizoaffective disorder. (P4:576-577) Prichard agreed with the other experts that Hilton suffers from antisocial personality disorder. (P4:577-600) Finally, Prichard opined that Hilton knew the criminal nature of his conduct and he could conform his conduct to the requirements of the law. (P4:600-602)

During his testimony, Prichard discussed the behaviors of a person with antisocial personality disorder. This testimony

included references to Hilton's behavior Prichard gleaned from his review of records, witness statements and other materials. (P4:584-599) Over defense objection, Prichard discussed Hilton's prior arrests and uncharged criminal behavior mentioned in some of these materials. (P4:589-593) These allegations and uncharged crimes included an arrest for arson and one for aggravated assault. (P4:591) Allegations of criminal behavior from an ex-wife's interview statement that included sexually molesting children. (P4:589-591) Prichard also found "indications" that in 1995, Hilton helped the director of a movie develop the idea of kidnaping pretty girls and releasing them to hunt them down like prey. (P4:592) Also, Prichard stated that the idea came to fruition when Hilton said he started hunting in September of 2007. (P4:592)

An interview statement of Hilton's ex-wife noted that within six months of marriage she found out Hilton was running a charity donation scam. (P4:589) He had her quit her job in law enforcement to work with him collecting checks from businesses under the ruse of collecting for charity. (P4:589) The ex-wife's interview also stated that her nine-year-old daughter had reported that Hilton had touched her sexually. (P4:589-590) According to the interview statement, the ex-wife confronted Hilton, and he admitted it. (P4:590) She said Hilton told her he excused it because the child was not his daughter. (P4:590-591) The ex-wife's statement asserted that Hilton exposed himself and asked her son to touch his penis.

(P4:591) Prichard also testified that there was "indication" of some inappropriate sexual conduct with the son. (P4:591)

At the close of the direct examination of Prichard, the trial court stated the reasons for overruling the defense objections to the collateral crimes:

> ... I understand the defense has objected to collateral crimes. And I understand that there were a whole lot of things that came out in the expert's testimony that normally would be, you know, verboten, I mean — just couldn't do.
>
> But the whole theme of the defense expert's testimony was that Mr. Hilton never did anything wrong until these murders, and that it was a sudden change in his life created by Ritalin that brought about — it was based on, you know, these medical problems compounded by his brain damage. And I think that just kind of opens the door. I think the State has the right to contest that that is in fact the situation.
>
> So I — know, I would agree that what came out here, normally we would not be — normally would not allow in court. But I think that's the circumstances of the case. But anyway, that's my ruling and why is was allowed....
>
> (P4:607)

Defense counsel renewed the objections and moved for a mistrial before cross-examination of Prichard. (P5:612-628) Among the grounds asserted, Counsel argued to the trial court that Hilton's alleged consultation in making the movie "Deadly Run" was the subject of a pretrial motion in limine, and the prosecution violated the order granting that motion both on cross-examination of Dr. Wu and in the presentation of Dr. Prichard's testimony. (R3:526-528, 563-564; P5:617-628) At one point during the argument the trial judge asked the prosecutor for his good-faith basis that

Hilton was involved with the movie. (P5:624) The State Attorney said, "I don't know where it comes from" because he only had a one page investigative report that did not mention a source. (P5:624-626) Defense counsel advised the court that the Defense investigation determined the one page report was based on a newspaper article. (P5:627) Hilton had no credits for being involved in anyway with making the movie. (P5:627) The court denied the motion for mistrial. (P5:628) During the prosecutor's penalty phase argument to the jury, he again mentioned the making of the movie. (P6:714-716) Defense counsel renewed the objections, and the trial court again denied a request for a mistrial. (P6:715-716)

SUMMARY OF ARGUMENT

1. Hilton moved to exclude recorded statements he made to law enforcement officers on the ground that they included references to irrelevant collateral crimes. One recording was made as officers executed a search warrant to obtain fingerprints, hair and DNA samples and another recording was made when Hilton gave a statement regarding a Georgia murder. The court denied the motions. These statements were inadmissible, since the only relevance was to show Hilton's propensity to commit crimes. See, Sec. 90.404 Fla. Stat.; Williams v. State, 110 So.2d 654 (Fla. 1959).

2. The trial court permitted the State's psychologist, Dr. Gregory Prichard, who testified in rebuttal during penalty phase, to testify about allegations of Hilton's past criminal conduct. These allegations included theft, fraud, arson, aggravated assault and sexually molesting children. This testimony infected the penalty phase with improper, non-statutory aggravating circumstances.

3. The trial court improperly excused the State's expert, Dr. Gregory Prichard, from the witness sequestration rule. Hilton objected to the State's expert being allowed to be present for all witnesses if Prichard was also going to testify in rebuttal. However, the trial court granted the State's request and allowed Dr. Prichard to remain in the courtroom during all proceedings and to testify as a rebuttal witness. Additionally, the court allowed

Prichard to improperly give an opinion on the credibility and validity of the Defense experts whom he observed as they testified during the penalty phase.

4. The trial judge acknowledged that there was no direct evidence about the circumstances surrounding the homicide in this case. In order to justify finding the heinous, atrocious or cruel (HAC) and the cold, calculated and premeditated (CCP) aggravating circumstances, the court relied on the facts surrounding the homicide of Meredith Emerson in Georgia and Hilton's statements to Georgia law enforcement officers. Collateral crimes evidence may not be used as the sole or substantial basis for proving an aggravating circumstance. See, Wuornos v. State, 676 So.2d 966, 971 (Fla. 1996); Finnev v. State, 660 So.2d 674, 680-682 (Fla. 1995). With no facts sufficient to prove HAC or CCP aggravating circumstances, the court improperly relied on assumptions from collateral crimes in attempt to show proof of the aggravators. Hilton's death sentence has been unconstitutionally imposed. See, Amends. V, VI, VIII, XIV, U. S. Const.

5. The trial court rejected the mitigating circumstance that Hilton's capacity to conform his conduct to legal requirements was impaired. Sec. 921.141 (6) (f), Fla. Stat. In rendering this finding, the trial court failed to satisfy the requirement that the order express reasons why there is substantial competent evidence in the record to support the rejection of the mitigating

circumstance. See, e.g., Coday v. State, 946 So.2d 988, 1000-1005 (Fla. 2007); Crook v. State, 813 So.2d 68 (Fla. 2002); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Campbell v. State, 571 So.2d 415 (Fla. 1990). Hilton's death sentence has been imposed without adequate consideration of the mitigation presented. His death sentence has been imposed in violation of constitutional requirements.

6. The trial court erroneously imposed a sentence of death in violation of the Sixth Amendment principles announced in Ring v. Arizona, 536 U.S. 584 (2002).

ARGUMENT

ISSUE I
THE TRIAL COURT ERRED IN ADMITTING STATEMENTS HILTON MADE TO LAW ENFORCEMENT BECAUSE THE STATEMENTS INCLUDED REFERENCES TO INADMISSIBLE COLLATERAL CRIMES.

Hilton moved to exclude recorded statements he made to law enforcement officers on the ground that they included references to irrelevant collateral crimes. (Rll:2126; T12:2241) One recording was made as officers executed a search warrant to obtain fingerprints, hair and DNA samples and another recording was made when Hilton gave a statement regarding a Georgia murder. (Rll:2126; R12:2241) The court denied the motions after hearing arguments. (T7:659-693;T8:868-902; T10:1002-1029) Although redactions were made to the statements, both continued to include improper references to collateral crimes that were irrelevant to any issue in the trial.(Til:1167-1199) These statements were inadmissible, since the only relevance was to show Hilton's propensity to commit crimes. See, Sec. 90.404 Fla. Stat.; Williams v. State, 110 So.2d 654 (Fla. 1959). Hilton's right to due process and a fair trial have been compromised, and a new trial is required. , Sees. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

On February 12, 2008, Sergeant David Graham and Detective Dawn Dennis with the Leon County Sheriff s Office executed a search warrant on Hilton while he was in custody in Georgia. (Til:1164-1165) Mitchell Posey, an agent with GBI, assisted in the collection of buccal swabs, hair and fingerprints from Hilton. (Til-.1166)

Although Hilton was not questioned, the entire execution of the warrant was recorded. (Til:1167-1168) (State's Exhibit 200) Portions of the recording were played for the jury over defense objections. (Til:1175-1194) During the process, Hilton talked about a number of things about the weather to drought conditions. (Til:1175-1180) At one point, Hilton said,

> ... Maybe I'm just bored and running my mouth right now, messing with the police. But if there's anything I can do for you, if they want to do immunity for me, I'll be glad to give a full and complete statement.

(Til:1180) Later, Hilton and the investigators had the following exchange,

> MR. HILTON: I'm going to tell you something else, too, I'm going to give you for free. The truth too. This is the truth, absolutely the truth.
>
> INVESTIGATOR GRAHAM: Yes, sir.
>
> MR. HILTON: Nothing before Sep - I started in September of last year. Nothing before that. Nothing before that. That's a promise.
>
> INVESTIGATOR GRAHAM: Yes, sir.
>
> MR. HILTON: I'm going to tell you right now, nothing – I started hunting in September.
>
> INVESTIGATOR GRAHAM: Okay.
>
> MR. HILTON: Nothing, nothing.
>
> INVESTIGATOR GRAHAM: Well, I appreciate it.
>
> MR. HILTON: That's the truth.

(Tll:1184)

On June 6, 2008, Sergeant Graham, along with two other law

enforcement officers, transported Hilton by car from Georgia to Florida. (Til:1194-1195) Hilton was not questioned during the drive. (Til:1195) Hilton talked in a rambling monologue about a vast number of subjects from his clothes, his health, his lack of family, lack of employment, the wars, his military training, the economy, the interest rates, the housing crisis, credit card debt, volcanos, the oil supply, the assassination of President Kennedy, hurricanes and Tallahassee traffic. (Til:1204-1207) Graham acknowledged that Hilton made a number of outrageous comments during the trip. (Til: 1207) An audio recording of the trip was made. (Til:1195-1196)(State Exhibit 298) The State played portions of the recording at trial. (Til:1199-1203) In the portion played, Hilton said,

> MR. HILTON: I'm not all bad. I mean, you got to understand, I mean, I'm sure you can see. I mean, I'm a fucking genius, man. I'm not a — I'm not all bad. I just, you know, lost my mind for a little bit. Lost a grip on myself, man. What can I tell you?
>
> FBI and everybody else is trying to scratch their head, hey, guys don't get started doing my shit at 61 years old. It just don't happen, you know. Like there's a retired FBI (indecipherable) named Cliff Van, Clifford Van Zandt, that keeps getting himself in the news, talking about me. And he said, this guy didn't just fall off the turnip truck, he said. You know, in other words, he's been doing this. But like I told you before, you know, when I saw you before, I said, remember, I said I'd give you one for free. Nothing before September, okay? I mean, I'm not joking, okay?
>
> I just, I got old and sick and couldn't make a living and just lost, flat lost my fucking mind for a while, man. I couldn't get a grip on it.

(Tll:1199-1200)

Hilton's comments that he did not start hunting until September of 2007, implied the commission of other homicides. The homicide in this case occurred in December of 2007. Although evidence of another homicide conviction in Georgia was admitted in penalty phase, that homicide occurred in January of 2008. (Pi:44-47) The references to hunting in September left the jury with the indication that Hilton had committed other homicides besides the case being tried, and, also, other homicides besides the Georgia homicide conviction admitted in aggravation at penalty phase. This admission of evidence effectively contradicted the trial court's previous ruling that allegations of other homicides in North Carolina could not be admitted. (R3:521524; R10:1923) Both the guilt and penalty phases of the trial have been prejudiced with irrelevant evidence of uncharged collateral crimes.

While the State may admit evidence suggesting collateral crimes if relevant to prove a material fact in issue, ". . . the question of relevancy of this type of evidence should be cautiously scrutinized before it is determined to be admissible..." because such evidence is presumed harmful. See, Williams v. State, 110 So.2d 654, 662 (Fla. 1959); Jackson v. State, 451 So.2d 458, 561 (Fla. 1984) . Criminal propensity, alone, is not a basis for admitting evidence of collateral crimes. See, Sec. 90.404(2) (a) Fla. Stat. Evidence of collateral crimes may not be admitted solely because the crimes are similar. See, e.g., Drake v. State,

400 So.2d 1217 (Fla. 1981). Furthermore, when different victims are involved in the collateral crimes, the jury is more likely to view the evidence as showing merely criminal propensity. See, Hayes v. State, 660 So.2d 257 (Fla. 1995). The fact that the evidence suggesting collateral crimes comes from the defendant's own statements does not render the evidence relevant and admissible. See, Jackson v. State, 451 So.2d 458 (Fla. 1984). The State was allowed to present statements of the defendant suggesting he began killing three months before the homicide in this case and four months before the one resulting in the Georgia conviction. This established nothing more than Hilton's propensity to commit crimes. As this Court has explained,

> The rationale underlying the *Williams* rule is that such evidence
>
> > would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded.
>
> Jackson v. State, 451 So.2d 458, 461 (Fla. 1984)(quoting Paul v. State. 340 So.2d 1249, 1250 (Fla. 3d DCA 1976, cert denied, 348 So.2d 953 (Fla. 1977). For this reason, we have held that the erroneous admission of irrelevant collateral crimes evidence "is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So.2d 903, 908 (Fla.), cert, denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). Accord Peek v. State. 488 So.2d 52, 56 Fla. 1986).

Castro v. State, 547 So.2d 111, 115 (Fla. 1989). The comments admitted in this case showed nothing more that Hilton's propensity to commit crimes.

The prejudice extends to the penalty phase of this case. When the State sought to introduce Hilton's confession to the Georgia homicide as part of its proof of the aggravating circumstance of a prior violent felony, the court allowed the State to repeat the comments Hilton made about "hunting". (PI:11- 24) These references to uncharged crimes became evidence of nonstatutory aggravating circumstances. See, e.g., Robinson v. State, 487 So.2d 1040 (Fla. 1986); Castro v. State, 547 So.2d 111 (Fla. 1989); Hitchcock v. State, 673 So.2d 859 (Fla. 1996); see, also. Issue II, *infra.*

The trial court erroneous admitted evidence of collateral crimes. Both the guilt and penalty phases of Hilton's trial have been prejudiced. A new trial is required.

ISSUE II
THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT, THROUGH THE TESTIMONY OF DR. PRICHARD, ALLEGATIONS OF HILTON'S ARRESTS, PRIOR BAD ACTS AND UNCHARGED CRIMES THAT WERE IMPROPER, NON-STATUTORY AGGRAVATING CIRCUMSTANCES.

The trial court permitted the State's psychologist, Dr. Gregory Prichard, who testified in rebuttal during penalty phase, to testify about allegations of Hilton's past criminal conduct. These allegations included theft, fraud, arson, aggravated assault and sexually molesting children. This testimony infected the penalty phase with improper, non-statutory aggravating circumstances, and the taint rendered the sentencing process unconstitutional. Art. I, Sees. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. A new penalty phase trial is now required.

During his testimony, Dr. Prichard discussed the behaviors of a person with antisocial personality disorder. This testimony included references to Hilton's behavior Prichard obtained from his review of records, witness statements and other materials. (P4:584-599) Over defense objection, Prichard discussed Hilton's prior arrests and uncharged criminal behavior mentioned in some of these materials. (P4:589-593) These allegations and uncharged crimes included an arrest for arson and one for aggravated assault. (P4:591) Allegations of criminal behavior from an ex-wife's interview statement that included theft, fraud and sexually molesting children. (P4:589-591) Prichard also found "indications"

that in 1995, Hilton helped develop the idea for a movie of kidnaping pretty girls and releasing them to hunt them down like prey. (P4:592) Prichard stated that the idea of the movie came to fruition when Hilton said he started hunting in September of 2007. (P4:592)

Referencing the interview statement of Hilton's ex-wife, Prichard testified as follows:

> One of the most important things between then, between the age of 21 in the military and now, he had multiple criminal arrests. He had a wife, a second wife in 1979. There were excerpts from an interview with the second wife, and she indicated in her interview several things that were important for me to know.
>
> One of those things, within six months of the marriage, Mr. Hilton talked his exwife into quitting her job in law enforcement, because Mr. Hilton wanted her to work for him. And what she discovered is that she was assigned by him as a runner to go by different businesses to pick up checks. What she discovered is that Mr. Hilton was soliciting businesses under the ruse of being a charity organization for money. So that's within the first six months of marriage.
>
> She also indicated in the — in the interview that her nine-year-old daughter reported to her that Mr. Hilton had touched her [Defense counsel objection overruled]— had touched her sexually.
>
> She indicated that she confronted Mr. Hilton about Mr. Hilton touching the daughter sexually, and he admitted to it. Again, we're talking about psychopathy. Any — the ends justifies the means. Whatever the psychopath wants, they're going to take it from people, including touching a child sexaully.
>
> * * * *
>
> The exwife is — is to later say that the son indicated that Mr. Hilton pulled out his penis on one occasion and asked him to touch it, and the son did. So there's also and indication that there was some inappropriate sexual contact with the son.

(P4:589-591)

Prichard continued his testimony commenting on Hilton's arrest history:

> We also have a number of arrests. We have an arrest for arson in 1982 — let's see, I lost my arrest list, I think — a number of arrests up until 2004. I have a police report in the 2004 arrest. That arrest was for an aggravated assault where it was reported to the police that a witness saw Mr. Hilton beating his dog in a public park. He got angry at the people for taking down his license tag and calling the police. So what he did is he — he was following the people that called the police on him, and the lady was afraid he was going to run her over in the van. So we have these behaviors.

(P4:592)

Next, Prichard talks about Hilton "hunting" for victims. He referenced Hilton's statement to investigators that he did not start hunting until September of 2007, and Prichard also referenced the alleged information that Hilton helped develop a horror movie idea involving turning pretty girls loose and hunting them like prey. Prichard testified as follows:

> One of the things that we hear him say is, when he's talking to GBI, is started hunting in September, September of 2007, hunting meaning hunting for victims. What he also said is that Blood Mountain was a good place to hunt because there was a large variety of victims.
>
> * * * *
>
> What's also interesting about that is remember that 1995 indication that he helped the director of the movie, and what his idea was is turn a pretty girl loose and then hunt them down like prey. Well, it — it came to fruition. [Defense counsel objection overruled] It came to fruition with the behavior he's describing from his own mouth, I went hunting in September of 2007.

(P4:592-593)

At the close of the direct examination of Prichard, the trial

court stated the reasons for overruling the defense objections to the collateral and uncharged crimes:

> ... I understand the defense has objected to collateral crimes. And I understand that there were a whole lot of things that came out in the expert's testimony that normally would be, you know, verboten, I mean – just couldn't do.
>
> But the whole theme of the defense expert's testimony was that Mr. Hilton never did anything wrong until these murders, and that it was a sudden change in his life created by Ritalin that brought about – it was based on, you know, these medical problems compounded by his brain damage. And I think that just kind of opens the door. I think the State has the right to contest that that is in fact the situation.
>
> So I – know, I would agree that what came out here, normally we would not be – normally would not allow in court. But I think that's the circumstances of the case. But anyway, that's my ruling and why is was allowed....
>
> (P4:607)

Defense counsel renewed the objections and moved for a mistrial before cross-examination of Prichard. (P5:612-628) Among the grounds asserted, Counsel argued to the trial court that Hilton's alleged consultation in making the movie ''Deadly Run" was the subject of a pretrial motion in limine, and the prosecution violated the order granting that motion both on cross-examination of Dr. Wu and in the presentation of Dr. Prichard's testimony. (P5:617-628) At one point during the argument the trial judge asked the prosecutor for his good-faith basis that Hilton was involved with the movie. (P5:624) The State Attorney said, "I don't know where it comes from" because he only had a one page document investigative report that did not mention a source. (P5:624-626)

Defense counsel advised the court that the Defense team investigation determined the one page report was based on a newspaper article. (P5:627) Hilton had no film credits for being involved in anyway with making the movie. (P5-.627) The court denied the motion for mistrial. (P5:628) During the prosecutor's penalty phase argument to the jury, he emphasized the movie again for the jury's consideration. (P6:714-716) Defense counsel's renewed objections were overruled, and the trial court again denied a request for a mistrial. (P6:715-716)

This testimony about allegations of arrests, uncharged crimes and bad conduct was improper non-statutory aggravation and highly prejudicial in the penalty phase of Hilton's trial. The claim that the defense had opened-the-door to the testimony is without foundation. In Geralds v. State, 601 So.2d 1157 (Fla. 1992), this Court held that the State may not present evidence of a capital defendant's criminal history that is inadmissible as nonstatutory aggravating circumstances under the pretense that it is being admitted for some other purpose,

> This rule is of particular force and effect during the penalty phase of a capital murder trial where the jury is determining whether to recommend the death penalty for the criminal accused. Improperly receiving vague and unverified information regarding a defendant's prior felonies clearly had the effect of unfairly prejudicing the defendant in the eyes of the jury and creates the risk that the jury will give undue weight to such information in recommending the penalty of death.

Geralds, 601 So.2d at 1163, see, also. Perry v. State, 801 So.2d

78, 91 (Fla. 2001); Hitchcock v. State, 673 So.2d 859, 861-862 (Fla. 1996); Robinson v. State, 487 So.2d 1040 (Fla. 1986). In Geralds, the prosecutor was permitted to use Geralds' prior convictions to impeach a defense mitigation witness. The witness had been a neighbor of Geralds' for a one-year period. She said she never had any confrontation with Geralds, never saw a violent nature and that he often played with her young children. On cross-examination, the prosecutor asked if she was aware that Geralds had eight prior convictions. This Court reversed the case for a new penalty phase.

In Perry v. State, 801 So.2d 78 (Fla. 2001), the prosecution presented Perry's exwife in penalty phase who testified to specific instances of spouse abuse and an incident where Perry had viciously beaten someone. None of these incidents related to the murder case being tried. The State acknowledged that this evidence was not relevant to aggravating circumstances, but instead, the evidence was relevant because the defense had opened-the-door to it with a claim of nonviolence made in the guilt phase. This Court found no basis in the record for the State's open-the-door claim and also rejected the evidence as anticipatory rebuttal of the no significant criminal history mitigator. Relying on Geralds and Hitchcock, this Court held the trial court erred in admitting the ex-wife's testimony. Additionally, this Court held the error was not harmless,

> ... Melissa Perry's statements to the penalty phase jury were highly inflammatory and constituted impermissible nonstatutory aggravation and, as such, could have unduly influenced the penalty phase jury. As this Court has stated, "[t]he jury is charged with formulating a recommendation as to whether [the defendant] should live or die....[0]ur turning a blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute." Kormondy v. State, 703 So.2d 454, 463 (Fla. 1997). Accordingly, we cannot say there is no reasonable possibility that this error did not contribute to the jury's recommendation...

Perry, 801 So.2d at 91.

In Hitchcock v. State, 673 So.2d 859, during the penalty phase conducted on a remand several years after the original conviction, the sister of the homicide victim testified on the prosecutor's direct examination that Hitchcock had been sexually abusing the victim prior to her murder. On cross-examination, defense brought out that the victim's sister did not disclose this information until seventeen years after the victim's murder. On redirect examination, the State asked the victim's sister if Hitchcock had ever sexually abused her. Defense counsel objected, and the prosecutor claimed the testimony showed why the sister did not come forward for several years was because she feared Hitchcock. The trial court overruled the objection. The prosecutor continued using the allegation of sexual abuse of another besides the homicide victim when he cross-examined the defense mental health expert about whether or not Hitchcock had tendencies toward pedophilia. This Court, relying on Geralds, reversed the case for

a new penalty phase, finding the testimony was not responsive to the cross-examination, and "...in reality, became a guise for the introduction of testimony about unverified collateral crimes." Hitchcock, 673 So.2d at 861.

In Robinson v. State, 487 So.2d 1040 (Fla. 1986), Robinson was on trial for murder, robbery and kidnaping. Some family members and an employer testified in mitigation that Robinson was a good-hearted person and a good worker. On cross-examination, the prosecutor asked the witnesses if they were aware of allegations of other crimes Robinson had committed after the murder, including allegations he committed a rape while in the jail. The alleged rape and other crimes had not been charged and had not resulted in a conviction. This Court reversed the case for a new penalty phase, and wrote:

> In arguing to the court and then in closing argument the state gave lip service to its inability to rely on these other crimes to prove the aggravating factor of a previous conviction of a violent felony. Sec. 921.141(5)(b), Fla. Stat. (1983); Douaan v. State, 470 So.2d 697 (Fla. 1985) Arguing that giving such information to the jury by attacking a witness' credibility is permissible is a very fine distinction. A distinction we find to be meaningless because it improperly lets the state do by one method something which it cannot do by another. Hearing about the other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this instance.

Robinson, 487 So.2d at 1042.

The prosecutor and trial judge's suggestion that the testimony was invited in this case because of the theme of Hilton's defense

case in penalty phase is without merit. First, Hilton waived the mitigating circumstance of no significant criminal history, and therefore, the State could not assert the criminal conduct allegations were relevant to rebut that mitigator. (R3:516-517) See, Maaaard v. State, 399 So.2d 973, 977-978 (Fla. 1981). Second, the state attorney's assertion that the testimony of Dr. Wu opened the door to the "Deadly Run" movie references is unfounded. In Dr. Wu' s testimony, he recounted comments from Hilton's employer about Hilton's delusional thinking and Wu testified,

> And the employer noted that he just became more and more bizarre. And the employer noted that he started to become delusional, that he said he was involved in making a movie called Deadly Run. This is clearly some kind of grandiose delusion he had.

(PI:128) The prosecutor on cross-examination went beyond the mere mention of a movie name, and he, rather than the witness, injected the content of the movie into the trial by his questioning of Dr. Wu:

> Q. Okay. You said in your testimony that he became delusional about making a horror movie?
>
> A. Well, that's based on what Tabor, I think, said. Tabor said that Mr. Hilton was saying that he was involved with making the movie Deadly Run.
>
> Q. But you said he was delusional about that?
>
> A. That was my understanding.
>
> Q. Is that your testimony? Was he delusional?
>
> A. That was my understanding, that he was delusional, that he was not actually involved with making the movie.

Q. Would it surprise you – do you know the producer of the movie Deadly Run –

A. No.

Q. – Samuel Rael? Have you heard anything about it?

A. I'm not familiar with the movie.

Q. Would it surprise you to learn that this movie made in 1995, the producer of that movie testified – would state that Gary Michael Hilton said, go ahead, let's get some beautiful women out in the woods, they could be hunted down like prey, that he consulted with him?

A. No, I'm not aware of any such information.

Q. Would that be delusional if it is the truth?

A. No.

Q. So is your opinion that he was delusional about the movie, if you have additional facts?

A. Well, if there is additional facts to indicate that he actually was involved with the movie, then I would stand corrected.

Q. Would it surprise you to learn that Gary Michael Hilton even helped this producer find a spot to shoot this movie at a secluded cabin near Cleveland, Georgia?

A. I have not been – I was not aware of that information.

Q. So does that change your opinion about him being delusional?

A. Yes, it would.

(P2:146-147) As the prosecutor later acknowledged to the judge, he did not know where the information about the movie came from because the one page report he had did not mention a source. (P5:624-626)

A third reason the trial court suggested as a basis for Dr. Prichard's testimony was that it was justified to counter "the defense expert's testimony ... that Mr. Hilton never did anything wrong until these murders." (P4:607) This is factually not supported. The defense experts actually agreed with Prichard that Hilton has antisocial personality disorder and that his behaviors caused him some problems, legal and otherwise, throughout his life. (P2:190-194, 236-260) No one said Hilton had never done anything wrong until the murder. The Defense experts testified that Hilton's bad conduct escalated to murder when he was over-medicated with Ritalin. (P2:184-188, 240-243, 260-261) Moreover, the reason Prichard said these details of allegations of uncharged crimes were relevant was to support his diagnosis of antisocial personality disorder — a diagnosis that was never in dispute, since the defense experts agreed that Hilton had antisocial personality disorder.

Hilton's penalty phase trial was contaminated with non-statutory aggravating circumstances of prior arrests, allegations of uncharged crimes and other bad conduct. Compounding this problem is the fact that the allegations were largely based on hearsay and double hearsay, since they were from Prichard's reading an ex-wife's police interview when neither the ex-wife nor the officer conducting the interview testified. Additionally, the trial court overruled the defense objections and did nothing to

stop this contamination from occurring – ""...turning a blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality or our death penalty statute." Perry v. State, 801 So.2d at 91, *quoting* Kormondy v. State, 703 So.2d 454, 463 (Fla. 1997). Hilton's death sentence is unconstitutionally imposed. , Sees. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const. He now asks this Court to reverse his death sentence.

ISSUE III

THE TRIAL COURT ERRED IN EXCUSING THE STATE'S EXPERT WITNESS PSYCHOLOGIST FROM THE SEQUESTRATION RULE DURING PENALTY PHASE, IN PERMITTING THE STATE'S EXPERT TO RENDER AN OPINION ON THE VALIDITY AND CREDIBILITY OF THE OPINIONS RENDERED BY THE DEFENSE MENTAL HEALTH EXPERTS, AND DENYING A REQUESTED JURY INSTRUCTION CONCERNING THE CORRECT USE OF THE STATE'S EXPERT'S TESTIMONY.

The Trial Court Improperly Excused Dr. Prichard From The Witness Sequestration Rule.

The State asked that its expert, Dr. Gregory Prichard, be excused from the witness sequestration rule and that he be allowed to be present during the entire penalty phase to assist the State and as a possible rebuttal witness. (PI:32-33) Due to the State's late notice of seeking the death penalty, the court had precluded the State's psychologist from examining Hilton as permitted under Fla. R. Crim. P. 3.202. (RIO:1870-1881, 1931-1932) Dr. Prichard was given various reports and other materials to review, as Rule 3.202(e)(1) provides. (Pl:32-33; P4:571-572) The prosecutor had permission to depose the defense expert witnesses, but he chose not to depose them. (RIO:1931-1932; P5:626) Defense counsel acknowledged that if Hilton personally testified at penalty phase, the State's expert could be in the courtroom during his testimony, but he objected to the State's expert being allowed to be present for all witnesses if he was also going to testify in rebuttal. (PI:33) The trial court granted the State's request and allowed Dr. Prichard to remain in the courtroom during all proceedings and to testify as a rebuttal witness. (PI:33; P4:568) The trial court

abused its discretion in exempting the State's expert from the witness sequestration rule.

Generally, the rule of witness sequestration precludes a witness from remaining in the courtroom during other proceedings and the testimony of other witnesses. See, e.g., Sec. 90.616 Fla. Stat.; Randolph v. State, 463 So.2d 186, 191-192 (Fla. 1984). A trial judge has the discretion to exempt a witness from the rule, if the party seeking the exemption can satisfy a need for the exemption that overrides any prejudice to the other party. *Id.* In Burns v. State, 609 So.2d 600, 606 (Fla. 1992), a State's mental health expert mental health expert was permitted to remain in the courtroom during penalty phase while defense experts testified. The State expert in Burns did not have access to the defendant to perform an evaluation. This Court found no abuse of discretion in exempting the expert from the sequestration rule because there was no other means available for the expert to have the ability rebut the defense's evidence in mitigation. As this Court, after noting the general law on the rule of witness sequestration, wrote:

> However, this is not an absolute rule and the trial court has discretion to determine whether a particular witness should be excluded. Id.; Spencer v. State, 133 So.2d 729, 731 (Fla. 1961), cert, denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962). In this case, the trial court did not abuse its discretion in exempting both the state and defense experts from the sequestration rule. Under the circumstances, this was the only avenue available for the state to offer meaningful expert testimony to rebut the defense's evidence of mental mitigation. See, Nibert v. State, 574 So.2d 1059 (Fla. 1990).

Burns, 609 So.2d at 606.

Unlike the situation in Burns, the State had other means available to offer meaningful rebuttal to the defense mental mitigation evidence in this case. Initially, Burns was tried and decided before this Court promulgated Fla. R. Crim. P. 3.202, providing procedures for the State to acquire the means to rebut defense mental mitigation evidence. While the State lost the right to have Hilton evaluated because of a late notice seeking the death penalty, the other provisions of the rule were respected regarding disclosure of reports, interviews and other materials relevant to defense mental mitigation. The prosecutor had the access to depose the defense experts, but he did not do so. Other than an personal evaluation of Hilton, the State's expert had source materials to use as contemplated under Rule 3.202. Burns is distinguishable from this case, the trial court erred in granting an exemption to the sequestration rule to Dr. Prichard.

The Trial Court Improperly Allowed Dr. Prichard To Testify To His Opinion On The Accuracy Of Other Experts' Opinions And Conclusions.

Dr. Prichard testified for the State in rebuttal. (P4:568-572) After establishing Prichard's qualifications, the prosecutor asked Prichard his opinion on the accuracy of the diagnoses of the experts who testified for Hilton. (P4:573) Defense counsel objected on the ground that the evidence rules did not allow Prichard to render an opinion on whether he agrees or disagrees with other

experts who have testified. (P4:574); See, e.g., Caban v. State. 9 So.3d 50 (Fla. 5th DCA 2009); Carver v. Orange County, 444 So.2d 452 (Fla. 5th DCA 1984); Schwab v. Tollev. 345 So.2d 747 (Fla. 1977). The trial court overruled the objection and allowed Prichard to so testify because, in this case, the court exempted Prichard from the witness sequestration rule because he was not permitted to examine Hilton because of the State's late filed notice to seek the death penalty. (PI:32-33; P4:574-576) Explaining the ruling, the court said,

> THE COURT: All right. I overrule that objection. I understand that is normally the case, but most witnesses are under the rule of sequestration, and that's the basis of that rule. I accepted[sic] this expert witness from that rule. I assume we will then hear why he thinks those are in error, and I don't — I don't think that's improper testimony. So, I'll overrule the objection.

(P4:574-575)

After the court's ruling, the prosecutor continued with his direct examination of Prichard and asked him to give an opinion on the accuracy of the diagnoses of the other experts. (P4:575) Prichard disagreed with the opinion that Hilton suffered a brain trauma that affected a personality change. (P4:575) Additionally, Prichard disagreed with the opinion that Hilton suffered from schizoaffective disorder. (P4:576-577) This testimony, in part, proceeded as follows:

> Q. In your opinion, are these accurate diagnoses for Hilton?
>
> A. Well, yes and no. The ones that have been mentioned,

I know it gets confusing. There's been a lot of terms, psychological terms that have thrown around. A couple of ones that have been mentioned, I do not disagree with. One of the ones is organic personality disorder. The nature of that diagnosis is because of some kind of head trauma, because of some kind of brain insult, a person's personality drastically changes following the assault. It's most often seen in very traumatic head injuries, such as car accidents where there's head trauma, the person's personality is noticeably different.

I do not agree with that with Mr. Hilton, because the idea that the bed falling on his head when he was nine created a subsequent drastic change in personality, I have seen no evidence of that. So I do not disagree with that — I'm sorry — I do not agree with that diagnosis.

Another diagnosis that has been suggested is schizoaffective disorder. I do not agree with that diagnosis. I think it was this morning that Dr. Morton correctly indicated that an individual with a schizoaffective illness, remember he said it's a severe mental illness, and a person — [Defense counsel renewed objection overruled]

If a person has a schizoaffective illness, what we're going to see is extremely bizarre behavior...

* * * *

I disagree with that diagnosis, because I agree with the characterization that schizoaffective mental illness is a — is a severe mental illness.

* * * *

What I would agree sith is the characterization of Mr. Hilton being antisocial personality disordered or/and psychopathic....

(P4:575-577)

Later, at the close of the direct examination of Prichard, defense counsel renewed the objection and move for mistrial. (P5:612-616) The trial court again overruled the objection and denied the motion for mistrial. (P5: 612-616) Compounding the error,

the trial court also denied defense counsel's request for an added jury instruction advising the jury that experts cannot testify about the credibility of other experts. (P5:616) The court did not disagree that the requested instruction reflected the correct law, but the court did not think it would assist the jury. (P5:616-617) The trial court's ruling exempting Dr. Prichard from the witness sequestration rule, and then, the court's using that ruling to exempt Prichard from the law preventing one expert from rendering an opinion on the validity of another expert's opinion, denied Hilton due process in his sentencing proceedings. The court compounded the error in refusing a jury instruction on the use of expert testimony in this situation. Hilton's death sentence has been imposed in violation of his constitutional rights to due process, a fair trial and protection from cruel or unusual punishment. Art. I, Sees. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. This Court must now reverse Hilton's death sentence.

ISSUE IV

THE TRIAL COURT ERRED FINDING THE HEINOUS, ATROCIOUS OR CRUEL AND THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCES AND IN RELYING ON THE FACTS OF THE COLLATERAL MURDER CONVICTION IN GEORGIA AS A BASIS TO FIND THE AGGRAVATORS.

The trial judge acknowledged that there was no direct evidence about the circumstances surrounding the homicide in this case. (R12:2352-2353)(App) In order to justify finding the heinous, atrocious or cruel (HAC) and the cold, calculated and premeditated (CCP) aggravating circumstances, the court relied on the facts surrounding the homicide of Meredith Emerson in Georgia and Hilton's statements to Georgia law enforcement officers. (R12:2351-2356) Although this Court has allowed collateral crimes evidence to prove a fact needed to establish an aggravating circumstance, see, Conde v. State, 860 So.2d 930, 954 (Fla. 2003), collateral crimes evidence may not be used as the sole or substantial basis for proving an aggravating circumstance. See, Wuornos v. State, 676 So.2d 966, 971 (Fla. 1996); Finnev v. State, 660 So.2d 674, 680-682 (Fla. 1995) . With no facts sufficient to prove HAC or CCP, the court improperly relied on the factual circumstances of the Georgia murder and extrapolated that "It is reasonable to believe that Ms. Dunlap and Ms. Emerson were treated similarly by the Defendant." (R12:2354)(App) Any such assumptions are not proof. The HAC and CCP aggravating circumstances should not have been found and used in Hilton's sentencing. His death sentence has been unconstitutionally imposed. See, Art. 9, 16, 17, Fla. Const.;

Amends. V, VI, VIII, XIV U.S.Const. Hilton asks this Court to reverse his sentence.

A. *The Heinous, Atrocious Or Cruel Finding*

The State's evidence could not establish the circumstances surrounding the homicide of Cheryl Dunlap. As a result, the trial judge substantially relied on the circumstances surrounding the Georgia homicide and Hilton's statement to Georgia authorities about that crime to support the HAC finding. Specifically, the court found the aggravator because of an unsupported assumption that the victim was in fear of impending death. (R12:2351-2354) (App.)

First, the trial court incorrectly concluded that fear of impending death could be supported simply because the victim had been held for some period of time. Although some evidence suggested Hilton held Dunlap captive for a number of hours or days before her death, there was no evidence about the circumstances of her captivity. (R12:2352) (App) Merely holding a victim for a period of time before death does not establish the victim feared impending death, thereby supporting HAC. See, Donaldson v. State, 722 So.2d 177, 186-187 (Fla. 1998); Robinson v. State, 574 So.2d 108, 112 (Fla. 1991)(HAC on the basis of fear of impending death not supported where victims were assured that they would not be killed).The trial court looked to the Georgia murder, and Hilton's statement about that murder, to surmise that Hilton "adheres to a

particular modus operandi when he ^hunts', kidnaps, and murders his victims. "It is reasonable to believe that Ms. Dunlap and Ms. Emerson were treated similarly by the Defendant." (R12:2354) (App) The treatment of Emerson cannot be used as proof of treatment of Dunlap. See, Wournos, 676 So.2d 966. Moreover, Hilton also said in his statement about the Emerson murder that he talked to her to calm her about her circumstances, implying that she was reassured that she would not be killed. (PI:77-81) Therefore, even if the statements about the Emerson murder is deemed relevant, it also tends to negate the fear of impending death as proof factor for the aggravator.

In Wournos, 676 So.2d 966, the victim, Charles Carskaddon, was found in a secluded area, and the medical examiner determined that he died from eight fatal gunshot wounds. Wournos pleaded guilty to the offense. The State relied on collateral crimes evidence of other murders of middle-aged men Wournos committed. The court's finding of the cold, calculated and premeditated aggravator relied on the collateral crimes to conclude that Wournos "... carefully and calculatingly selected the victim, stalked him and lured him to a secluded area with intent of killing and robbing him." Wournos, at 971. This Court held that the trial court improperly relied entirely upon the collateral crimes evidence to support the aggravating circumstance:

> As her fourth issue, Wournos argues that the State failed to prove the aggravating factor of cold, calculated and

premeditation. We agree with Wuornos that the trial court relied entirely upon collateral crimes evidence to prove the existence of this factor when the sole relevance of this evidence was to establish bad character or propensity. *Finney v. State,* 660 So. 2d 674, 681 (Fla.1995). The trial court stated as much in its sentencing order:

> Charles Carkaddon was not the first of Miss Wournos' murder victims. The evidence indicates that by the time Miss Wournos killed Mr. Carskaddon she had a well established pattern of selecting white, midde-aged male victims, luring them to a secluded area with promises of sex, shooting them multiple times in the torso, and stealing their money, car and all other personality[sic] in their possession. The theft of Mr. Carskaddon's property did not occur spontaneously following the killing. Miss Wournos carefully and calculatingly selected the victim, stalked him and lured him to a secluded area with the intent of killing and robbing him.

Apart from the improper use of collateral crimes evidence to prove bad character or propensity, nothing in the record supports the last two sentences of this quotation. There were no witnesses to the killing of Carskaddon, and Wournos' confessions in themselves do not support the existence of cold, calculated premeditation. Accordingly, the trial court erred in finding this aggravating factor....

Wournos, 676 So.2d at 971.

Just as in Wournos, the trial court in this case improperly relied on collateral crimes evidence in an effort to support finding the HAC aggravator. The trial court recognized that there was no evidence of the circumstances of Dunlap's captivity. Consequently, there was no proof of the trial court's assertion that Dunlap feared impending death during her captivity prior to her death. No evidence supported the HAC finding. Hilton's

sentencing has been tainted with this improper finding.

B. *The Cold, Calculated And Premeditated Finding*

In finding the cold, calculated and premeditated aggravating circumstance, the trial court also violated of this Court's decision in Wournos as previously discussed. (R12:2354-2356)(App.) The court specifically and primarily relied on statements Hilton gave to Georgia authorities about the murder in Georgia. Although he made general statements about how to commit crimes, Hilton made no reference to the murder of Dunlap. The trial court's order reads, in part:

> This aggravator was clearly established by the State. Nothing illustrates this better than the Defendant's own statements. Those statements, taken in their totality, illustrate and extraordinary amount of cool and calm reflection. His approach to these crimes was very matter of fact. He needed money, so he had to go hunting. He needed to avoid arrest, so he had to kill. There was no anger, panic, or emotion associated with his actions. And, the manner in which Defendant dismembered and disposed of the body further evidence that the Defendant's actions were the product of calm reflection.

(R12:2355) (App.) This order, like the one in Wournos, seeks to rely on collateral crimes, bad acts and criminal propensity as proof. There was no witnesses or statements showing the circumstances leading to Dunlap's death. The series of prior murders in Wournos were deemed inadequate to prove that the specific murder then under review in that appeal was committed in a similar manner, with a similar state of mind and with similar calculation as Wournos' other homicides. Even though Wournos had a

"well established pattern" of prior homicides, the collateral crimes were not relevant or sufficient to establish that she acted in conformity to that pattern in the specific case on appeal. See, Wournos, 676 So.2d at 971. Hilton's statements about collateral crime are also inadequate to show cold, calculation in this case.

Suggestions in the trial court's order that Hilton showed preplanning by procuring needed items, scouting locations and taking actions after the death to cover-up the crime are also without foundation. (R12:2355)(App.) Hilton was homeless and lived camping out of his van. Every item he owned was with him. None of the items the trial court mentioned – zip ties, tape, chain and a BB gun – are unique to committing a murder. Moreover, there is no evidence that these items were specifically purchased for committing crimes. As far the suggestion that he scouted out remote locations as preplanning for a crime, once again, Hilton lived in the woods. His campsites were his home. Finally, the fact of a planned cover-up of the crime after the homicide is not probative of preplanning for a murder before the killing occurred.

The cold, calculated and premeditated aggravating circumstance has not been proven beyond a reasonable doubt with probative evidence. Hilton's death sentence must now be reversed.

ISSUE V

THE TRIAL COURT ERRED IN REJECTING THE MITIGATING CIRCUMSTANCE THAT HILTON HAD AN IMPAIRED CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS ACTIONS OR TO CONFORM HIS ACTIONS THE REQUIREMENT OF THE LAW WITHOUT ADEQUATE EVALUATION OF THE DEFENSE EXPERT TESTIMONY PRESENTED IN MITIGATION.

The trial court rejected the mitigating circumstance that Hilton's capacity to conform his conduct to legal requirements was impaired. Sec. 921.141 (6) (f), Fla. Stat. In rendering this finding, the trial court failed to satisfy the requirement that the order express reasons why there is substantial competent evidence in the record to support the rejection of the mitigating circumstance. See, e.g.. Codav v. State, 946 So.2d 988, 1000-1005 (Fla. 2007); Crook v. State, 813 So.2d 68 (Fla. 2002); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Campbell v. State, 571 So.2d 415 (Fla. 1990). Hilton's death sentence has been imposed without adequate consideration of the mitigation presented. His death sentence has been imposed in violation of constitutional requirements. See, Amends. V, VI, VIII, XIV, U.S. Const.; Parker v. Dugger, 498 U.S. 308 (1991); Eddings v. Oklahoma, 455 U.S. 104 (1982). This Court must now reverse Hilton's death sentence.

Hilton presented evidence establishing that his mental capacity to conform his conduct to the requirements of the law was substantially impaired, qualifying for the statutory mitigating circumstance provided for in Section 921.141(6)(f) Florida Statutes.

Dr. Golden, a neuropsychologist, and Dr. Strauss, a

psychiatrist, examined, tested and evaluated Hilton, and they both concluded that at the time of the crime, Hilton's ability to control his conduct was substantially impaired. (P2:195-196, 207-208; 260-261)See, also. Statement of Facts, *supra.* In rebuttal, the State presented Dr. Gregory Prichard, a psychologist, who had reviewed background materials and listened to the opinions of the other experts at trial, but who had not personally tested or examined Hilton. Prichard simply disagreed with the opinions of Drs. Golden and Strauss on the issue of Hilton's ability to control his conduct at the time of the crime. (P4:574-577) See, also, Statement of Facts, *supra.*

Without analysis, the trial court rejected the opinions of Drs. Golden and Strauss in favor of the opinion of Dr. Prichard, and the court simply wrote the following:

> The defense presented the testimony of Dr. Charles Golden, a board certified psychologist, and Dr. Abbey Strauss, a psychiatrist, who both opined that Defendant's ability to conform his conduct to the law was substantially impaired. The state presented the testimony of Dr. Gregory Prichard, a psychologist, who opined to the contrary. The Court finds that Dr. Prichard's testimony was more credible and more consistent with the other evidence in the case as to this point. The Court finds that this factor in mitigation was not proven.

(R12:2357) (App.) The trial judge's mere statement the he found Prichard's testimony more credible and consistent with the facts does not satisfy the requirement that the court's sentencing order expressly state why there is substantial competent evidence in the

record justifying the rejection of the mitigation.

This Court outlined the steps the trial judge must follow when considering mitigation to insure compliance with the constitution. In Coday, after discussing these steps at length, this Court summarized as follows:

> In summary, we have established a number of broad principles for the trial courts to use in evaluating mitigating evidence offered by defendants. A trial court must find as a mitigating circumstance each proposed factor that has been established by the greater weight of the evidence and that is truly mitigating in nature. However, a trial court may reject a proposed mitigator if the mitigator is not proven or if there is competent, substantial evidence to support its rejection. Even expert opinion evidence may be rejected if aht evidence cannot be reconciled with the other evidence in the case. Finally, even where a mitigating circumstance is found a trial court may give it no weight when that circumstance is not mitigating based on the unique facts of the case.

Coday, 946 So.2d at 1003. The trial court's cursory treatment of the mitigator in the sentencing order does not support a basis for rejection of the mitigating circumstance.

The trial judge failed to comply the above mandates when rejecting as not proven the statutory mitigating circumstance concerning Hilton's impaired ability to conform his conduct to the the requirement of the law. Hilton now asks this Court to reverse his death sentence.

ISSUE VI
THE DEATH PENALTY IS UNCONSTITUTIONALLY IMPOSED BECAUSE FLORIDA'S SENTENCING PROCEDURES ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

The trial court erroneously imposed a sentence of death in violation of the Sixth Amendment principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Hilton's motions to dismiss the death penalty as an option in his case should have been granted. (R4:781-R6:1046; R6:1055-1085; R7:1339-1340) Ring extended the requirements of Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of the facts relied upon to increase maximum sentences to the capital sentencing context. Florida's death penalty statute violates Ring in a number of areas including the following: the judge and the jury are co-decision-makers on the question of penalty and the jury's advisory recommendation is not a jury verdict on penalty; the jury's advisory sentencing decision does not have to be unanimous; the jury is not required to make specific findings of fact on aggravating circumstances; the jury's decision on aggravating circumstances are not required to be unanimous; and the State is not required to plead the aggravating circumstances in the indictment.

Hilton acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme

Court previously upheld Florida's statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), cert, denied, 123 S.Ct. 662 (2002), and King v. Moore, 831 So.2d 143 (Fla. 2002), cert, denied, 123 S.Ct. 657 (2002). Additionally, Hilton is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So.2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statutes with the constitutional requirements of Ring. See, e.g., Miller v. State, 42 So.3d 204 (Fla. 2010); Marshall v. Crosby, 911 So.2d 1129, 1133-1135 (Fla. 2005) (including footnotes 4 & 5, and cases cited therein); State v. Steele, 921 So.2d 538. At this time, Hilton asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in the constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare Section 921.141 Florida Statutes unconstitutional. Hilton's death sentence would then fail to be constitutionally imposed. Amends. V, VI, VIII, XIV U.S. Const.; , Sees. 9, 16, 17 Fla. Const. Hilton's death sentence must be reversed for imposition of a life sentence.

CONCLUSION

For the reasons presented Issue I of this initial brief, Hilton asks that his judgments and sentences be reversed with direction to afford him a new trial. Alternatively, for the reasons in Issues I through VI, Hilton asks this Court to reverse his sentence of death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Carolyn Snurkowski, Assistant Attorney General, Capital Appeals, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and to Appellant, Gary M. Hilton, Offender ID# 203672 Buncombe County Detention Facility, 20 Davidson Dr., Asheville, NC 28801, on this 20th day of January, 2012.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

GARY MICHAEL HILTON,

Appellant,

v. **CASE NO. SC11-898**

STATE OF FLORIDA,

Appellee.

APPENDIX TO

INITIAL BRIEF OF APPELLANT

Sentencing Order dated April 21, 2011

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.:2008 CF 697A
SPN.: 197149

vs.

GARY MICHAEL HILTON,

Defendant.

, _____ , _____ J

SENTENCING ORDER

On February 28, 2008, the Defendant, Gary Michael Hilton, was indicted for one (1) count of First Degree Murder of Cheryl Dunlap, occurring between December 1, 2007, and December 15, 2007, one (1) count of Kidnapping, and two (2) counts of Grand Theft. He was tried before a jury on January 31, 2011, through February 15, 2011. The jury found the Defendant guilty of First Degree Murder (both premeditated and felony murder), Kidnapping (both to facilitate a felony and to terrorize), and Grand Theft (personal property). The Defendant was found not guilty of Grand Theft (motor vehicle). On February 17,2011, the jury reconvened for the presentation of evidence in support of aggravating and mitigating factors. On February 21, 2011, the jury recommended by a vote of twelve to zero (12-0) that the Defendant be sentenced to death for the murder. On March

31, 2011, the State filed its Memorandum In Support Of Recommendation Of Jury. Although invited to do so, the Defense did not file a sentencing memorandum. On April 7, 2011, the Court held a sentencing or Spencer hearing during which both sides were allowed to present further evidence and make legal argument. The Defendant declined to make a statement. Final sentencing was set for April 21,2011.

This Court heard the evidence presented in both the guilt and penalty phases, had the benefit of the State's legal memoranda and heard argument in favor of and in opposition to the death penalty. This Court accords great weight to the recommendation of the jury and reweighs the evidence to determine whether or not the State proved each aggravating circumstance beyond a reasonable doubt (See Reynolds v. State. 934 So.2d 1128 (Fla. 2006)) and finds as follows:

AGGRAVATING FACTORS

1. THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.

The evidence presented during the penalty phase establishes that the Defendant kidnapped Meredith Emerson on January 1, 2008, while Ms. Emerson was hiking on Blood Mountain in North Georgia, Defendant was

arrested at a convenience store by Georgia authorities on January 4, 2008. Based on defendant's statements it was later determined that Ms. Emerson was murdered around noon on January 4, 2008. On January 7,2008, the Defendant led authorities to Ms. Emerson's body. Ms. Emerson's nude body was covered by brush, decapitated and had been bumed with bleach. Her head was located in another area. According to defendant's statement on February 4, 2008, he had kept Ms. Emerson chained by the neck in the van. Defendant further admitted having sexually battered Ms. Emerson. Defendant admitted that his purpose in abducting Ms. Emerson was to obtain money from her using her ATM card. In addition to the Georgia Bureau of Investigation (GBI) agent's testimony as to having interviewed defendant and being present when he plead guilty to the charges, the State presented a certified copy of judgment and sentence as to the murder charge. Although the Georgia murder occurred after the murder of Ms. Dunlap, the conviction still qualifies under this aggravator since the plea and sentencing as to that charge occurred prior to the sentencing for the instant case. Elledge v. State. 346 So.2d 998, 1001 (Fla. 1977).

The Court finds this aggravating circumstance to have been established beyond a reasonable doubt. The Court finds this factor to be particularly egregious given the similarities with the instant offense, the closeness in time

with the instant offense and the Defendant's statement that these murders were part of a calculated course of conduct to find victims that he had started in September 2007. This aggravating circumstance is given great weight.

2. THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF A KIDNAPPING.

The evidence during the guilt phase of the trial showed that Cheryl Dunlap was last seen by witnesses at an area known as Leon Sinks, located in the Apalachicola National Forest in Leon County, Florida on December 1, 2007. Ms. Dunlap was seen walking on a hiking trail in the park. She had made plans earlier in the day to meet and have dinner with a friend. She never made the dinner date and was never heard from again. Her abandoned vehicle was found that evening on Highway 319. One of the tires had been punctured. The puncture wound was later linked to the defendant's bayonet. A masked man fitting the general description of Defendant was observed on surveillance video withdrawing money from Ms. Dunlap's bank account on several occasions between December 2, 2007, and December 4, 2007. After an extensive search, Ms. Dunlap's body was found on December 15, 2007, in a remote area of the forest several miles from Leon Sinks. Ms. Dunlap's nude body has been covered by brush. Her head and hands had been removed from

her body and were not found at that location. The severely charred remains of a human head and hands were found in a bum pit at a nearby campsite which was linked to Defendant by both witness sightings and DNA evidence on a cigarette butt. Upon Defendant's arrest, Ms. Dunlap's DNA was found on various items in Defendant's possession. In a statement to a fellow inmate overheard by a correctional officer at the Leon County Jail, Defendant indicated that after he took Ms. Dunlap, he kept her alive for "hours or days." Defendant's statement that he did not kill Ms. Dunlap right away is corroborated by the medical examiner's estimate that Ms. Dunlap's death occurred several days after her abduction.

The evidence of kidnapping in the instant case is consistent with the modus operandi Defendant used in the kidnapping and murder of Meredith Emerson in Georgia, to wit: holding the victim for several days to terrorize and/or to ensure he had the correct information to obtain money from the victim's bank account.

The murder of Cheryl Dunlap occurred as a result of and while Defendant was engaged in the kidnapping of Ms. Dunlap. This is evident from the jury's verdict whereby Defendant was found guilty of Kidnapping. Walls v. State. 641 So.2d 381 (Fla. 1994) and Lowenfield v. Phelps, 484

U.S. 231 (1988). The jury further found that the kidnapping was committed both to facilitate a felony and to inflict harm on or to terrorize the victim.

In cases where premeditation is not shown and the killing is accidental, little weight should be given to this aggravator, because but for the felony, the homicide would not be first degree murder. However, in this case, the jury specifically found that the murder was both premeditated and felony murder Under these circumstances, the independent felony should be given greater weight.

The Court finds this aggravating circumstance to have been established beyond a reasonable doubt. The Court accepts the jury's finding as to the kidnapping and the underlying bases for the kidnapping and the murder. The Court also independently makes the same findings. This aggravating circumstance is given great weight,

3. THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

In order to establish this aggravator, "where the victim is not a law enforcement officer, the State must show beyond a reasonable doubt that the sole or dominant motive for the murder was the elimination of a witness" Serranno v. State, 36 FLW S108a (Fla. March 17, 2011). The evidence

presented by the State established this to be the case. In the Defendant's own words, "... once you've take someone, you either kill them or you get caught."[1] His actions and words show that killing his victim was part of his plan to avoid detection and arrest.

Where there is substantia) competent evidence to support a finding that the dominant motive for the murder was to eliminate a potential witness this aggravating circumstance is applicable. Jacobs v. State. 396 So.2d 1113 (Fla. 1981); Vaught v. State. 410 So.2d 147 (Fla. 1982); Remeta v. State. 522 So.2d 825 (Fla. 1988); Swafford v. State. 533 So.2d 270 (Fla. 1988); and Wike v. State. 698 So.2d 817 (Fla. 1997) ("Evidence that a victim knew the Defendant and could later identify him is sufficient to prove this aggravating circumstance.").

The Court finds this aggravating circumstance to have been established beyond a reasonable doubt. This aggravating circumstance is given moderate weight.

4. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED FOR FINANCIAL GAIN.

[1] **The defense has repeatedly argued that the State cannot use collateral crime evidence to establish an aggravating circumstance. Although these statements were made to Georgia investigators, the statements are not evidence of a collateral crime. These statements are direct evidence of the defendant's course of conduct starting in September 2007, which includes the murder of Ms. Dunlap.**

In order to establish this aggravating factor, the State must prove beyond a reasonable doubt that the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain. Clark v. State. 609 So.2d 513 (Fla. 1992). This aggravator is supported by Defendant's statements that during the time leading up to the murder he needed money; and when he needed money he would go hunting for a victim to rob and kill. The evidence is clear that Defendant kidnapped Ms. Dunlap with the intent to obtain her ATM card and PIN number; and ultimately, killed her to avoid arrest for the kidnapping and theft. The evidence shows that Defendant did use Ms. Dunlap's card to withdraw $700 from her bank account while he was holding her against her will. The jury convicted Defendant of Grand Theft for these actions. The subsequent murder of Ms. Dunlap was part and parcel of Defendant's modus operandi for theft. Hence, she was murdered to facilitate the theft. Although the theft was not the *primary* motive for the murder itself, this aggravating factor still applies pursuant to Hildwin v. State. 727 So.2d 193 (Fla. 1998). It is not improper doubling for the court to find the aggravators of felony murder, pecuniary gain and avoid arrest, where the victim was kidnapped in order to steal her car, which was needed for a get away vehicle, and the motive for the murder was so the victim could not identify the defendant. Soann v. State. 857 So.2d 845 (Fla. 2003). Here the

victim was kidnapped to facilitate stealing from her bank account and was murdered to keep her from being able to identify the defendant in the theft and kidnapping.

The Court finds this aggravating circumstance to have been established beyond a reasonable doubt. This aggravating circumstance is given some weight.

5. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

It should be noted that "[t]he intention of the killer to inflict pain on the victim is not a necessary element of the aggravator." Guzman v. State. 721 So.2d 1155, 1160 (Fia. 1998). "[TJhe HAC aggravator may be applied to torturous murders where the killer was utterly indifferent to the suffering of another." Id. at 1160. Defendant's indifference to Ms. Dunlap's suffering is best illustrated by the calm and callous way he describes his method of killing to the Georgia authorities. It is clear from those statements that he views his victims as nothing more than prey to be hunted, used to suit his purposes, and then simply discarded.

The Florida Supreme Court "has held that the actions of the defendant preceding the actual killing are relevant to this aggravator.... [T]he fear and emotional strain of the victim from the events preceding the killing may contribute to its heinous nature [cites and internal quotation marks omitted],

Accordingly, the HAC aggravating circumstance has been repeatedly upheld where the victims were acutely aware of their impending deaths [cites and internal quotation marks omitted]." Hertz v. State. 803 So.2d 629, 651-652 (Fla. 2001); and Loonev v. State. 803 So.2d 656$_5$ 680 (Fla. 2001). Great weight should be given this aggravating circumstance because of the length of time the victim was bound and because of her cognition of impending death. Swafford vs. State, supra.: Melendez v. State. 498 So.2d 1258, 1261 (Fla. 1986); Lightboume v. State. 438 So.2d 380, 391 (Fla. 1983); Vaught v. State. 410 So.2d 147, 151 (Fla. 1982); Lucas v. State. 376 So.2d 1149$_s$ 1153 (Fla. 1979); and James vs. State. 695 So.2d 1229,1235 (Fla. 1997).

There is no real hard evidence as to exactly when Ms. Dunlap was finally murdered. However, there are a number of circumstances that establish that she was alive for an extended period of time. The medical examiner was unable to establish a definitive time of death and acknowledged some uncertainty about the time of death. However, his best estimate was that she died between December 5,2007, and December 8,2007 (This would be four to seven days in captivity). Defendant was over heard by a correctional officer telling another inmate that he kept Ms. Dunlap alive for "hours or days." The "home video" seized from the Defendant's camera dated December 3, 2007, is in large part very difficult to understand, however, there are audible comments that suggest that the Defendant just committed the murder and is

in the process of hiding the evidence of his crime, Since the Defendant's motive in kidnapping Ms. Dunlap was to gain access to her bank account with her ATM card, it is certainly reasonable to believe that he would have kept her alive long enough to make sure she had given him the correct PIN number. The bank account was not accessed until December 2, 2007, about 10:00 p.m.

We also do not know a great deal about under what circumstances she was held in captivity. However, we do know that she suffered some abuse during this time. The medical examiner testified to a large, deep bruise to Ms. Dunlap's back which shows she suffered some type of painful trauma prior to her being murdered.

Furthermore, where there is some evidence to support an aggravating factor in the murder for which the Defendant is to be sentenced, the Court may rely on the circumstances of a collateral crime to support the finding of an aggravating circumstance when it tends to prove a material fact necessary to establish an aggravating circumstance. Conde v. State. 860 So.2d 930, 954 (Fla. 2003). There was evidence of a collateral crime introduced in the penalty phase. Defendant's statements to the Georgia authorities regarding the abduction and murder of Meredith Emerson tends to prove that Defendant adheres to a particular modus operandi when he "hunts", kidnaps,

and murders his victims. It is reasonable to believe that Ms. Dunlap and Ms. Emerson were treated similarly by the Defendant.

Taking all of this into consideration, it is clear Ms. Dunlap endured great fear and emotional strain for an extended period of time before the Defendant decided to murder her. This emotional strain must be considered in determining the presence of the HAC aggravator. Clark v. State. 443 So.2d 973 (Fla. 1983), Cook v. State, $42 So.2d 964 (Fla. 1989), Preston v. State. 607 So.2d 404 (Fla. 1992).

The Court finds this aggravating circumstance to have been established beyond a reasonable doubt. This aggravating circumstance is given great weight.

6. THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

This aggravating factor focuses on Defendant's state of mind. This aggravator requires proof beyond a reasonable doubt that the killing was the product of cool and calm reflection involving a careful plan or prearranged design to commit murder. The Defendant must have exhibited a heightened premeditation without pretense of moral or legal justification. Jackson v. State, 648 So.2d 85(Fla. 1994).

This aggravator was clearly established by the State. Nothing illustrates this better than the Defendant's own statements. Those statements, taken in their totality, illustrate an extraordinary amount of cool and calm reflection. His approach to these crimes was very matter of fact. He needed money, so he had to go hunting. He needed to avoid arrest, so he had to kill. There was no anger, panic, or emotion associated with his actions. And, the manner in which Defendant dismembered and disposed of the body further evidence that Defendant's actions were a product of calm reflection.

Defendant had a prearranged plan to commit the murder of Cheryl Dunlap. This is evidenced by several facts in evidence. Cheryl Dunlap was a stranger to Defendant. He "hunted" her. He had tools of his trade in the ready; including zip ties, duct tape, chains, and BB guns. He fashioned a homemade mask to disguise himself at the ATM machine. He took the victim to a remote location(s) which he had thoroughly scouted beforehand. He dismembered the body and burned the head and hands to prevent identification and collection of forensic evidence. In short, he did many things which would have required a methodical period of planning and reflection prior to this murder showing a "heightened premeditation." Preston v. State. 444 So.2d 939 (Fla. 1984).

In Swafford v. State. 533 So.2d 270 (Fla. 1988), the court stated: "The cold, calculated, premeditated murder, committed without pretense of legal or moral justification, can also be indicated by circumstances showing facts such as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course." 533 So.2d at 277. The murder of Cheryl Dunlap was a senseless act for which no moral or legal justification of any kind has been offered to this Court. The circumstances and evidence show that this murder was calmly planned and executed, and that it was in no way provoked by Ms. Dunlap.

The Court finds this aggravating circumstance to have been established beyond a reasonable doubt. This aggravating circumstance is given great weight.

MITIGATING FACTORS

The jury was instructed as to three mitigating factors, which are as follows:

1. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED.

The defense presented the testimony of Dr. Charles Golden, a board certified psychologist, and Dr. Abbey Strauss, a psychiatrist, who both opined that Defendant's ability to conform his conduct to the law was substantially impaired. The state presented the testimony of Dr. Gregory Prichard, a psychologist, who opined to the contrary. The Court finds that Dr. Prichard's testimony was more credible and more consistent with the other evidence in the case as to this point. The Court finds that this factor in mitigation was not proven.

2. THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME EMOTIONAL OR PSYCHOLOGICAL DISTURBANCE.

Doctors Golden and Strauss also both opined that this mitigating circumstance was present. Dr. Strauss diagnosed Defendant as suffering from an antisocial personality disorder and a schizoaffective disorder. He says that given Defendant's "baseline" with these disorders, the use of Ritalin "triggered" the murders in this case. Dr. Golden never made a very specific diagnosis of Defendant, but did opine that the combination of brain damage (Dr. Joseph Wu), "disorders" and the drug usage (William Norton) caused Defendant to have a lack of emotional control resulting in the murders. Dr. Prichard was never specifically asked his opinion as to this mitigator, but the essence of his testimony was that

the only thing wrong with Defendant was that he suffered from a personality disorder, was a psychopath and chose to break the law because that was what suited Mr. Hilton. The Court does not feel it necessary to enter into an intellectual debate as to whether a personality disorder is the type of "emotional or psychological disturbance" envisioned by this statutory mitigator. The Court does accept Dr. Prichard's testimony that defendant did not suffer from a major mental illness. Therefore, defendant's acts were volitional. However, some extreme emotional disturbance certainly had to be at play for the defendant to commit these horrendous acts. The Court does not accept the defense's "Ritalin did if theory. Five different statements by the defendant have been presented in evidence from January 7,2008, through August 28,2008. The defendant was not on Ritalin at the time of any of these statements. In each of these statements the Defendant displays a callous disregard for human life. As recently as August 28, 2008, more that nine moths after this murder and after at least eight months without Ritalin, the Defendant indicated that he was only sorry that he got caught and would murder again. The Court finds that this mitigating circumstance has been proven and give it some weight.

3. THE EXISTENCE OF ANY OTHER FACTORS OF THE DEFENDANT'S CHARACTER, BACKGROUND, OR LIFE, OR THE

CIRCUMSTANCES OF THE OFFENSE THAT WOULD MITIGATE AGAINST THE IMPOSITION OF THE DEATH PENALTY.

The defense has asserted a number of non-statutory mitigating circumstances which have been individually considered by the Court. The Court will title them as presented by the defense. However, this is not a factual determination that the factor as alleged has in fact been proven.

a. Mr. Hilton grew up in an emotionally abusive and neglectful home.

There was certainly testimony presented that showed that Defendant did not grow up in an ideal household. However, there was no showing that he was the victim of any extreme abuse or neglect. Accordingly, the Court gives some weight to this mitigating circumstance.

b. Mr. Hilton abused substances.

Defendant did abuse drugs including Ritalin over a long period of time. It is not as clear whether defendant was abusing drugs at the time of this incident. There is no direct evidence that he was. Accordingly, the Court gives some weight to this mitigating circumstance.

c. Mr. Hilton was deprived of a relationship with his biological father.

This mitigating circumstance was proven. Accordingly, the Court gives moderate weight to this mitigating circumstance.

d. Mr. Hilton is already serving a Life Sentence and society is adequately protected.

This mitigating circumstance was proven. Accordingly, the Court gives some weight to this mitigating circumstance.

e. Mr. Hilton served his country through military service.

The Defense established that Defendant entered the Army on February 10, 1964 and was honorably discharged on December 2, 1965. He reenlisted on December 3, 1965 and was discharged on July 14, 1967. Normally, military service is a mitigating circumstance. However, the second discharge was for unsuitability with honorable conditions. Based on the testimony presented, Defendant was discharged because of undesirable character traits. This factor detracts from its mitigating character. Defendant's statements about the military also diminish the strength of this mitigating circumstance. Defendant repeatedly justifies his actions based upon his

military training. He stated in June 2008 that his military training let him "disassociate the act of killing from the restraints society is imposing on killing." This is an insult to the thousands of law abiding military veterans in our country. Accordingly, the Court gives very little weight to this mitigating circumstance.

f. Mr. Hilton suffered maternal deprivation and lack of bonding between mother and child.

It was established that Defendant's mother found herself in a difficult conflict between her son (defendant) and his step-father (husband). Initially, she decided to stay with her husband and let Defendant stay with a friend from work. This mitigating circumstance was proven. Accordingly, the Court gives some weight to this mitigating circumstance.

g. Mr. Hilton was removed from his home into foster care as an adolescent.

Thomas Perchoux indicated that Defendant came to live with him and his wife in 1960 - 1961. Although it was never clearly articulated, apparently, this was after Defendant shot his step-father. As noted above (f.), the Defendant's mother initially

chose to support her husband. Mr. Perchoux appeared to be a nice man, who took a genuine interest in defendant. The Defendant's mother later changed her mind, took the Defendant back in and left her husband. This mitigating circumstance was proven. Accordingly, the Court gives some weight to this mitigating circumstance.

h. Mr. Hilton grew up in a financially poor family.

Perhaps this circumstance could be implied by the fact that Defendant's family moved quite a bit, the Court declines to make that assumption. The testimony was that Ms. Cleo Debag (mother) was a valued employee in the company where she worked. This mitigating circumstance was not reasonably proven.

i. Mr. Hilton suffered a traumatic brain injury as a child.

The defense expert, Dr. Wu, testified that Defendant's brain scan was consistent with someone who had a traumatic brain injury. This testimony is unrebutted. In terms of significance, the real issue is what significance this had as to Defendant's conduct in 2007. The Court finds that it has not been proven that this prior injury significantly impacted Defendant's

criminal conduct in this case. Accordingly, the Court gives some weight to this mitigating circumstance. j. Mr. Hilton suffers from severe mental defects.

The Court does not find that this mitigating circumstance has been reasonably proven. The Court accepts that Defendant, along with a large majority of our prison population, is properly diagnosed as having an antisocial personality disorder. This is not a "severe mental defect." Defendant has a full scale IQ of 120; he is articulate; and he is a skilled manipulator. As he repeatedly indicated, he has a "rage" against society. Cheryl Dunlap became the focus of that rage, because he wanted her money. Cheryl Dunlap was simply a means to achieve his desires; she was simply an object to him. Although all of this is unacceptable in a free society, none of it proves that he suffers from a "severe mental defect." This mitigating circumstance was not reasonably proven.

CONCLUSION The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake. The Court finds beyond a reasonable doubt, as

did the jury by a twelve to zero (12-0) recommendation, that the aggravating circumstances outweigh the mitigating circumstances in this case. Accordingly, it is

ORDERED and ADJUDGED that the Defendant, GARY MICHAEL HILTON, is hereby sentenced to death for the murder of Cheryl Dunlap.

The Defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

FURTHERMORE, as to Count II of the Indictment, kidnapping, **I HEREBY** adjudicate Defendant guilty and sentence him to life imprisonment

AS to Count **III** of the Indictment, grand theft motor vehicle, based on the jury's verdict **I HEREBY** adjudicate Defendant not guilty.

AS to Count IV of the Indictment, grand theft, **I HEREBY** adjudicate Defendant guilty and sentence him to five (5) years imprisonment.

All prison sentences are to run consecutively to each other and consecutively as to any other existing sentences.

Defendant is given credit for all jail time served in this case on Count II of the Indictment (kidnapping) along with the statutorily required court costs and fees which will be reduced to a civil judgment.

The Defendant is hereby notified that he has thirty (30) days to file an appeal to this judgment and sentence and that this sentence is subject to automatic review by the Florida Supreme Court.

May God have mercy on the Defendant's soul.

DONE and ORDERED Tallahassee, Leon County, Florida this 21st day of April, 2011.

JAMES C. HANKINSON
Circuit Judge

cc:
William N. Meggs, State Attorney
Georgia Cappleman, Assistant State Attorney
Nancy A. Daniels, Public Defender
Maria Ines Suber, Assistant Public Defender
Robert Friedman, Assistant Public Defender