STATEMENT OF THE CASE

James Ernest Hitchcock appeals his death sentence for first degree murder in the July 1976 death of his 13-year-old step-niece, Cynthia Driggers. The jury recommended a death sentence by a vote of 10-2. R 1024. The court found four aggravating circumstances: 1) appellant was under sentence of imprisonment, in that he was on parole for burglary, at the time of the murder (moderate weight); 2) he committed the murder while engaged in the offense of sexual battery (great weight); 3) the murder was committed to avoid or prevent lawful arrest (great weight); and 4) was especially heinous, atrocious, or cruel (considerable weight). R 1112-14.

In mitigation, it gave some weight to appellant's age (20). R 1114. It listed three groupings of non-statutory mitigation:

1) aspects of the crime (appellant was under the influence of alcohol and marijuana at the time of the crime; life-long personality difficulties influenced him at the time of the crime; the murder was the result of an unplanned impulsive act; he was not armed before the altercation; he surrendered and cooperated with authorities; and he voluntarily confessed), each of which received very little weight;

2) appellant's background (he grew up in extreme rural poverty; he experienced the lingering death of his father at a young age; he witnessed his mother's epileptic seizures; he dropped out of school and was unable to pursue a formal education; he witnessed and experienced emotional and physical abuse; he had a borderline personality disorder; he left home at an early age to escape the circumstances he was in; he worked hard in several demanding jobs to support himself and his family; he

risked his life to save his uncle from drowning), each receiving some weight;

3) positive character traits (self-education and education of others; acted as a mediator or peacemaker perhaps saving a corrections officer and another inmate from death or serious injury; he improved his character defects; he has been thoughtful and caring to his mother and other family members; artistic talent; steps toward self improvement; good conduct in court; love and support of family members), each receiving some weight. R 1115-17. The court refused to consider evidence of plea negotiations with the state. R 1117 (amended sentencing order).

A. The state put into evidence a document showing that appellant was on parole for an Arkansas burglary conviction at the time of the murder, and presented three witnesses.

Dr. Guillermo Ruiz performed the autopsy. The body was found in some bushes in an "area in the back of the house, about 20 yards back." T 109. There was a laceration between one eye and the eyebrow, and a contusion beneath the right eye, and another abrasion on the right side of the forehead. T 111-12. They were inflicted within hours before death. T 112. There was a superficial wound on the neck, and abrasions probably due to the body being pushed into the bushes. T 112-13. There were post-mortem changes from ant bites. T 113-14. Injuries to the neck were consistent with manual strangulation. T 115. The cause of death was asphyxiation due to strangulation. T 116. There was a recent (a few hours before death) tear in the hymen indicating that she had been a virgin, and semen. T 116-17. Ruiz would say she was not unconscious when she was hit. T 121. He could not put any time on how long

she was conscious after the strangulation began. T 124. He noted no broken fingernails, did not know if there was foreign matter under her fingernails, and did not note any abrasions on her wrist. T 125.

Lynn Driggers, Cynthia's younger sister, testified that while appellant (their stepfather's brother) lived with the family, Cynthia told her that appellant was doing inappropriate things to her. T 133. They confronted him, and Lynn told him they were going to tell their mother, and he replied that he would rape and kill them. Id. The night of the murder, Lynn told Cynthia that they had to tell. T 134. Lynn told no one of this until 1993. T 135. In 1993, she testified that she told appellant that if he didn't stop she was going to tell the mother, and he said he would kill them; in 1993 she did not say he would rape them. T 142.

The last witness was Det. Nazarchuk, who introduced a taped statement, in which appellant said (T 1119):

> (sigh) I came in about 2:30, I came in through the window in the dining room, went into my bedroom, then I went back out and I went to Cynthia's room, I went in and uh, me and her had sex and she said she was hurt, she was gone to tell her mama. I said you can't. And she said I am. She started to get up and I wouldn't let her and she started to holler then. When she did that, I got up and grabbed her by the neck and made her quit hollerin' and I picked her up and I carried her outside and I had my hand over her mouth at the time and we got outside and we was layin' on the grass and I told her Cindy you can't tell your mama. She said I am, said I got to I'm hurt and you just hurt me again. She started to scream then and I got her by the throat and I was chokin' her and, she, I let up and she was screamin' and hit her again, hit her and I hit her twice, I think and she was still hollerin' so I choked her and I just kept chokin' and chokin' I don't know what happened I just choked and choked then I started to pick her up and I pushed her over in the bushes and I got up and left an I went back in the house went in an took a shower, washed my

shirt and I went in bedroom and I laid down, at's all I can tell you.

B. Richard Greene, an attorney representing him on appeal from 1978 through 1988, testified that in 1978 appellant's verbal skills were very limited. T 151. His letters were very brief and basic until around 1980, when the subjects became more broad ranging. T 151-52. In the summer of 1980, he began a program of self-education, and asked for books to take his GED. T 153-54. He had dropped out of school about grade eight, and in prison he had to self-initiate educating himself. T 153. He learned on his own without any classroom or teacher or fellow students receiving his GED in 1981. T 153-55. He formed an interest in literature and read Shakespeare and other works: "It was totally different from the person I met in 78, the person in 78 would never have undertaken books like this." T 156-57. He watched PBS programs like Nova, Scientific American and Masterpiece Theater. T 157. Over objection, the state established that Greene also represented appellant on clemency. T 151.

Dr. Jethro Toomer, a psychologist, testified that appellant suffered from borderline personality disorder and numerous significant, severe personality difficulties, but over the years he showed signs of self improvement. T 175-76. Personality difficulties are life long -- pervasive, enduring characteristics resulting from early experience. T 176. Persons with positive early experiences can make appropriate judgments, delay gratification, defend against primitive impulses, handle stress appropriately, modulate emotional expression. T 177. Those without early supportive nurturing experiences may advance chronologically, but remain at a much, much lower level of personality and emotional development. Id. Appellant's history shows trauma

and adversity. T 178-79. On his own since age 13, he grew up in a dysfunctional family, finding himself in a world where he could not function appropriately. T 179. He lacked skills that would let him make appropriate judgments, roaming from place to place without any security, stability or predictability, so that he could not forge a sense of self. T 179. He could not engage in directed goal achievement, with poor interpersonal relationships and overall instability. T 179. He grew up in poverty and was traumatized by the sustained illness and death of his father, who was the glue holding the family together. T 181.

The father's death led to the mother working long hours while raising seven children. T 181. She married an alcoholic who abused her and verbally and emotionally abused appellant, leading to appellant's running away from home. T 181-82. He could not form significant relationships, moving around from one place for a short time to another, going back and forth. T 183.

Appellant never learned to trust anybody, feared abandonment, lacked security, so that he could not form a relationship with a significant other. T 184-85.

Structure, regimentation and predictability could lead to a normally functioning personality. T 185. When appellant was imprisoned there was remediation. T 185-86. He earned his GED and involved himself in reading and learning. T 186. He tried to help others to a similar level by helping them read. T 187. He acted as a mediator, showing a certain amount of maturity and rehabilitation. T 187-88. He stopped smoking as another try at self improvement, showing maturity. T 188.

Testing did not show effects of major mental illness. T 188.

Appellant's personality problems would have affected his entire life, including at the time of the crime. T 188. At the time of the crime, he could not deal with an emotionally charged situation, and could not deal with abandonment and rejection. T 190. He could not manage stress. T 191.

The third defense witness was Betty Augustine, a sister 11 years older than appellant. She did not attend school as a child. T 197. Appellant was less than seven when their father died at home from skin cancer on the side of his face. T 198. Their small house in the country lacked running water; they burned wood for heat. T 198-99. They were farm laborers -- Betty went to work at age 11, as did her siblings -- engaged in hand labor without machines. T 199. The mother picked cotton, leaving baby James at the end of the row while she worked. T 200. When appellant was 11, their mother married an abusive alcoholic, and appellant moved out when he was 13 or 14. T 201. After Betty's husband was disabled, appellant babysat for her so she could work; he shared with her what money he had. T 202.

Lisa Mackabee, appellant's niece, testified to a long-term correspondence with him. T 204. He has kept a positive outlook with her and told her to cherish time with her family; they are friends and he has always supported her. T 205-206.

Wanda Green, a sister five years older than appellant testified that they were poor. T 208. They picked and chopped cotton. Id. The home was a shack without plumbing or even paper on the walls. Id. At times they had to go hungry. T 208-209. They had to pick cotton in the fall and winter and chop cotton in the summer; appellant chopped cotton but was too young to pick it. T 209. The stepfather was physically

abusive, once pulling a gun on their mother. T 210. Appellant left home because he did not get along with the stepfather. T 211.

Charles Foster, a death row inmate, testified that appellant talked him out of hurting someone a couple of times. T 213. When an officer said he had thrown his mail in the trash, Foster was going to throw a bar of soap at him, intending to cut him with a razor if he came near enough, but appellant talked him out of it. T 213-14, 217. Appellant is "a pretty smart dude, we'll listen to him." T 214. Most people would have told Foster to go ahead and throw the soap. Id. Another time, inmates wanted Foster to kill another man. T 215. One inmate offered Foster a sharp piece of glass, another a piece of sharpened metal, to kill the man, but appellant dissuaded him. T 216.

The defense read jurors the prior testimony of Jerry White, an inmate executed by Florida, who said that he used to read to appellant because appellant did not know how to read. T 220-21. Later appellant taught James Morgan to read. T 221. White had a high opinion of appellant, who did not treat White any differently because he was black. T 221-22.

James Harold Hitchcock, appellant's brother, testified that he owned a gas station when appellant was seven or eight, and appellant worked at the station after school, on weekends, and all summer. T 225. Appellant did a good job. T 226. Later, James Harold ran a fruit harvesting crew, and appellant (then age 13) came to work for him for two or three eight-month seasons. T 227. A hard worker, appellant worked for James Harold off and on (the work was seasonal) until his arrest. T 228-29.

James Morgan, a former death row inmate, testified that he was imprisoned when he was 16. T 230. He could not read or write until appellant gave him daily lessons over six months. T 231. This sometimes took six hours a day: appellant taught him everything from the alphabet on up. T 232. They used the dictionary, religious pamphlets, whatever came in handy. T 232. As a result, Morgan could read Moby Dick, which he had always wanted to read. Id. Appellant changed Morgan's life. T 233.

Ruby Slader, appellant's niece, testified to a long correspondence with appellant. T 235. She would turn to him for advice because he would not lie to her. T 236. Based on his advice she left a relationship with an alcoholic. T 236-37. He has never asked for anything -- not money or favors. T 237. He has had a positive effect on her life. T 238.

The defense read the prior testimony of Wayne Hitchcock, appellant's deceased cousin. When he and appellant were 17-18 years old they were swimming with Wayne's father. The father fell into flood waters, and was floating downstream and could not swim. Although the father weighed 220-230 pounds, and appellant weighed only about 150-160 pounds, appellant saved the father from drowning. T 241-42. Appellant "had a rough time getting him back up on the bank because he was dead weight to him, he couldn't swim, all his clothes on, everything." T 242. This was in deep water with a bad current. T 245. The father's legs and hips had previously been broken so that he limped and could not swim, and he had been drinking. T 245-46.

Wayne testified that he and appellant worked for James Harold in Florida. They

took care of James Harold's children when his wife had an operation and was recuperating. T 243. When they worked as fruit pickers, appellant was a good hard worker, putting in a lot of hours. T 247.

Martha Galloway, appellant's older sister, testified about the house they lived in before the house in which their father died. T 248-49. It had two rooms, and did not have plumbing or electric heat. Id. There was not enough money for food when their father was sick, and their clothes were made from bread sacks or linens. T 249. The skin cancer took one of his eyes and went into his ear. T 250. He was real sick the last couple of years. Id. Their mother is epileptic; when she had grand mal seizures appellant would run away and hide. T 251. She would beat herself in the chest, her muscles were out of control, and she could have killed herself. Id. The stepfather beat and gashed their mother's head, causing a big scar, but she was ashamed to go to the hospital for stitches. T 252. Martha was abused by her older brother. T 258.

Bertha Galloway, appellant's mother, testified that he was about six when his father died. T 261. She then married Edward Galloway out of economic necessity. Id ("Well, he made me a living, the biggest thing I needed."). Since appellant has been in prison he got his high school diploma -- the first of her children to graduate from high school. T 262. She testified that he has sent her cards and writes to her once or twice a week. T 263. Bertha worked in the cotton fields and sewed quilts to support her children. T 263. The small children sat on the ends of the rows while she worked in the fields. T 264.

C. After the defense case, the state put into evidence an MMPI narrative

report over defense objection. T 265-72. It presented no other rebuttal evidence.

D. After the penalty verdict, the court received the defense's sentencing memorandum and conducted a Spencer hearing. The defense proffered from the record of the original trial appellant's intoxication on marijuana and alcohol at the time of the trial. R 1033-34; transcript of original trial pages 759-61. The court refused to consider in mitigation the affidavit of the original trial prosecutor showing that the state had made a plea offer of life imprisonment. T 418.

E. After the court initially imposed sentence, appellant moved for an evidentiary hearing on newly discovered evidence. R 1075. The motion alleged that, on September 11, 1996, Wandalene Green appeared on television and for the first time disclosed that Richard Hitchcock had confessed to the murder of Cynthia Driggers. Id. Appellant offered in corroboration that he has previously testified that Richard committed the murder, that he has previously plead to another crime for Richard, that five other family members would have testified to the unique relationship between him and Richard which would have led him to confess falsely to protect Richard, that three family members had been barred from testifying as to Richard's acts of violence, and that one had been barred from testifying as to his reputation for violence, that the officer who took appellant's ring on the night of the murder testified that there were no wounds on his hands, that the trial testimony of the state's forensic expert, Diana Bass, is unrelible based on the testimony of her supervisor in another case, that family members had been barred from giving detailed testimony that Richard was a violent pedophile, and that he had a violent temper. R 1077-78. The motion set out a claim

of actual innocence so that it would violate the Cruel Unusual Punishment Clauses of the state and federal constitutions to execute appellant. R 1079.

The state responded that an evidentiary hearing was appropriate for the limited purpose of addressing the evidence given by Wandalene Green, and that the court should not consider the corroborating evidence. R 1109.

The defense also filed a rule 3.800(b) motion to correct sentencing errors. R 1061. After hearing argument on the motion on June 13, 1997, the court noted potential deficiencies in the sentencing order and announced that it would file a supplemental sentencing order. T 445-49.

On October 8, Judge Cycmanick entered an amended sentencing order. R 1111. On that day he also entered an order granting an evidentiary hearing on the motion concerning newly discovered evidence; the order limited the hearing as proposed by the state. R 1120. Appellant filed a rule 3.800(b) motion to correct sentencing errors in the amended sentencing order. R 1122.

On December 3, 1997, Judge Cycmanick conducted the limited evidentiary hearing. R 1142. Before he ruled, the chief judge reassigned the case to Judge Conrad to determine the motion concerning newly discovered evidence. R 1145.[1] Appellant moved for new penalty phase arguing that Judge Conrad could not dispose of the case. R 1148. Judge Conrad ordered an evidentiary hearing on the issue of newly discovered evidence, again on the limited grounds suggested by the state. R 1152.

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[1] The incidents surrounding Judge Cycmanick's departure from the bench are set out in the argument section of the brief.

At the hearing, Ms. Green testified that in August 1995 she went to her mother's home to talk with Richard Hitchcock, who had come down from Georgia. T 539. When their mother was at the store, they discussed family matters, and the following occurred:

> ... I said, "You know, Richard," I said, "whenever they electrocute Ernie," I said, "it will really be rough on mama." I said, "You know that it is coming up."
>
> And he said -- he just sat there and looked for a while. I said, "I don't know what we're going to do with her."
>
> And he was looking down and he said, "They don't electrocute people for rape."
>
> And I said, "Richard, they do electrocute them for murder," and I said, "and sooner or later they are going to electrocute him."
>
> He just looked down and he said, "They don't electrocute people for rape."
>
> I said, "Richard, do you know what you are saying to me?"
>
> And he said, "Yeah."
>
> And I said, "Then, what you are saying is that Ernie didn't kill Cindy." I said, "Richard, did you kill Cindy? Are you admitting that you killed Cindy?"
>
> And he said, "Yeah."
>
> And so I told him, I said, "You know that I have to tell this." I said, "If you are telling me this, I cannot go along with you. I have to tell this."
>
> And he said, "Yeah, I know it."
>
> Well, my mother came back in at that point and I didn't wanted to inform

> her on what we were talking about, so I just let it go. And I was going to go back the next day. Well, I was going to confront him with it; but when got over there the next day, he had already left.

T 540-41. Richard died two months later in a car wreck, before she could talk to him again. T 541-42. Previously, she had believed his denial of involvement in the murder, and had been estranged from the others in the family, who thought appellant was innocent. T 542-44. She did not tell anyone about this until she told the news media at the end of the 1996 jury trial. T 544. When defense investigator James Johns met her to discuss her testimony in 1996, they only discussed family history. T 546. After she told the news media, she told Johns. T 546-47.

Johns testified that Wanda never talked with him about Richard's statement either before or after the trial. T 566.

The defense argued that Richard's statement would be admissible as to guilt as a statement against penal interest and under Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) and would be admissible at penalty under Green v. Georiga, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). It argued that the evidence would have affected the outcome of the original trial, and that having it at penalty "would affect what mitigation could be found and would affect both the jury verdict and what sentence the court would impose." T 572-73.

Judge Conrad denied the motion, finding that Wandalene's testimony was unworthy of belief, so that it would probably not produce an acquittal. R 1166. He also found that Richard's statement would be inadmissible hearsay at a retrial. R 1168.

Appellant timely filed his notice of appeal March 18, 1998, and this appeal, R

1170, follows.

SUMMARY OF THE ARGUMENT

The following errors, considered separately or cumulatively, require resentencing.

1. It was error to let the MMPI narrative into evidence as rebuttal. Dr. Toomer did not testify about the MMPI, much less the narrative report. It did not impeach his testimony. The state's extensive use of the report in its argument requires reversal.

2. The court erred in overruling the objection to the state's argument to the jury to disregard evidence of appellant's deprived and abusive childhood. T 338-41. The state told jurors that they were free to disregard this unrefuted evidence. Such evidence is mitigating as a matter of law. The sentencer may not refuse to consider such evidence in mitigation.

3. The court erred in overruling the objection to the state's jury argument that it did not cross Dr. Toomer because his testimony was babble intended to mystify jurors and he said nothing of relevance. The real reason for not crossing him was to keep him from refuting the state's attacks on his testimony. T 267-68. The prosecutor acted as a witness in explaining his actions and gave his personal view denigrating the witness.

4. Fundamental error occurred in the state's final argument. The state urged jurors to disregard valid mitigation. It mischaracterized Dr. Ruiz' testimony. It used the emotionally charged term "rape" a dozen times. It told jurors to imagine Cynthia's final anguish. It represented 1976 as a simpler time so that the crime was worse for

having occurred then. It gave its own version of what it is like to be strangled. It attacked the defense witness. It used its impeachment exhibit as substantive evidence. It characterized valid defense mitigation as a mere plea for sympathy. It invoked the lex talionis.

5. The judge engaged in criminal activity while sitting in this case and was removed from the bench while dispositive motions were pending. Under the unique facts at bar, this Court should order resentencing. It was error for a successor judge to decide the motion for a new sentencing hearing.

6. The court erred in finding, and in letting the state argue, the avoid arrest circumstance. The record lacks "very strong" proof that the dominant or sole motive of the murder was witness elimination. It shows that appellant murdered Cynthia in a panic when she started hollering. It was also error to overrule the objection that the instruction does not tell jurors that the state must show that witness elimination must be the dominant or sole motive for the murder.

7. The imprisonment and felony murder aggravators were applied unconstitutionally. In 1976, the imprisonment circumstance applied only to "prisoners". This interpretation was consistent with the due process and statutory rule of strict construction. Retroactive application of the unexpected expansion to include parolees is unconstitutional. In 1976, the felony murder circumstance applied to murders committed during the commission of "rape", not "sexual battery." Rape was a narrower crime than sexual battery. Retroactive application of the broader sexual battery circumstance is unconstitutional.

8. The record does not support the felony murder factor. The circumstance in effect in 1976 concerned a murder during a rape. The record does not show a forcible nonconsensual sexual act constituting rape. The more recent factor concerns a murder during a sexual battery. The present record shows appellant and Cynthia had sex and it hurt, so that she was going to tell her mother. It does not show a sexual battery. Further, as it merely mirrors an element of the crime, the circumstance is unconstitutional.

9. It was error to use the heinousness aggravator. In the present record, the state's pathologist testified that he did not know how long Cynthia Driggers would have remained conscious. The present record does not show a prolonged consciousness of impending death. It does not show that appellant chose a torturous method to kill. The instruction used here unconstitutionally failed to guide the jury's consideration of the circumstance as required by Sochor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992).

10. It was error to deny an instruction on doubling of aggravating circumstances. As the state presented them, the jury could have decided that they arose from the same aspects of the case. A properly instructed jury would have avoided improperly and unconstitutionally considering doubled aggravators.

11. The avoiding arrest and felony murder circumstances doubled with each other, so that it was error to consider them individually and give them separate weight. The avoiding arrest and imprisonment circumstances also doubled, so that it was error to consider them individually and give them separate weight.

12. The findings as to mitigation are so bare as to defy appellate review. This Court should reverse for resentencing.

13. The death sentence is disproportionate at bar.

14. The court erred in permitting the state to present evidence that appellant's former counsel had represented him on clemency. For the jury to know that the highest political officers of the state had determined whether appellant's death sentence was appropriate was irrelevant and prejudicial.

15. It was error to decide the claim of newly discovered evidence without considering the evidence and circumstances presented in corroboration.

16. The successor judge erred in ruling on the motion for new penalty phase concerning newly discovered evidence. Ruling on the motion involved determination of the weight of evidence heard by the jury, which the successor judge had not heard.

17. The court erred in excluding evidence that the state had previously offerred appellant a life sentence.

18. The extraordinary length of this case has amounted to a denial of appellant's rights under the Speedy Trial, Due Process and Cruel Unusual Punishment Clauses. The state has caused the delay by repeatedly denying appellant a full, fair sentencing.

ARGUMENT

The following errors, separately or cumulatively, require resentencing.

1. WHETHER THE COURT ERRED IN LETTING THE STATE PUT INTO EVIDENCE THE MMPI NARRATIVE REPORT.

The defense expert, Dr. Toomer, testified that his evaluation of appellant involved a clinical interview, administering "a variety of protocol psychological exams that are designed to assess intellectual functioning, personality functioning, to assess whether or not and to what degree there may be some likelihood of thought process disturbance or brain damage, aganisticy (ph), if you will", and talking to family members and others, and reviewing records. T 172-74. Psychological testing served "to get some feel for how the person responds intellectually, to get some feel for the person's emotional responsiveness, to test and to assess whether or not there may be likelihood of some type of organic impairment or neuropsychological impairment." T 174. The evaluation was conducted on August 20, 1996. T 172.

Dr. Toomer's said appellant had numerous significant, severe personality difficulties, and that over the years he showed signs of self-improvement. T 176. He testified extensively to appellant's psychological development up to the time of the murder and after. T 176-94. This testimony was based on background information -- the only reference to the testing was that Toomer "did not find anything in the testing that would suggest that he was suffering from the affects of any major mental illness." T 188.

The state's cross examination consisted of five questions, which established that:

Toomer had administered a Minnesota Multipersonality Phase Inventory (MMPI); the MMPI consisted of 560 true or false questions; and there was an interpretative report prepared by the University of Minnesota -- the test was "administered and then interpreted, scored, if you will". T 194.

After the defense rested, the state sought to introduce the item identified by Dr. Toomer. T 265. The proffered exhibit was a 20-page document, T 271, including graphs, "some kind of chart" and a narrative. T 272. The defense objected that it was improper rebuttal and that the state had not cross-examined the witness about the report, noting that a properly qualified and trained person needed to interpret it.[2] T 265-67.

When the judge asked why he did not impeach the witness with the report, the prosecutor replied: "Why should I give him the chance to explain it away, if they want to call him they can. The fact I chose to use this tactic, I'll put it into evidence rather than give him a chance to talk his way out of it, it's a tactical and legitimate decision." T 267-68. He said the report was prepared by a psychologist at the University of Minnesota, and that the jury could read it and draw its own conclusions, adding: "If

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[2] A cautionary notce at page 5 of the Adult Clinical Interpretive Report states: "This MMPI-2 interpretation can serve as a useful source of hypotheses about clients. This report is based on objectively derived scale indices and scale interpretations that have been developed in diverse groups of patients. The personality descriptions, inferences, and recommendations contained herein need to be verified by other sources of clinical information because individual clients may not fully match the prototype. The information in this report should most appropriately be used by a trained, qualified test interpreter. The information contained in this report should be considered confidential. State's exhibit 8 (e.s.). [This exhibit is sometimes erroneously referred to as exhibit 7 in the record.]

they want to recall Doctor Toomer, that's fine. This is not a reason for it not to be admissible." T 268.

The defense noted that Toomer had never testified to anything from the scoring of the MMPI, that it was outside the scope and not proper rebuttal. T 268. The state replied: "He said this test result was part of the basis of his opinion in direct and cross." Id. It told the judge the ruling was "totally in your discretion." T 269. It argued that the narrative "is contrary to what his testimony was. It doesn't find he's a borderline personality, doesn't find he has relationship problems, it finds a lot of other things he chose to not tell this jury about, and I have every right to tell this jury things Doctor Toomer didn't tell them." T 270. The state suggested that the defense recall the witness in surrebuttal, but the defense decided not to. T 271-72, 275. The judge let the state put pages 3-5 of the exhibit, consisting of a narrative, into evidence. T 272.

The judge erred in allowing the state to (in its own words) use the "tactic" of introducing the report without affording "the chance to explain it away" or "talk his way out of it". It was error to overrule the objection of improper impeachment. One cannot clearly discern the legal basis of the ruling admitting the report, but it seems the court relied on the state's claim that Toomer had said he relied on the report and that the report was contrary to his testimony. T 269-70. The judge noted that, as there had been "no questions" asked about the report, he could not tell if it was true rebuttal, T 268-69, but said: "They're not restricted, not limited or restricted in their examination of presentation of their case or the presentation of further witnesses solely to elicit or solicit information to the jury by way of cross examination whether the information

would, impeach the witness through other examination testimony or other exhibits." T 270-71. It appears that the court thought that the narrative was admissible for purposes of impeachment.

Section 90.608, Florida Statutes does not authorize the state's approach. It provides that one may impeach a witness by:

> (1) Introducing statements of the witness which are inconsistent with the witness's present testimony.
>
> (2) Showing that the witness is biased.
>
> (3) Attacking the character of the witness in accordance with the provisions of s. 90.609 or s. 90.610.
>
> (4) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified.
>
> (5) Proof by other witnesses that material facts are not as testified to by the witness being impeached.

It may be that, the court thought the report was an adoptive statement under to section 90.608(1) since, according to the state, the witness had relied on it in reaching his opinion. The evidence does not show, however, that the witness relied on the narrative part of the 20-page document.

In questioning Dr. Toomer, the state did not ask if he had relied on the MMPI report, much less if he relied on the narrative section (as opposed to the graphs or chart). On direct examination, he did not mention the MMPI or the narrative. The state was incorrect in saying that "he said this test result was part of the basis of his opinion in direct and cross", T 268, and that "the entire thing he said was part of his

evaluation". T 272. Its only reason for not questioning Toomer was to deny him a chance "to explain it away" or "talk his way out of it". T 267-68.

Under these circumstances, the narrative was inadmissible under section 90.608(1). The predicate to admission under the rule is that the proponent confront witnesses with the evidence and afford them a chance to explain it. Brumbley v. State, 453 So. 2d 281, 385 (Fla. 1984). This the state refused to do.

Subsections 2 (impeachment as to bias), 3 (impeachment as to character), and 4 (impeachment as to capacity) cannot apply: the document does not show bias, does not show criminal convictions of the witness, and does not show any testimonial incapacity.

As to subsection 5, the narrative contradicts nothing said on direct.[3] The state's only argument here was that the report contained "statements, findings that are contrary to the findings of Doctor Toomer to the extent they're not contrary, they do flesh out in a more concrete way what Doctor Toomer said, absolutely admissible and perfectly appropriate for me to give the jury, a chance to themselves look at something the doctor looked at, and that's what this is." T 266. As the state's argument proceeded, it became clear that its position was not that the report directly contradicted Toomer's

[3] In fact, it confirmed Toomer's testimony, stating: "His problems have probably resulted from a hedonistic amoral lifestyle and an inability to postpone gratification. He is likely to have come from a chaotic, tense, and noncohesive home where inconsistent discipline was a hallmark. He may have had significant interpersonal difficulties in the past. Anger and violence may result if he is provoked. His basic problem seems to be that he is impulsive and insists on having his own way regardless of the law or the feelings of other people." Adult Clinical Interpretive Report, pages 4-5 (state's exhibit 8).

testimony; instead, it claimed that the narrative did not make the findings that he made and found things that he did not mention in his testimony: "if you read the narrative evaluation of this, it is contrary to what his testimony was. It doesn't find he's a borderline personality, doesn't find he has relationship problems, it finds a lot of other things he chose to not tell this jury about, and I have every right to tell this jury things Doctor Toomer didn't tell them." T 270. And in fact, as shown below, the state used the statement in this negative way -- telling jurors that the narrative contained negative assessments of appellant's personality, and claiming that Toomer had chosen not to tell the jury about them. T 331-34, 342-43. Thus, the state used it as a sort of reverse negative impeachment.

" Negative impeachment" is the often dubious act of crossing witnesses about the failure to mention certain details at a prior time. McBean v. State, 688 So. 2d 383 (Fla. 4th DCA 1997) (citing cases). The correct procedure is to confront the witness with the omission under section 90.608(1). Id. See Moylan v. The Meadow Club, 979 F.2d 1246, 1249 (7th Cir. 1997) (citing authorities).

Of course, the state did not confront Toomer with the claimed omission, lest he "explain it away" or "talk his way out of it".

From the foregoing, it was error to admit the narrative. Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980) sets out the standard for abuse of discretion. This Court wrote at page 1202 that this standard does not apply to an incorrect application of an existing rule of law: "appellate courts must recognize the distinction between an incorrect application of an existing rule of law and an abuse of discretion".

The abuse of discretion standard does not allow departure from the Evidence Code. Taylor v. State, 601 So. 2d 1304, 1305 (Fla. 4th DCA 1992) states: "As to abuse of discretion, we cannot agree, since the trial court's discretion here was narrowly limited by the rules of evidence."

"There's no reason this jury has to take Doctor Toomer's word about what this means", argued the state. T 268. As the defense pointed out, however, Toomer did not testify as to anything from the scoring of the MMPI. Id. In effect, the state set up a straw man to attack in final argument. The straw man was the notion that the witness had testified that the MMPI narrative supported his findings. This approach ("tactic" as the state put it) is generally disapproved. See Morgan v. State, 700 So. 2d 29, 30 (Fla. 2d DCA 1997). In Morgan, the state created a straw man alibi on cross of the defendant, and then attacked this defense in final argument. In reversing the eventual conviction, the Second District observed that the state

> reminded the jury that the defense never asked Morgan where he was on the night Fuller was attacked, despite the fact that this question was 'a real obvious question to ask the guy.' The prosecutor then remarked that although Morgan claimed to be at a party on the night in question, he failed to produce his girlfriend to corroborate this alibi. These remarks effectively destroyed the "alibi" which the state's own questions had created.

The state argued the report extensively to the jury. It said Dr. Toomer had not been honest or candid. It said his testimony contained not a single thought, made no sense, that he "literally babbled for an hour." T 331. It said it had not cross-examined him "because he didn't say one word, not one word or thought that was in any way relevant to this case or made any sense." T 332. The state urged the jury to read the

narrative, addng: "the interesting thing you should ask yourselves is why didn't Doctor Toomer tell us any of the things in his report and I'll give you a few snippets of it." T 332. It said the narrative showed that persons with appellant's profile tend to be pleasure oriented, seek self-gratification at other's welfare, and asked: "You remember Doctor Toomer telling you that? Did any of the hour long psycho-babble you heard say that? No. He just didn't bother to add that to his testimony." T 332.

It noted that the report showed various conflicts about sexual identity, showing female pattern of interest, somewhat uncomfortable in relationship with women, and said: "Did he tell you any of that, no, didn't really go into any of that." T 333. It said the report showed appellant may seem likeable at first, but his relationships tend to be superficial, and he was quite insensitive to others, manipulating them and feeling no guilt about it. T 333. "Did he tell you that?", asked the state, "And you may ask yourselves in considering his testimony, why? Why didn't he tell us what this supposedly objective test that he uses as a tool, he didn't tell you about this." T 333. It said the report showed that, if provoked, appellant may resort to violence, and insists on having his own way regardless of the law or feelings of others, T 333, adding: "This test assesses his personality now. This test was given in the last month, tells you how James Ernest Hitchcock who sits there right now is. And he didn't tell you any of that. Read it over. I'm giving you snippets of it. Please read the whole thing." T 334.

Later, it again took up the narrative to impeach another witness: "As you reveal from the MMPI you must also be aware the defendant is manipulative, so you must take into account when you listen to witnesses like Mr. Green, his lawyer, that Mr.

Green was going to Mr. Hitchcock for the purpose of representing him. That Mr. Hitchcock knows that you don't show your lawyer your bad side, you show your lawyer everything that's good about you." T 342-43.

The state used an unauthorized form of impeachment to attack the defense expert's testimony. It turned mitigation into evidence and argument for death. The result was violation of the right to a fair penalty proceeding under the Due Process and Cruel Unusual Punishment Clauses. Use of the document violated the Confrontation Clause and the Due Process and Cruel Unusual Punishment Clause requirement of heightened reliability in death penalty determinations. Extended use of the narrative to attack the witness affected the verdict and resulting sentence. This Court should order jury resentencing.

In determining prejudice, this Court will look to both preserved and unpreserved errors. The cumulative effect of this error and the errors discussed below require reversal.

2. WHETHER THE COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO THE STATE'S ARGUMENT ON MITIGATION.

Once proven, childhood poverty, deprived circumstances or an abusive background are mitigating circumstances as a matter of law:

> ... The court must find as a mitigating circumstance each proposed factor that is mitigating in nature [FN4] and has been reasonably established by the greater weight of the evidence: [FN omitted] "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla.Std.Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. ... .
>
> FN4. This is a question of law. A mitigating circumstance can be defined broadly as "any aspect of a defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978). Valid nonstatutory mitigating circumstances include but are not limited to the following:
>
> 1) Abused or deprived childhood.
> 2) Contribution to community or society as evidenced by an exemplary work, military, family, or other record.
> 3) Remorse and potential for rehabilitation; good prison record.
> 4) Disparate treatment of an equally culpable codefendant.
> 5) Charitable or humanitarian deeds.

Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990)(e.s.).

The sentencer must consider an abused or deprived childhood in mitigation. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Specifically, it violates the eighth amendment not to consider James Ernest Hitchcock's deprived

and abusive childhood in mitigation. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

Here the state told jurors to ignore evidence of an abused or deprived childhood, even if proved by the defense (T 338-41):

> This isn't a crime where someone was trying to gain money or trying to get back at society for its evil. This is a rape of a little girl. She didn't do anything to him. She didn't cause his poverty. This wasn't him striking back. His poverty and his living circumstance are not mitigating in this case, at all, because they don't give us any understanding of why he did what he did. They don't reveal anything about his character.
>
> MS. CASHMAN: Objection. Misstating what the law is as to mitigation.
>
> MR. ASHTON: It's my argument.
>
> THE COURT: I'm going to overrule the objection.
>
> MR. ASHTON: The defendant lived through his father's death, and that was a very traumatic experience for his entire family, and you should feel some sympathy for a seven year old who had to watch his father die. Is it mitigating? Does it give you any in spite into why he did what he did? It doesn't. It just doesn't tell us anything.
>
> I submit to you sheer sympathy isn't mitigation. Mitigation is something that explains the crime or makes us understand the crime or makes the defendant less morally culpable for the crime in some way, not just something that makes us feel sorry for him. If this was about sympathy it would be a totally different process. But we see in the defendant's own family that people overcome. The human spirit can overcome virtually anything, and though the psychologist may not agree with this Pollyanna that I'm speaking, the defendant's mother and family, as example, as hard as it is, there are two ways to go. You work hard, you make a life or you become a criminal. The defendant made that choice. I submit that is not mitigating.

The judge erred in overruling the objection. The argument misstated the law of

mitigation. It is contrary to Campbell, Eddings and Hitchcock. In Eddings, the sentencer refused to consider the defendant's background and childhood. Disapproving, the Court wrote: "The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." 455 U.S. at 114-15 (e.s.). At bar, the state argued that jurors could and should give no weight to the mitigation. Eddings noted that the sentencer must consider such evidence even though it does not tend to provide a legal excuse from criminal responsibility. Id. 113. Again, at bar, the state contended that the jury should consider such evidence only if it explained the criminal act itself: it contended that evidence of poverty would be mitigating only if appellant "was trying to gain money or trying to get back at society for its evil."

Under Campbell, the sentencer: 1) must decide if the defendant showed by sufficient evidence that he had an abused or deprived childhood; and then 2) must decide its weight. The state's remarks as a whole placed an unauthorized step between the factual determination of the existence of a factor and the weighing of the factor. It told the jury that it was free to disregard the factor even if established by the evidence.

The state's argument is contrary to Nibert v. State, 574 So. 2d 1059, 1061-1062 (Fla. 1990), where this Court wrote (e.s.):

> Nibert presented a large quantum of uncontroverted mitigating evidence. First, Nibert produced uncontroverted evidence that he had been physically and psychologically abused in his youth for many years. The trial court found this to be "possible" mitigation, but dismissed the mitigation by pointing out that "at the time of the murder the Defendant

> was twenty-seven (27) years old and had not lived with his mother since he was eighteen (18)." We find that analysis inapposite. The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary. Nibert reasonably proved this nonstatutory mitigating circumstance, and there is no competent, substantial evidence to support the trial court's refusal to consider it. See, e.g., Brown v. State, 526 So. 2d 903, 908 (Fla.) (defendant's disadvantaged childhood, abusive parents, and lack of education and training, constitute valid mitigation and must be considered), cert. denied, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988).

Accord Walker v. State, 707 So. 2d 300, 318 (Fla. 1997) (citing cases). Under the state's argument, mitigation would apply only to non-criminals. Hence, it would never apply to capital sentencing. Contrary to the state's argument, such evidence must be considered by the sentencer.

The state's argument was prejudicial. It denied the constitutional right to full, fair sentencing based on consideration of all valid mitigators. The evidence of childhood poverty and abuse formed a large part of the case for life. The state said jurors were free to disregard such evidence. The court's ruling put a seal of approval on this argument. See Wheeler v. State, 425 So. 2d 109, 111 (Fla. 1st DCA 1982) ("The court's overruling of the objection compounded the prejudice."), Eagle-Picher Industries, Inc. v. Cox, 481 So. 2d 517, 530 (Fla. 3rd DCA 1985) ("The trial court not only failed to admonish counsel for such prejudicial remarks, he overruled objections thereto and allowed plaintiff's counsel to repeat the comments which compounded the

prejudicial effect."), Carrol v. Dodsworth, 565 So. 2d 346, 348-49 (Fla. 1st DCA 1990) ("The damage was compounded by the trial court's overruling of plaintiffs' timely objection and allowing defense counsel to repeat his improper question ... ."), Rollins v. Div. of Administration, 373 So. 2d 386, 388 (Fla. 4th DCA 1979) ("Had the trial court sustained the objection, we would have no difficulty in affirming the judgment. But in overruling the objection the trial court placed its imprimatur on counsel's argument").

The state's argument was in keeping with its having told jurors to disregard mitigation established by the evidence.

In voir dire, the state instructed jurors on sentencing procedure, saying in pertinent as to mitigation:

> These are facts argued to you by the defense as mitigating circumstances. They can be any number of things. I'm not even going to -- it could be one to a hundred things, could be any number of different things, these are factors presented to you by the defense. The job you have is first of all to be convinced these facts are true, the defense could assert to you a fact but you could say, well, I don't believe that fact is proven reasonably certain to be true.
>
> If you find the fact is proven then it's your decision to decide if it's mitigating, the defense could give you a fact in evidence and you could say it's proven but I don't think it's mitigating. Basically you go through all the facts and decide what's mitigating and then do you what's called a weighing process.

T 121-22 (e.s.). There was no objection. In final argument, it said, also without objection (T 319-20) (e.s.):

> You ask yourself, am I reasonably convinced that fact A, that the defense is asking me to believe in mitigation is true. If you find it's not true and

> you're not convinced, then you throw it out and you don't consider it. If you find that it is proven, you ask yourselves the next question, is it mitigating, is this the kind of fact that should have any weight in deciding whether somebody lives or dies for a crime like this.
>
> If you find -- you may find a fact is proven. You may find, oh, yeah, the defendant received a spelling b medal when he was four, you may find that fact proven, but you may say, so what, doesn't matter, has no place in this kind of a case so you can throw it out.
>
> If you find the fact proven and you find it is somehow mitigating, then comes the hard part. Then you have to weigh it. You look at all the aggravating circumstances proven and you look at all the mitigating circumstances proven and you ask yourselves, which of the two is of greater weight. Which of the two is more significant in deciding the punishment for this kind of crime.

The state's argument vitiated the case for life. This Court should reverse and remand for jury resentencing proceeding.

In determining prejudice, this Court will consider both preserved and unpreserved errors. Whitton v. State, 649 So. 2d 861, 864-65 (Fla. 1994) states:

> Although Whitton did not object to the first two alleged comments on Whitton's post-arrest silence, he argues that the cumulative impact of all three comments requires reversal. We agree that we must consider all three comments in our harmless error analysis because the harmless error test requires an examination of the entire record. The reviewing court must examine both the permissible evidence on which the jury could have legitimately relied and the impermissible evidence which might have influenced the jury's verdict. DiGuilio, 491 So. 2d at 1135.").

In this regard, appellant's discussion of the state's argument above and below, as well as the other points on appeal, should be taken into consideration.

3. WHETHER THE COURT ERRED IN OVERRULING THE OBJECTION TO THE STATE'S ARGUMENT TO THE JURY ABOUT DR. TOOMER.

The following occurred in the state's argument (T 330-32):

Now, Doctor Toomer testified for about an hour and a half, and you will recall that when my turn came to cross examine him, I didn't. And you may have asked yourselves why. I will tell you this --

MS. CASHMAN: Objection. Improper closing.

MR. ASHTON: I don't think I've done anything improper yet.

MS. CASHMAN: I think he's about to and I'm going to --

MR. ASHTON: Wait and see if I do or not.

THE COURT: Objection is overruled at this point.

MR. ASHTON: A fair assessment of Doctor Toomer's testimony is that he told you absolutely nothing. Think about his testimony. Was there one word, one phrase, one thought out of that entire hour or hour and a half testimony that made any sense at all? It didn't make any sense, not one word that man said in the entire time he spoke made any sense at all. He literally babbled for an hour. He would be asked a question and he would answer it and it would take 15 minutes and at the end you would go, what did he say?

It is the defense's burden to reasonably convince you of the existence of a mitigating circumstance. And it is the expert's burden or job to give it to you in a way you can understand, to make sense, to convince you that his opinion is right.

Doctor Toomer got up there and basically, apparently, from the facts believed, that he could just babble on and then give you an opinion and that you were supposed to accept it, that he didn't have to explain it to you in a way you can understand or make sense of it.

> He wasn't cross-examined, ladies and gentlemen, because he didn't say one word not one word or thought that was in any way relevant to this case or made any sense. ....

It was error to overrule the objection. The argument was improper. The prosecutor turned himself into a witness, giving his reasons for not cross-examining the witness, and expressing his personal views belittling the witness. (He told the jury something very different from what he told the judge: when the judge asked why he did not cross-examine the witness, he said: "Why should I give him the chance to explain it away, if they want to call him they can. The fact I chose to use this tactic, I'll put it into evidence rather than give him a chance to talk his way out of it, it's a tactical and legitimate decision." T 267-68 (e.s.).)

Counsel may not comment on matters outside the record, Libertucci v. State, 395 So. 2d 1223 (Fla. 3d DCA 1981) (prosecutor wishes he could have called co-defendant), Hoppock v. Parker, 695 So. 2d 424, 430 (Fla. 4th DCA 1997), or deride an expert witness. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) (attacking mental health expert), Carnival Cruise Lines, Inc. v. Rosania, 546 So. 2d 736 (3d DCA 1989) ("[They] have a doctor, the best that money could buy. They went out and got a doctor."). "An attorney's expression of his personal opinion as to the credibility of a witness, or of his personal knowledge of facts, is fundamentally improper. Muhammad v. Toys "R" Us, Inc., 668 So. 2d 254, 258 (Fla. 1st DCA 1996); Walt Disney, 640 So. 2d at 1158." Airport Rent-A-Car, Inc. v. Lewis, 701 So. 2d 893, 896 (Fla. 4th DCA 1997).

The reason the state gave the jury for not cross-examining the witness is like

argument condemned in Muhammad, where counsel suggested that the expert's theory was so ludicrous that he did not bother to appear to testify in person. The court held such argument "is violative of rule 4-3.4(e), in that it constitutes counsel's personal opinion as to the justness of the cause and the credibility of the witness." 668 So. 2d at 258.

In deciding prejudice, this Court will look to both preserved and unpreserved errors. Whitton. In this regard, appellant's argument concerning the state's entire final argument (Points 1 and 7) and his other points on appeal should be considered in conjunction with this issue.

The state's improper argument amounted to a denial of due process requiring reversal.

4. WHETHER FUNDAMENTAL REVERSIBLE ERROR OCCURRED IN THE STATE'S FINAL ARGUMENT TO THE JURY.

As already noted, the court overruled defense objections to the state's argument. The argument contained many other improprieties requiring reversal as fundamental error.

The state told the jury that it was free to determine for itself whether proven facts were mitigating, and that it was to look to the evidence and the defense for mitigation. T 320-21. This was improper: it is a question of law as to whether something is mitigation which the sentencer must consider. Campbell, Eddings. Further, the sentencer is to look at the entire record, not just to the defense case, for mitigation. Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992) ("every mitigating factor apparent in the entire record before the court at sentencing, both statutory and nonstatutory, must be considered and weighed in the sentencing process") (e.s.). This is true even if the defense affirmatively waives mitigation. Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993) ("We repeatedly have stated that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. E.g., Santos v. State, 591 So. 2d 160 (Fla. 1991); Campbell v. State, 571 So. 2d 415 (Fla. 1990); Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988)."); Robinson v. State, 684 So. 2d 175, 177 (Fla. 1996).

The state mischaracterized Dr. Ruiz' testimony to establish the felony murder circumstance: "We have proven beyond a reasonable doubt based upon that statement

from defendant, based upon the medical evidence from Doctor Gore [sic] there was evidence of recent hymenal tears, a recent sexual assault on the victim within hours prior to her actual death." T 323. Dr. Ruiz did not testify to a sexual assault -- he only said that Cynthia had sex some hours before her death.

As noted, the elements of rape and sexual battery are distinct, yet the state blurred the two together, using the emotionally charged term rape a dozen times: T 322 ("... James Ernest Hitchcock raped cynthia Driggers and ... this crime was committed to cover up that crime."), 324 ("... he was going to be reported for rape. He was going to be arrested and sent to prison for rape..."), 326 ("... how this girl in 1976 would react mentally to being raped. You must ask yourselves, did she go through exceptional torture in being raped ..."), 327 ("...and that's just the rape. The rape was so horrible and so painful ..."), 329 (" A person who is on parole rapes a 13 year-old girl ..."), 337 ("Why is that something that we say should be considered in deciding whether someone lives or dies for raping and murdering a 13-year-old girl?"), 338 ("...and then got out on parole and raped a little girl ..."), 339 ("This is a rape of a little girl."), 345 ("This is what you're sentencing him for, for what he did to this child, for putting his arms around her neck after he raped her, and for taking her life.").

As to the heinousness circumstance, the state told jurors to imagine what was in Cynthia's mind: "You must assess from the evidence what Cindy Driggers went through in her last moments and hour of her life. On what was in her thoughts or what was possible in considering this circumstance." T 325. Such argument is improper. Garron v. State, 528 So. 2d 353, 358-59 (Fla. 1988) ("you can just imagine the pain this

young girl was going through as she was laying there on the ground dying"), Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) ("can anyone imagine more pain and any more anguish than this woman must have gone through in the last few minutes of her life, no lawyers to beg for her life."), Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989) (asking jurors "to try to place themselves in the hotel during the victim's murder").

Although the record contains nothing about the mores of 1976, the state argued to the jury that it was a simpler time in which inappropriate sexual activity was less common: "This isn't 1996, this is not the age of Melrose Place and sex on the internet. This was 1976. This is when Donnie Osmond was still a star, when Michael Jackson had his original nose, this is 1976, you have to ask yourself how this girl in 1976 would react mentally to being raped." T 326. As noted above, it is improper for counsel to comment on matters outside the record.

The state mischaracterized appellant's statement as saying he choked her inside the house. R 327 ("He choked her in the bedroom until she stopped screaming."). His statement was: "She started to get up and I wouldn't let her and she started to holler then. When she did that, I got up and grabbed her by the neck and made her quit hollerin' and I picked her up and I carried her outside and I had my hand over her mouth at the time ... ." R 1119.

The state gave its own version of what it is like to be strangled: "... when you strangle someone, they are conscious. They know what's happening. They can feel -- they can feel the fact that they can't breathe, they know they can't breathe. And

anyone [who's] ever held their breath or lost their breath or had the wind knocked out of them can know how frightening it is not to be able to breathe. It is absolutely terrifying." R 328. This is a subtle golden rule argument putting jurors in the decedent's shoes. See Urbin v. State, 714 So. 2d 411, 421 (Fla. 1998).

As already noted, the state spent much of its argument attacking Dr. Toomer as a babbler who believed that he could fool the jury with his testimony: "Doctor Toomer got up there and basically, apparently, from the facts believed, that he could just babble on and then give you an opinion and that you were supposed to accept it, that he didn't have to explain it to you in a way you can understand or make sense of it." T 331. The state said Toomer's testimony was in no way relevant and made no sense. T 331-32. He generally accused the witness of psycho-babble and deceiving the jury. T 332-33. Counsel may not attack an expert witness. Nowitzke, Carnival Cruise Lines, Muhammad.

Although the MMPI narrative was admitted as rebuttal of Dr. Toomer, the state used it as substantive evidence and even as aggravation. It argued that the report showed many bad things about appellant, T 332-34, and that this represented "how James Ernest Hitchcock who sits there right now is." T 334. This was improper. State v. Green, 667 So. 2d 756 (Fla. 1995) (state may not use impeachment evidence as substantive evidence); State v. Smith, 573 So. 2d 306, 313 (Fla. 1990) ("There can be no question that evidence of a prior inconsistent statement offered as impeachment is admissible only for that purpose unless it is independently admissible on other grounds. [Cit.] Such evidence generally is hearsay and usually does not satisfy the demands of

reliability necessary to prove an essential element of a crime or defense."). Also, since it was admitted to impeach Dr. Toomer, it was wrong to use it to impeach the credibility of Richard Greene.

The prosecutor did not not ask Toomer about the lifestyle of migrant workers, and presented no evidence about it, but he implied that he himself was familiar with the subject, and that Dr. Toomer's testimony was based on ignorance: "Perhaps Doctor Toomer is not familiar with the vagrant lifestyle of workers, migrant workers was he running around unconnected to anything?" T 336.

Although the defense made no such argument,[4] the state characterized the defense as begging for sympathy, and characterized appellant's mitigating evidence -- to repeat, valid mitigation under Campbell -- as a mere ploy for sympathy:

> Look at everything. What have you been shown. The defendant came from an impoverished background. People used to say that being poor wasn't something to be ashamed of. It's being asserted to you that it is, you should feel sorry for the defendant because he was poor.
>
> Ladies and gentlemen, you should feel sorry for the defendant's mother because she was poor, because she had to fight and struggle and work all her life to make something for her and her kids, and you should feel sorry for her.
>
> You should feel sorry for someone who was poor and still tried hard and made a life. Those are the people who deserve your sympathy. The defendant was poor and went to prison for burglary and larceny, and then got out on parole and raped a little girl and you shouldn't feel sorry for him one iota, he never made on single effort to do anything. He had examples of his mother and his family and his father who died on the couch after working all his life to support his family, and what did he do,

[4] In fact, the defense argued that sympathy played no role in the sentencing decision. T 347-48, 362.

he went out and just became a criminal.

> You shouldn't feel remotely sorry for him. This isn't mitigating. Had he made one effort to do something better, maybe. It's not mitigating. He grew up in a shack out in the city -- sorry, out in the country. They didn't have running water.

R 338-39 (e.s.). The next paragraph turned this line of argument into a golden rule argument (R 339) (e.s.):

> Ladies and gentlemen, I would guess that if you took all the people in this courtroom and went back a generation or two you're going to find every one of them had a relative that grew up the same way, because 75 years ago that wasn't that unusual. And, yeah, maybe Mr. Hitchcock's family was a couple decades behind the rest of us in getting running water, but what does that really have to do with this?

After incorrectly arguing that the jury was to consider appellant's background only if he killed for money or to get back at society, R 340-41, the state reverted to the untrue claim that the defense was making an argument for sympathy (to repeat, the defense made no claim for sympathy), saying (T 340-41 (e.s.)):[5]

> The defendant lived through his father's death, and that was a very traumatic experience for his entire family, and you should feel some sympathy for a seven year old who had to watch his father die. Is that mitigating? Does it give you any in spite [in] into why he did was he did? It doesn't? It just doesn't tell us anything.
>
> I submit to you sheer sympathy isn't mitigation. Mitigation is something that explains the crime or makes us understand the crime or makes the defendant less morally culpable for the crime in some way, not just something makes us feel sorry for him. If this was about sympathy it would be a totally different process, but we see in the defendant's own family that people overcome. The human spirit can overcome virtually

[5] See also the argument at transcript page 345.

> anything, and though the psychologist may not agree with this Pollyanna that I'm speaking, the defendant's mother and family, as example, as hard as it is, there are two ways to go. You work hard, you make a life or you become a criminal. The defendant made that choice. I submit that is not mitigating.

The quote above concludes with an argument that would entirely eliminate consideration of background mitigation: if, as the state argued, such mitigation does not apply to persons who become criminals, it could never apply in a criminal case. Thus it combined improper argument attacking a valid legal principle[6] and an invalid theory

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[6] See Nowitzke v. State, 572 So. 2d 1346, 1355 (Fla. 1990):

> The record as a whole indicates, and the state admits, that the prosecution's strategy throughout the entire trial was to discredit the whole notion of psychiatry in general and the insanity defense specifically. We have addressed the impropriety of such an attack in the past, stating:
>
> > In response to rebuttal of the insanity defense, the assistant state attorney made several comments during cross-examination of court appointed psychiatrists and during closing argument, which were intended to discredit the insanity defense as a legal defense to the charge of murder. We believe that once the legislature has made the policy decision to accept insanity as a complete defense to a crime, it is not the responsibility of the prosecutor to place that issue before the jury in the form of repeated criticism of the defense in general. Whether that criticism is in the form of cross-examination, closing argument, or any other remark to the jury, it is reversible error to place the issue of the validity of the insanity defense before the trier of fact. To do so could only helplessly confuse the jury. The insanity defense is a policy question that has plagued the courts, legislatures, and governments for decades. It is unnecessary to similarly plague [juries].
>
> Garron v. State, 528 So. 2d 353, 357 (Fla. 1988) (emphasis added).

that would abolish valid mitigation.[7]

The state concluded its argument with an improper appeal to the principle of the lex talionis (R 346):

> Because in the last analysis of this case, what you have to ask yourselves is for what he did, and considering the mitigation, is merely putting him in prison for life enough? Is it equal justice before the law? Does it balance? Is it equal? I submit to you that it is not and it never will be equal.
>
> The only punishment which truly says what he did and what he deserves is unfortunately a sentence of death, and that should be the recommendation of each and everyone of you in this case. Thank you.

In sum, the final argument amounted to a denial of due process and the right to a fair, accurate sentencing under the Cruel Unusual Punishment Clauses of the state and federal constitutions.

Here, of course, it was the entire concept of background mitigation which the state attacked. As in Nowitzke, the state's quarrel is with a policy decision of this Court and of the United States Supreme Court that it is important and must be considered in mitigation.

[7] For instance, it is improper to equate the mental mitigation with legal insanity. To do so would mean that it could never apply, since a legally insane defendant could not be found guilty of murder. See State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) (mental mitigation involves disturbance "less than insanity"), Morgan v. State, 639 So. 2d 6, 13 (Fla. 1994) ("The rejection of [a defendant's] insanity and voluntary intoxication defenses does not preclude consideration of statutory and nonstatutory mental mitigation.")

5. WHETHER THIS COURT SHOULD REVERSE IN THE INTERESTS OF THE JUDICIAL PROCESS, AND WHETHER IT WAS ERROR FOR A SUBSTITUTE JUDGE TO RULE ON THE MOTION FOR RESENTENCING.

The jury proceedings occurred in September 1996. On October 8, 1996, Judge Cycmanick initially imposed sentence. R 1049. On October 18, 1996, appellant timely moved to correct sentencing errors. R 1061. Judge Cycmanick held a hearing on June 13, 1997 on this motion. T 442-49. On September 22, 1997, the Judicial Qualifications Commission filed a notice of formal charges following his third arrest for DUI on June 27, 1997. Inquiry Concerning Cycmanick, 718 So. 2d 756 (Fla. 1998); "Judge in DUI Accepts Fate", Orlando Sentinel, D3 (July 31, 1997). On October 8, 1997, Judge Cycmanick entered his amended order sentencing appellant to death. R 1111. That day he also entered an order setting a hearing on the motion for an evidentiary hearing on newly discovered evidence. R 1120. On November 5, appellant filed a motion to correct errors in the amended sentencing order. T 1122. On December 3, the judge conducted an evidentiary hearing on the newly discovered evidence. T 451. On December 8, the JQC began its hearings. Inquiry Concerning Cycmanick.

In January 1998, the judge entered the home of an assistant state attorney with whom he had had a romantic relationship, committing acts leading to his departure from the bench. Inquiry Concerning Cycmanick; "Judge Held in Break-In at Ex-Girlfriend's Home," Orlando Sentinel, A1 (Jan. 3, 1998).[8]

[8] According to the newspaper: "The prosecutor and judge began dating in December 1995, but by April she ended it. On several

On January 13, Chief Judge Perry (who could not be involved in this sentencing because he had previously prosecuted appellant in this case, T 6), reassigned the case to Judge Conrad "for the sole purpose of disposing of Defendant's pending Motion for Evidentiary Hearing on Newly Discovered Evidence". R 1145. Appellant filed a motion for new penalty phase, objecting that a substitute judge could not decide the pending motions. T 1148. Despite this limited appointment, Judge Conrad denied the motion for new penalty phase. T 1155. After an evidentiary hearing, he denied relief on the issue of newly discovered evidence. T 1162.

A. Under the unique facts at bar, resentencing is required in the interests of the credibility and integrity of the judicial process. In Robinson v. State, 702 So. 2d 213 (Fla. 1997), this Court ordered a new trial where the judge was removed from the bench during an investigation and prosecution for bribery and the defense attorney (a former partner of the judge) was also involved in unethical conduct. The judge's allegedly illegal acts (the judge has yet to be convicted of anything) occurred during the time of Robinson's trial. This Court stressed the unique facts of the case, writing that while any of them "taken alone might be insufficient to warrant a new trial or be considered harmless error, when considering these factors combined we cannot conclude that Robinson received a fair and impartial trial." Id. 217.

While this case is different from Robinson in some significant aspects, similar

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occasions since the break-up, in person and by e-mail, the assistant state attorney told the judge to stop the unwanted advances, the police report states. But she said the harrassment cntinued despite her pleas." The prosecutor also "told police Cycmanick had hounded her for months".

relief is warranted. Unlike in Robinson, the judge was found guilty of criminal conduct committed while presiding over this cause. It appears that he was involved in a relationship with an assistant state attorney while presiding over this cause. Although it is unclear whether the romantic relationship ended in April 1996 (so that he was engaged in harrassing her at the time of the jury proceedings) or 1997 (so that they were still involved romantically at that time), either possibility calls the credibility and integrity of the proceedings into question.

Before entering the amended sentencing order now under appeal, the judge was barred from cases in which alcohol was a significant issue.[9] At bar, alcohol is a significant issue: use of alcohol at the time of the crime was the first nonstatutory mitigator the judge considered. Without explanation he gave it very little weight.[10] Further, much of the case for life rested on the effects of an alcoholic authority figure on appellant's young mind. Under these facts, the judge could not evaluate the direct and indirect effect of alcohol on this case.

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[9] "Judge Facing DUI Charge Back on Job After Treatment", Orlando Sentinel, C3 (Aug. 19, 1997), states: "Cycmanick has been instructed not to handle any cases that involve alcohol as a major issue, including drunken-driving manslaughter."

[10] It appears the judge minimized alcohol's effects during the times relevant to this case: "Alcoholic Judge Fights to Keep Job," Orlando Sentinel, D3 (Dec. 9, 1997), reports the chief judge's testimony to the JQC: "Circuit Judge Belvin Perry said [he] told Cycmanick about a year ago that he was concerned his colleague might be drinking too much. But he said Cycmanick denied having a problem." (E.s.) This after two DUI convictions! The article also quotes Judge Cycmanick: "I looked at myself in the mirror after the last DUI and said, 'I'm not under an I-4 bridge. I don't fit all the stereotypes. But I'm an alcoholic'". Thus it appears that he could not see the effects of alcohol until three DUI arrests.

The judge was faced with prosecution and placed on probation before issuing the amended sentencing order. It is inappropriate for a judge to be under the thumb of one of the parties in this way. In In re Lee, 336 So. 2d 1175, 1177 (Fla. 1976), this Court reprimanded a judge who had engaged in sexual activities in a parked automobile. It directed that he "not exercise jurisdiction in any criminal case without the express approval of the Chief Justice". This arose not from his first criminal prosecution, but from his third. Compare In re Garrett, 613 So. 2d 463 (Fla. 1993).

The judge's removal led to appellant's inability to obtain relief on his motion to correct sentencing errors in the amended sentencing order. Judge Conrad was appointed only on the motion on newly discovered evidence. Not he nor any other judge could rule on the motion to correct sentencing errors, as only the judge who had presided over the jury sentencing proceeding could enter a new sentencing order. Corbett v. State, 602 So. 2d 1240 (Fla. 1992).[11] This Corbett error is an independent ground for reversal.

The unique circumstances of this case require resentencing. In violation of the Due Process and Cruel Unusual Punishment Clauses, appellant did not receive a fair sentencing proceeding.

B. Another result of Judge Cycmanick's acts was that, over objection, R 1148-50, 1154, Judge Conrad, who had not conducted the jury proceedings, held the

[11] Although it reiterated some claims from the previous motion, the motion also presented claims relating only to changes in the amended order. Cf. Goode v. Hialeah Race Course, Inc., 246 So. 2d 105 (Fla. 1971) (successor motion for rehearing may address changes made in decision on original rehearing).

evidentiary hearing on, and denied, the motion concerning newly discovered evidence. It was Corbett error for him to do so as the matter necessarily entailed weighing the new evidence against the evidence previously adduced. A successor judge may not reverse the judgment of the predecessor judge on the facts and argument considered by the predecessor. Haliburton v. Singletary, 691 So. 2d 466, 469 (Fla. 1997).

6. WHETHER THE COURT ERRED IN FINDING, IN LETTING THE STATE ARGUE, AND IN INSTRUCTING THE JURY ON, THE "AVOIDING OR PREVENTING LAWFUL ARREST" CIRCUMSTANCE.

The court found that the murder was committed to avoid or prevent lawful arrest,[12] writing (R 1114; e.s.; fn. omitted):

> It is absolutely clear from the Defendant's statement as well as the testimony of the victim's sister and the medical examiner, Dr. Ruiz, that the murder was committed in order to "silence" her from reporting his sexual abuse of her and the consequences that would follow. I use the word "silence" because it sums up best why the Defendant was beating and "chokin'" (sic) her to stop her "screamin'" and hollerin'" (sic). The "chokin' and chokin'" did, indeed silence the victim from ever reporting his unlawful attacks to her mother. Additionally, pushing her into the bushes, going back into the house, showering, and washing his shirt conclusively demonstrates that the murder was definitely committed for purposes of avoiding or preventing lawful arrest. Thus, this aggravating factor has been proven beyond a reasonable doubt and will be given great weight.

The court overruled defense objections that the evidence did not support the aggravator and that, under the state's theory,[13] it doubled with the sentence of imprisonment circumstance; it ruled that it would let the state argue the circumstance. R 276-82. The state argued it to the jury. T 324.

The court erred. Unless one has killed a law enforcement officer, the circumstance requires "strong proof" of the motive; it must be "clearly shown that the

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[12] "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." § 921.141(5)(e), Fla.Stat.

[13] The state argued to the court that the fact he was on parole helped support the circumstance. T 277-78.

dominant or only motive for the murder was the elimination of the witness. We have also held that the mere fact that the victim knew and could have identified his assailant is insufficient to prove intent to kill to avoid lawful arrest." Perry v. State, 522 So. 2d 817, 820 (Fla. 1988) (cits. omitted). In Robertson v. State, 611 So. 2d 1228 (Fla. 1993), Robertson killed a woman who had witnessed her companion's murder. A witness testified that Robertson told him that he had shot the woman because she was screaming. Id. 1230 This Court struck the circumstance, writing (id. 1232):

> ... The State must prove beyond a reasonable doubt that an aggravating circumstance exists. Williams v. State, 386 So. 2d 538 (Fla. 1980). Moreover, even the trial court may not draw "logical inferences" to support a finding of a particular aggravating circumstance when the State has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984). In order to support a finding that a defendant committed a murder to avoid arrest, the State must show beyond a reasonable doubt that the defendant's dominant or only motive for the murder of the victim, who is not a law enforcement officer, is the elimination of a witness. Menendez v. State, 368 So. 2d 1278 (Fla. 1979). "Proof of the requisite intent to avoid arrest and detection must be very strong" to support this aggravating circumstance when the victim is not a law enforcement officer. Riley v. State, 366 So. 2d 19, 22 (Fla. 1978).

See also Geralds v. State, 601 So. 2d 1157 (Fla. 1992)(burglar killed woman who knew him; aggravator struck as he may have killed her as she tried to escape). The aggravator does not apply even if there is a substantial inference that the murder was committed to cover up a crime. Davis v. State, 604 So. 2d 794 (Fla. 1992) (burglar killed woman who knew and could identify him; fact that witness elimination may have been a motive in the murder insufficient to support aggravator); Dailey v. State, 594 So. 2d 254 (Fla. 1991) (14-year-old girl raped, stabbed, strangled, and drowned).

This is not a case in which the defendant moved the victim to a remote location to commit the murder in a place where it would not be detected. Cf. Hall v. State, 614 So. 2d 473, 477 (Fla. 1993) (defendant forced woman into her car and drove to secluded wooded area); Cave v. State, 476 So. 2d 180, 188 (Fla. 1985) (victim taken "some thirteen miles to a rural area in order to kill and thereby silence the sole witness to the robbery"); Routly v. State, 440 So. 2d 1257, 1264 (Fla. 1983) ("no logical reason" to drive victim to remote area away from houses "except for the purpose of murdering him to prevent detection"); Swafford v. State, 533 So. 2d 270, 276 (Fla. 1988) (gas station employee taken to remote location six miles away and murdered); Davis v. State, 698 So. 2d 1182, 1193 (Fla. 1997) (defendant abducted girl to trailer park where he sexually assaulted and murdered her; relying on Swafford, Cave, and Routly).

The court erred in finding the circumstance. There is at most an inference that, at the time of the murder, appellant had in mind that Cynthia was hurt and was going to tell her mother. From this, one must pyramid hypotheses that he thought that the mother would tell the police, that he thought that the police would arrest him, and that this was the sole or dominant motive for the murder. As in Geralds, however, there is a less complex motive -- that he killed her as an irrational response to the panic of the moment as Cynthia kept hollering. There can be little doubt that the mother might have expelled him from the home, but it is speculation that the police would have been brought in to arrest him.

Cook v. State, 542 So. 2d 964, 970 (Fla. 1989) states (e.s.):

> Next Cook attacks the finding Mrs. Betancourt was killed to avoid arrest, arguing that his statement that he shot her "to keep her quiet because she was yelling and screaming" was insufficient to support the trial court's findings. We agree. The facts of the case indicate that Cook shot instinctively, not with a calculated plan to eliminate Mrs. Betancourt as a witness.

See also Bates v. State, 465 So. 2d 490 (Fla. 1985).

In Elam v. State, 636 So. 2d 1312 (Fla. 1994), Elam beat his employer to death in a confrontation about missing funds. Justice Grimes noted in dissent that Elam told a cellmate that the victim "had to be done away with to avoid his being found out." Id. 1315. This Court struck the aggravator as the record indicated "that the murder took place as the result of a spontaneous fight that erupted when Beard confronted Elam concerning misappropriated funds." Id. 1314. See Perry v. State, 522 So. 2d 817, 820 (Fla. 1988) ("some evidence that [robber] may have 'panicked' and 'blacked out' during the murder," refuted circumstance).

The state did not present "very strong" proof under Robertson and Riley. The judge's order does not find that the dominant or sole motive was to avoid or prevent arrest. It does not recite facts to support such a finding. Appellant's statement was that: Cynthia said she was hurt and was going to tell her mother. When he would not let her get up, she started to holler, and he grabbed her by the neck and to make her quit. He picked her up and carried her outside. On the grass, he told her she could not tell her mother; she said she was hurt and had to tell her. " She started to scream then and I got her by the throat and I was chokin' her and, she, I let up and she was screamin' and hit her again, hit her and I hit her twice, I think and she was still hollerin'

so I choked her and I just kept chokin' and chokin' I don't know what happened I just choked and choked". T 1119. It was error for the judge to rely on actions after the murder. "Covering up evidence of a murder does not establish that the murder itself was committed for the purpose of avoiding arrest or detection for criminal activity." Herzog v. State 439 So. 2d 1372, 1382 (Fla. 1983) (Boyd, J., concurring in part and dissenting in part).

The use of this circumstance, and letting the state argue it to the jury, violates the Cruel Unusual Punishment Clauses of the state and federal constitutions. Given the wealth of mitigation at bar, this Court should order resentencing.

B. The court erred in denying the defense motion challenging the constitutionality of this circumstance and its standard jury instruction. R 674-80, 873. As noted, the circumstance requires "strong proof" that the "dominant or only" motive for the murder was to avoid lawful arrest. The standard instruction,given at bar,[14] merely tracks the statute and does not advise the jury of this requirement. It unconstitutionally relieves the state's burden of proof, and fails to narrow the circumstance, in violation of the Due Process and Cruel Unusual Punishment Clauses of the state and federal constitutions.

[14] "The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or to effect escape from custody." T 367.

7. WHETHER THE COURT ERRED IN DENYING APPELLANT'S CONSTITUTIONAL CHALLENGES TO THE SENTENCE OF IMPRISONMENT AND FELONY MURDER CIRCUMSTANCES AS APPLIED.

In his rule 3.800(b) motion to correct sentencing error, appellant argued that the sentence of imprisonment[15] and felony murder[16] circumstances violated the Ex Post Facto, Due Process, Double Jeopardy, Equal Protection, and Cruel Unusual Punishment Clauses of the state and federal constitutions, as applied. R 1061-63, 1065-67. The court rejected his argument, although it noted possible ex post facto problems as to the imprisonment circumstance. R 1112-13. Unauthorized aggravators violate the Cruel Unusual Punishment Clauses of the state and federal constitutions. Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992); Richmond v. Lewis, 506 U.S. 40, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992). Appellant incorporates the argument made in his motion, and argues:

A. In the original 1977 sentencing, the trial court did not use the sentence of imprisonment aggravator; it did not apply to parolees until Aldridge v. State, 351 So. 2d 942 (Fla. 1977). State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973) stated (e.s.):

> Considered in that vein, Fla.Stat. Section 921.141(6), subsections (a) and (b), F.S.A., prescribe the death penalty for a capital felony committed by a prisoner or by one previously convicted of a capital felony.

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[15] "The capital felony was committed by a person under sentence of imprisonment." § 921.141(5)(a), Fla.Stat.

[16] "The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any ... rape ... ." § 921.141(5)(d), Fla.Stat. (1975).

State v. Dixon is consistent with the constitutional and statutory requirement of strictly construing criminal statutes against their author, the state. See Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) (rule "is rooted in fundamental principles of due process"); Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980) (rule applies to penalties as well as substantive offenses); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990) (sentence of imrpisonment aggravator); § 775.021(1), Fla.Stat.

Aldridge expanded the definition to include parolees. Applying Aldridge to this 1976 murder violates the Ex Post Facto Clauses. The bar to ex post facto laws applies to judicial enlargement of statutes. Bouie v. City of Columbia, 378 U.S. 357, 353-54, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) states:

> An ex post facto law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime, or makes it greater than it was, when committed.' Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648. [FN omitted] If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Cf. Smith v. Cahoon, 283 U.S. 553, 565, 51 S.Ct. 582, 586, 75 L.Ed. 1264. The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d ed. 1960), at 58--59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. Id., at 61.

Accord Rhodes v. State, 283 So. 2d 351, 354-55 (Fla. 1973). Based on Bouie and Rhodes, this Court held in Wilson v. State, 288 So. 2d 480, 482 (Fla. 1974) that the

court may not expand the scope of a criminal law and apply the expansion retroactively.

The Ex Post Facto Clauses apply to expansion of sentencing statutes. Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). They apply to retroactive application of a new aggravating circumstance. State v. Hootman, 709 So. 2d 1357 (Fla. 1998).[17] In making this argument, appellant is aware that State v. Hootman provides at page 1360:

> The State argues that the change in the law is purely procedural and that the change neither altered the definition of the crime nor increased the penalty by which the crime is punishable. In support of this argument, the State relies on cases in which this Court has upheld the application of amendments related to preexisting aggravators. We find those cases to be distinguishable from this case because in each instance the amendments merely refined or extended existing aggravating factors [FN3] or reiterated one of the elements of the underlying crime, namely premeditated murder. [FN omitted.] As the trial court properly concluded:
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> FN3. See Trotter v. State, 690 So. 2d 1234 (Fla. 1996) (applying community control extension of existing aggravator retroactively); Valle v. State, 581 So. 2d 40 (Fla. 1991); Hitchcock v. State, 578 So. 2d 685 (Fla. 1990) (holding "committed by a person under sentence of imprisonment" aggravator may be applied where defendant on parole at time of crime).
>
> In all the foregoing cases which find retroactive application constitutional, the aggravating factors did not add anything new to the elements of the offense or to the other applicable aggravating factors. The penalty phase juries were not given additional detrimental information to consider in making its sentencing recommendations. In contrast, the application of newly enacted S 921.141(5)(m) is neither a refinement in an existing

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[17] State v. Matute-Chirinos, 713 So. 2d 1006 (Fla. 1998) abrogated State v. Hootman insofar as it authorized review of a case certified by a district court when the case is pending in the district court on a petition for writ of certiorari.

aggravating factor nor a reiteration of an existing element to a crime.

Appellant submits that State v. Hootman and Hitchcock[18] overlooked that expansion of the circumstance to parolees did give juries additional detrimental information. Without the expansion, the jury would not know about the burglary conviction and sentence and appellant's parole status. Further, the sentencer weighs circumstances rather than evidence. See State v. Jordan, 440 So.2d 716, 718 (La. 1983) (retroactive application of "significant prior history of criminal activity" circumstance violated ex post facto even though state could still introduce evidence of defendant's prior criminal activity). Use of an improper aggravator unconstitutionally alters the delicate capital weighing process. It places a thumb on death's side of the

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[18] In Hitchcock, this Court wrote:

> In our original opinion in this case, we noted that the court could have found committed by a person under sentence of imprisonment in aggravation because Hitchcock was on parole at the time of this crime. 413 So. 2d at 747 n. 6. The court found this aggravator applicable on resentencing. Hitchcock now argues that this is an ex post facto violation and constitutes double jeopardy because this Court did not recognize parole as the equivalent of being under sentence of imprisonment until Aldridge v. State, 351 So. 2d 942 (Fla. 1977), cert. denied, 439 U.S. 882, 99 S.Ct. 220, 58 L.Ed.2d 194 (1978). Resentencing proceedings, however, are completely new proceedings. King v. Dugger, 555 So. 2d 355 (Fla. 1990). These ex post facto and double jeopardy claims are of no merit because the resentencing occurred after we released Aldridge. See Spaziano v. State, 433 So. 2d 508 (Fla. 1983), aff'd, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

578 So. 2d at 693. Appellant respectfully submits that the opinion's logic is unclear. If, as this Court held, Aldridge applied retroactively to this 1976 crime, that fact proved, rather than refuted, appellant's ex post facto claim.

scale. Stringer, 503 U.S. at 232; Richmond, 506 U.S. at 48.

The law of the case doctrine does not bar consideration of this matter. This doctrine "is not an absolute mandate, but rather a self-imposed restraint". State v. Owen, 696 So.2d 715, 720 (Fla. 1997). It does not authorize an illegal sentencing decision. This Court wrote in Bedford v. State, 633 So.2d 13, 14 (Fla. 1994):

> The district court denied relief on the rationale that we had previously affirmed that sentence and because the law of the case precluded review. Judge Anstead dissented, urging that an illegal sentence may be corrected at any time. We agree with the dissent of Judge Anstead, and for the reasons expressed therein, we hold that an illegal sentence may be corrected even after it has been erroneously affirmed.

More specifically, the "'clean slate' rule" applies to capital resentencing, so that the court is not obligated by prior decisions as to sentencing circumstances. Preston v. State, 607 So. 2d 404, 408-409 (Fla. 1992). In Preston, this Court continued: "Moreover, we have held that a trial judge may properly apply the law and is not bound in remand proceedings by a prior legal error. Spaziano v. State, 433 So. 2d 508, 511 (Fla. 1983), aff'd, 468 U.S. 447". Id. 409. See also Jones v. State, 559 So. 2d 204, 206 (Fla. 1990)("Since the district court of appeal had jurisdiction to review the third sentencing, it also had the authority to change the law of the case previously set forth in [prior appeals].")

B. In 1976, the felony murder circumstance provided: "The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any ... rape ... ." § 921.141(5)(d), Fla.Stat. (1975). Instead of using this

circumstance, however, the court used the circumstance as amended by Chapter 83-216, Section 177 of the Laws of Florida, which substituted "sexual battery" for "rape." R 1113. Use of the 1983 aggravator violated the Ex Post Facto Clauses.

In Askew v. State, 118 So. 2d 219, 221-22 (Fla. 1960) (citing cases), this Court wrote: "The elements of the crime are (1) penetration of the female private parts by the private male organ, and (2) force of such a nature as to put the victim in such fear that she is thereby compelled to submit to the act."[19]

Rains v. State, 671 So. 2d 815 (Fla. 5th DCA 1996) succinctly noted that the force and non-consent elements of rape were much narrower than the elements of sexual battery:

> In August, 1993, Robert Maurice Rains was indicted on one count of capital sexual battery stemming from the alleged rape of his niece in 1971. Section 794.01, Florida Statutes (1971), the applicable statute, required evidence of force and lack of consent as elements of the offense. See Paramore v. State, 238 So. 2d 604 (Fla. 1970) (victim's testimony should be rigidly scrutinized as to the nature and extent of force used). "[I]f the exhibited or threatened force was not sufficient to put the woman 'in fear of loss of life or other great danger,' evidence of resistance was required to demonstrate the act was by force and against her will." Hufham v. State, 400 So. 2d 133, 134 (Fla. 5th DCA 1981). Under this standard, our courts reversed rape convictions for insufficient evidence on facts far more egregious than exist in the instant case. See Bailey v. State, 76 Fla. 213, 79 So. 730 (1918); see also Hollis v. State, 27 Fla. 387, 9 So. 67 (1891); O'Bryan v. State, 324 So. 2d 713 (Fla. 1st DCA), cert. denied,

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[19] Section 794.01(2), Florida Statutes (1973) defined rape and forcible carnal knowledge as follows (e.s.):

> Whoever ravishes or carnally knows a person of the age of eleven years or more, by force and against his or her will, or unlawfully or carnally knows and abuses a child under the age of eleven years, shall be guilty of a life felony, punishable as provided in § 775.082.

> 336 So. 2d 1184 (Fla. 1976); Johnson v. State, 118 So. 2d 806 (Fla. 2d DCA 1960).
>
> While there is little (or no) doubt that the defendant's actions would result in conviction under our present statute, because the State failed to adduce evidence as to lack of consent and use of force as those terms were legally defined in 1971, we are constrained to reverse.

Sexual battery, in contrast, does not necessarily have the element of force: under Sections 794.011(2), (3), (4) and (5), Florida Statutes, it is the non-consensual, coercive or forcible sexual intercourse or union. See Hufham v. State, 400 So. 2d 133, 134 (Fla. 5th DCA 1981) (contrasting sexual battery and prior crime of rape). Sexual battery "is broader than its predecessor, the forcible rape statute, and meant to be broader". State v. Aiken, 370 So. 2d 1184, 1187 (Fla. 5th DCA 1979) (Dauksch, J., concurring).

Use of the sexual battery circumstance violated the Ex Post Facto Clauses. See State v. Schackart, 947 P.2d 315, 324 (Az. 1997) (retroactive application of amendment to prior violent felony circumstance), Bowen v. State, 911 S.W.2d 555, 562-63 (Ark. 1995), State v. Jordan. Cf. Tricarico v. State, 711 So. 2d 624 (Fla. 4th DCA 1998) (state could not use felony murder theory that did not exist until after date of crime).

Appellant acknowledges that this Court rejected a similar argument in Hitchcock v. State, 578 So. 2d 685, 693 (Fla. 1990):

> Hitchcock's claim that instructing the jury in terms of "sexual battery" rather than "rape" is an ex post facto violation is without merit. See Tompkins v. State, 502 So. 2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987); Hitchcock v. State, 413

So. 2d 741 (Fla.), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982); Adams.

Appellant submits that this Court erred. None of the cited cases presented ex post facto claims -- they involved due process challenges to retroactive application of the circumstance.

Again, under Preston, the court "is not bound in remand proceedings by a prior legal error." This Court should change the law of the case to avoid the ex post facto violation at bar.

8. WHETHER THE EVIDENCE SUPPORTS THE FELONY MURDER CIRCUMSTANCE, AND WHETHER THAT CIRCUMSTANCE IS CONSTITUTIONAL.

A. Dr. Ruiz testified there was evidence of sexual trauma in that he "found a tear five centimeters at 5:00 in the hymen. She was a virgin." T 116. Appellant's statement was that " me and her had sex and she said she was hurt", and that he killed her when she was hollering after he said she could not tell her mother. T 1119. Lynn Driggers testified that Cynthia had discussed "some inappropriate things that Ernie was doing to her", and that, when confronted with this, appellant said he would rape and kill them if they told their mother. T 133. This record does not support the felony murder circumstance that the murder occurred during the commission of a rape or sexual battery. (Appellant argues elsewhere in this brief that use of the sexual battery aggravator was unconstitutional on other grounds. His argument here is that the evidence shows neither a rape nor a sexual battery.)

To prove a rape, the state had to show beyond a reasonable doubt: "(1) penetration of the female private parts by the private male organ, and (2) force of such a nature as to put the victim in such fear that she is thereby compelled to submit to the act." Askew, 118 So. 2d at 221-22. " The offense of forcible rape is never established where the evidence presented by the state fails to show that the act was accomplished by force and against the will of the victim, but only shows that she protested." O'Bryan v. State, 324 So. 2d 713 (Fla. 1st DCA), cert. denied, 336 So. 2d 1184 (Fla. 1976). Semble Rains. The court below did not find a forcible rape, and the record does not show force and non-consent.

As to the retroactively-applied sexual battery circumstance, the record does not show that the sexual conduct amounted to a sexual battery. To repeat, the state's case shows only that appellant had sex with Cynthia Driggers. It shows he had threatened to rape and kill her and her sister if they told their mother about "inappropriate activities". The pathologist said she had been a virgin before she had sex with appellant on the night she was killed. She said that night that it hurt. This does not establish a sexual battery.[20] See Hufham, 400 So. 2d at 134 (discussing force-coercion-consent element).

Further, the record does not show that, if there was a rape or sexual battery, the murder occurred during its commission. The act was over when the murder occurred.

The record does not support the felony murder circumstance at bar. Its use violates the Cruel Unusual Punishment Clauses of the state and federal constitutions, requiring resentencing.

B. The court erred in denying appellant's motion arguing that the circumstance is unconstitutonal in that it fails to narrow the class of persons eligible for death. R 682-86, 881. Appellant acknowledges that this Court has repeatedly rejected such argument. He respectfully submits, however, that those decisions are incorrect under Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990) (premeditation circumstance would be unconstitutional if it simply mirrored premeditation element of murder) and Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568

[20] The record does show the crime of carnal intercourse with an unmarried person under 18 years. § 794.05, Fla.Stat. (1975).

(1988).

9. WHETHER THE COURT ERRED IN USING THE HEINOUSNESS CIRCUMSTANCE AND GIVING AN UNCONSTITUTIONAL INSTRUCTION.

A. The present record does not support the finding that the murder was especially heinous, atrocious or cruel under section 921.141(5)(h), Florida Statutes.

This Court usually upholds this aggravator in strangulation cases, but the rule is not absolute. The present record does not show prolonged, conscious awareness of impending death or that appellant chose a torturous method to kill Cynthia Driggers.

Speculation cannot substitute for proof of this aggravator. See Knight v. State, 721 So. 2d 287, 298 (Fla. 1998). "[T]he trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984)." Robertson v. State, 611 So. 2d 1228 (Fla. 1993). This circumstance does not apply to every strangulation. See DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989).

The reason for using this aggravator in such cases is that "'it is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable.' Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987)." Deangelo, 616 So. 2d at 442-443.

Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) states: "The United States Supreme Court recently has stated that this factor would be appropriate in a

'conscienceless or pitiless crime which is unnecessarily torturous to the victim.' Sochor v. Florida, [504 U.S. 527, 536,] 112 S.Ct. 2114, 2121 [, 119 L.Ed.2d 326] (1992). Thus, the crime must be both conscienceless or pitiless and unnecessarily torturous." At bar, the state did not show these elements.

The reason for finding strangulations especially heinous is like the reason for finding the circumstance where there is a severe beating. But again, not every such beating satisfies the circumstance. In Elam v. State, 636 So. 2d 1312 (Fla. 1994), Elam beat his employer to death with his fist and with a brick. This Court struck the heinousness circumstance, writing (id. 1314):

> We find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel inapplicable. Although the [victim] was bludgeoned and had defensive wounds, the medical examiner testified that the attack took place in a very short period of time ("could have been less than a minute, maybe even half a minute"), the [victim] was unconscious at the end of this period, and never regained consciousness. There was no prolonged suffering or anticipation of death.

The state failed to show that Cynthia was conscious for an appreciable time after the fatal attack began. Dr. Ruiz would say she was not unconscious when she was beaten, but could not put any time on the amount of time that she was conscious after the beginning of the strangulation. T 124. The record also does not show that appellant purposely chose an unnecessarily torturous method of killing. The record does not show prolonged suffering or anticipation of death under Elam.

This aggravator violated the Cruel Unusual Punishment Clauses of the state and federal constitutions requiring resentencing.

B. The court erred in denying, R 867, appellant's motion attacking the

circumstance and the standard jury instruction (given at bar, T 367) as unconstitutional. R 773. The standard instruction tracks State v. Dixon, 283 So. 2d 1, 9 (1973):

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.	The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.
State v. Dixon.	In re Standard Jury Instructions in Criminal Cases, 678 So. 2d 1224, 1226 (Fla. 1996)

As already noted, to be constitutional, the aggravator must apply to crimes which are both conscienceless or pitiless and unnecessarily torturous. Richardson, 604 So. 2d at 1109; Sochor, 504 U.S. at 536. Appellant's motion argued that the standard instruction does not state that the circumstance applies only to such crimes. Sochor noted that adherence to the State v. Dixon definitions leads to constitutional error unless the sentencer is guided by corrective case law (id. 535-37):

> Sochor maintains that the same Eighth Amendment violation occurred again when the trial judge, who both parties agree is at least a constituent part of "the sentencer," weighed the heinousness factor himself. To be sure, Sochor acknowledges the rule in Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), where we held it was no error

for a trial judge to weigh an aggravating factor defined by statute with impermissible vagueness, when the State Supreme Court had construed the statutory language narrowly in a prior case. Id., at 653, 110 S.Ct., at 3057. We presumed that the trial judge had been familiar with the authoritative construction, which gave significant guidance. Sochor nonetheless argues that Walton is no help to the State, because Florida's heinousness factor has not been subjected to the limitation of a narrow construction from the State Supreme Court.

In State v. Dixon, 283 So. 2d 1 (1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), the Supreme Court of Florida construed the statutory definition of the heinousness factor:

> "It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim." 283 So. 2d, at 9.

Understanding the factor, as defined in Dixon, to apply only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim," we held in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), that the sentencer had adequate guidance. See id., at 255-256, 96 S.Ct., at 2968 (opinion of Stewart, Powell, and STEVENS, JJ.).

Sochor contends, however, that the State Supreme Court's post-Proffitt cases have not adhered to Dixon's limitation as stated in Proffitt, but instead evince inconsistent and overbroad constructions that leave a trial court without sufficient guidance. And we may well agree with him that the Supreme Court of Florida has not confined its discussions on the matter to the Dixon language we approved in Proffitt, but has on occasion continued to invoke the entire Dixon statement quoted above, perhaps thinking that Proffitt approved it all. See, e.g., Porter v. State, 564 So. 2d 1060 (1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d

1106 (1991); Cherry v. State, 544 So. 2d 184, 187 (1989), cert. denied, 494 U.S. 1090, 110 S.Ct. 1835, 108 L.Ed.2d 963 (1990); Lucas v. State, 376 So. 2d 1149, 1153 (1979).

But however much that may be troubling in the abstract, it need not trouble us here, for our review of Florida law indicates that the State Supreme Court has consistently held that heinousness is properly found if the defendant strangled a conscious victim. See Hitchcock v. State, 578 So. 2d 685, 692- 693 (1990), cert. denied, 502 U.S. 912, 112 S.Ct. 311, 116 L.Ed.2d 254 (1991); Holton v. State, 573 So. 2d 284, 292 (1990); Tompkins v. State, 502 So. 2d 415, 421 (1986); Johnson v. State, 465 So. 2d 499, 507, cert. denied, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985); Adams v. State, 412 So. 2d 850, cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). Cf. Rhodes v. State, 547 So. 2d 1201, 1208 (1989) (strangulation of semiconscious victim not heinous); Herzog v. State, 439 So. 2d 1372 (1983) (same). We must presume the trial judge to have been familiar with this body of case law, see Walton, 497 U.S., at 653, 110 S.Ct., at 3057, which, at a minimum, gave the trial judge "[some] guidance," id., at 654, 110 S.Ct., at 3057. Since the Eighth Amendment requires no more, we infer no error merely from the fact that the trial judge weighed the heinousness factor. While Sochor responds that the State Supreme Court's interpretation of the heinousness factor has left Florida trial judges without sufficient guidance in other factual situations, we fail to see how that supports the conclusion that the trial judge was without sufficient guidance in the case at hand. See generally Maynard v. Cartwright, 486 U.S., at 361-364, 108 S.Ct., at 1857-1859.

Unlike the trial judge in Sochor, the jury was not familiar with any limiting body of law, and the standard instruction, by merely tracking State v. Dixon, did not provide the guidance required by the Eighth Amendment. It was error to overrule the objection to the standard instruction.

The court also refused to give a proposed instruction which would have made clear that the circumstance applies only if the defendant has deliberately inflicted or consciously chosen a method with the intent to cause extraordinary mental anguish or

physicl pain, that the victim must have consciously suffered such mental anguish or physical pain for a substantial period of time before death. R 964, T 284-290, 293-95, 303.

The state must show beyond a reasonable doubt that the crime was "not ... meant to be deliberately and extraordinarily painful." Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990). It is significant that this is not a case in which the evidence conclusively shows a prolonged aggravated battery accompanying strangulation, such as occurred in Orme v. State, 677 So. 2d 258 (Fla. 1996), so that this limitation would not apply. It was for the jury to decide if the state had proven this element after being properly instructed. It was error to refuse the instruction.

10. WHETHER IT WAS ERROR TO REFUSE AN INSTRUCTION ON DOUBLING.

It was also error to deny a doubling instruction. R 997, T 302-303. It is for the jury to decide, under appropriate instructions, whether aggravators so overlap as to constitute a single aggravator. Castro v. State, 597 So. 2d 259, 261 (Fla. 1992). The jury's consideration of an invalid aggravator is eighth amendment error regardless whether the trial judge correctly applies the law in the sentencing order. Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). At bar, a properly instructed jury could have concluded from the state's presentation that the avoiding arrest and felony murder circumstances and the avoiding arrest and imprisonment circumstances overlapped in this fashion. This Court should reverse for resentencing.

Denial of the instruction violated the Cruel Unusual Punishment and Due Process Clauses of the state and federal constitutions, as the jury's consideration of circumstances unauthorized by law is uncosntitutional. Stringer, Sochor.

11. WHETHER IT WAS ERROR TO CONSIDER BOTH THE FELONY MURDER AND AVOIDING ARREST CIRCUMSTANCES, AND THE AVOIDING ARREST AND IMPRISONMENT CIRCUMSTANCES WHICH WERE BASED ON THE SAME FACTS.

Improper doubling occurs when both aggravators rely on the same essential feature or aspect of the crime. Provence v. State, 337 So. 2d 783, 786 (Fla. 1976), Banks v. State, 700 So. 2d 363, 367 (Fla. 1997). At bar, the felony murder and avoiding arrest circumstance were based on the same essential feature or aspect of the crime: the state argued that the murder occurred after a sexual battery, and that it was committed to conceal the sexual battery. Hence, it was error to apply both circumstances.

Likewise, the avoiding arrest and imprisonment circumstances were based ont the same essential feature or aspect: the state argued that appellant committed the murder to avoid arrest because he was on parole.

Use of an invalid aggravator is unconstitutional. Stringer, Sochor.

12. WHETHER THE COURT'S FINDINGS AS TO MITIGATION WERE DEFICIENT, REQUIRING RESENTENCING.

"A court's written finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it." Van Royal v. State, 497 So. 2d 625, 628 (Fla. 1986). It must show that determination of mitigation is the result of "a reasoned judgment". State v. Dixon, 283 So. 2d at 10. Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982) states: "the trial court must exercise a reasoned judgment in weighing the appropriate aggravating and mitigating circumstances in imposing the death sentence. To satisfactorily perform our responsibility we must be able to discern from the record that the trial judge fulfilled that responsibility."

"Specific findings of fact provide this Court with the opportunity for a meaningful review of a defendant's sentence. Unless the written findings are supported by specific facts and are timely filed, this Court cannot be assured the trial court imposed the death sentence based on a 'well-reasoned application' of the aggravating and mitigating factors." Rhodes v. State, 547 So. 2d 1201, 1207 (Fla. 1989). In Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995) this Court explained (e.s.):

> Once established, the mitigator is weighed against any aggravating circumstance. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.

Review of the exercise of discretion in death penalty cases is at least entitled to the formality requirements made in such areas of the law as civil divorce cases. Cf. Kennedy v. Kennedy, 622 So. 2d 1033 (Fla. 5th DCA 1993) (despite court's broad discretion, it must make findings of fact as to each statutory factors in determining alimony). Likewise, orders granting new trials must articulate reasons to allow appellate courts to fulfill their duty of reviewing by determining whether judicial discretion has been abused. Thompson v. Williams, 253 So. 2d 897 (Fla. 3d DCA 1971); White v. Martinez, 359 So. 2d 7 (Fla. 3d DCA 1978).

At bar, the findings as to aggravators and as to appellant's age have a small amount of factual content, but the findings as to nonstatutory mitigation have none. The court merely listed various factors and, after clumping them into groups, arbitrarily gave them "little" or "some" weight. There cannot be meaningful appellate review of a bare list.

Meaningful appellate review ensures the constitutionality of our death penalty. Parker v. Dugger, 498 U.S. 308, 321, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991) ("We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally."), Proffitt v. Florida, 428 U.S. 242, 250-251, 252-53, 258-59, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976), State v. Dixon, 283 So. 2d 1, 10 (1973). At bar, there can be no meaningful appellate review of the unreasoned determination of mitigation. The trial court's order did not afford appellant an individualized sentencing determination. This Court should reverse for resentencing.

13. WHETHER THE DEATH SENTENCE IS DISPROPORTIONATE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). It applies only to "the most aggravated, most indefensible of crimes," Dixon, 283 So. 2d at 8, and this is not one of them.[21]

This Court has reduced sentences when there was substantial mitigation and it struck aggravators. Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988); Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984); Blair v. State, 406 So. 2d 1103, 1109 (Fla. 1981). The court below found four aggravators. But it also found 24 mitigating factors and circumstances.

The impropriety of the aggravating circumstances is briefed. If any of them is stricken, that the sentence should be life.[22]

Even if no aggravator is stricken, the mitigation outweighs the aggravation and

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[21] As in another case reduced on proportionality grounds, the pretrial life plea offer for Mr. Hitchcock shows "[t]he State itself originally concluded that the crime did not warrant imposition of the death penalty and agreed to a plea bargain of life imprisonment until [the defendant] himself insisted otherwise." Elam v. State, 636 So. 2d 1312, 1315 (Fla. 1994).

[22] This Court has reduced the sentence to life where aggravators were stricken, and there was a death recommendation. Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988) (after striking an aggravating circumstance, court determined mitigation it found "counterbalance" the remaining aggravators); Rembert v. State, 455 So. 2d 337, 340 (Fla. 1984) (where court struck aggravating factors and there was "considerable" nonstatutory mitigation not found by the trial judge, sentence reduced to life); Blair v. State, 406 So. 2d 1103, 1109 (Fla. 1981) ("because of the existence of a mitigating factor, and the improper inclusion of several aggravating factors, we must reduce to life"), and Kampff v. State, 371 So. 2d 1007 (Fla. 1979).

compels reduction to a life sentence. See Santos v. State, 629 So. 2d 838, 840 (Fla. 1994) (defendant went to estranged lover's home, chased her and children screaming down street, shot her and the children; "the case for mitigation is far weightier than any conceivable case for aggravation that may exist here"); Kramer v. State, 619 So. 2d 274 (Fla. 1993) (reduction based in part on model prisoner evidence: court "is required to weigh the nature and quality of [sentencing] factors as compared with other similar reported death appeals")[23]. The "gravity" of the "imprisonment" aggravating factor "is somewhat diminished by the fact that [appellant] did not break out of prison". See Songer. The other three factors are moderated by appellant's age, immaturity, upbringing, and impairment at the time of the crime.

Mitigation showing adjustment to prison life, status as a prison conciliator, and future nondangerousness in prison, are strong reasons for reducing a sentence. Kramer (sentence in beating death reduced in part due to model prisoner evidence: "[t]his necessarily implies a potential for rehabilitation and productivity withn a prison setting"); Songer; Cooper v. State, 526 So. 2d 900, 902 (Fla. 1988). See Holsworth v. State, 522 So. 2d 348, 355 (Fla. 1988) (death is a "total rejection of the possibility of rehabilitation") and Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

Appellant's impoverished and traumatic childhood, devotion to family members

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[23] Death sentences are reduced where the "entire picture of mitigation and aggravation ... does not warrant the death penalty." Smalley v. State, 546 So. 2d 710, 723 (Fla. 1989); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Proffitt v. State, 510 So. 2d 896 (Fla. 1987).

and kindness toward others are reasons for reducing his death sentence. Songer; Spivey v. State, 529 So. 2d 1088, 1095 (Fla. 1988); Brown v. State, 526 So. 2d 903, 905 (Fla. 1988); Holsworth, 522 So. 2d at 354; Caruthers v. State, 465 So. 2d 496, 498-99 (Fla. 1985). Youth at the time of the crime, a statutory mitigating factor found here, coupled "with the defendant's lack of maturity, coping skills and development" is a significant factor in reducing a death sentence. See Morgan v. State, 639 So. 2d 6 (Fla. 1994); Livingston; Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985); Swan v. State, 322 So. 2d 485, 488 (Fla. 1975).

This Court has ruled that "evidence [of drug or alcohol abuse] must be considered in mitigation, Fead v. State, 512 So. 2d 176, 178 (Fla. 1987); Cannady v. State, 427 So. 2d 723, 731 (Fla. 1983); Buckrem v. State, 355 So. 2d 111, 113-14 (Fla. 1987), especially where established by evidence uncontroverted in the record." Hardwick v. State, 521 So. 2d 1071, 1076 (Fla. 1988). Intoxication alone has been repeatedly considered to mitigate a killing without reference to statutory mitigation. Fead; Buckrem; Norris v. State, 429 So. 2d 688, 690 (Fla. 1983). It has figured greatly in sentence reduction in many death-recommendation cases. Smalley, 546 So. 2d at 723; Proffitt, 510 So. 2d at 898; Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985) (where defendant killed wife[24] with a blunt instrument but was drinking at the time, sentence reduced to life). Intoxication played a significant part in this killing, and is a

[24] Even where the defendant and victim are not members of the same family, the fact that a killing was preceded by a quarrel has convinced this Court that life is the appropriate sentence. Buckrem v. State, 355 So. 2d 111 (Fla. 1987); Neary v. State, 384 So. 2d 881, 885-885, 888 (Fla. 1980). See also Banda v. State, 536 So. 2d 221 (Fla. 1988).

substantial reason for reducing the sentence to life.

Others whose sentences have been reduced to life committed equally or more disturbing crimes. In Reilly v. State, 601 So. 2d 222 (Fla. 1992), the defendant raped, beat and strangled a four year old boy. But the jury recommended life and the death sentence was reduced under Tedder v. State, 322 So. 2d 908 (Fla. 1975). See also Bedford v. State, 589 So. 2d 245 (Fla. 1991) (victim strangled during sex; reduced under Tedder).

The same is true in death recommendation cases. In Chaky v. State, 651 So. 2d 1169, 1170 (Fla. 1995), the defendant killed his spouse with "two very forceful blows" to the back of her head. A prior attempted murder was found in aggravation, but as it occurred years before in Vietnam, it was discounted. The sentence was reduced to life. In Banda v. State, 536 So. 2d 221, 225 (Fla. 1988), a dispute over borrowed money resulted in death by "several crushing blows to the skull," and possibly strangulation. This Court reduced the sentence as disproportionate. See also Halliwell v. State, 323 So. 2d 557 (Fla. 1975) ("Appellant grabbed a 1-inch breaker bar and beat the husband's skull with lethal blows and then continued beating, bruising and cutting the husband's body with the metal bar after the first fatal injuries to the brain. That conduct alone justified a finding of premeditated murder, but we see nothing more shocking in the actual killing than in a majority of cases decided by this Court."), Rembert v. State, 445 So. 2d 337 (Fla. 1984) (robbery-murder victim beaten to death, sentence reduced to life), and Swan v. State, 322 So. 2d 485 (Fla. 1975) (victim's "hands, neck and left foot were tied so that any efforts she might have made to free herself could have choked her

to death," and "death resulted from the severe beating." Swan was nineteen at time of crime; sentence reduced to life).

On appellant's initial appeal in this case, two Justices found death disproportionate, Hitchcock v. State, 413 So. 2d 741, 748 (Fla. 1982) (McDonald, joined by Overton, dissenting):

> In this case, there was testimony that from childhood Hitchcock's mind had not been entirely normal. Prior to commission of this crime Hitchcock had been drinking heavily and smoking marijuana. Returning from his 'night on the town,' he entered the bedroom of the thirteen year old victim and engaged in sex with her. When she announced that she had been hurt and was going to tell her mother he reacted impulsively. From the record I can discern no basis for the jury or the trial judge's failure to find that the defendant committed this crime while under the influence of extreme mental or emotional disturbance or that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Certainly his actions fall far short of showing a reasoned planning or reasoned knowledge of what he was doing when he strangled the victim.

Concurring in the 1983 denial of post-conviction relief, the two Justices expressed a "continuing belief that the death penalty is not appropriate for Hitchcock." Hitchcock v. State, 432 So. 2d 42, 44 (Fla. 1983) (McDonald and Overton, concurring). After the second penalty phase at which the state presented the same case for death as at the first, two different Justices (Kogan and Barkett), would have reduced the sentence on proportionality grounds; Justice Shaw dissented for unstated reasons. Hitchcock v. State, 578 So. 2d 685 (Fla. 1991), vacated, Hitchcock v. Florida, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). Reduction to life is the only proper remedy in this case that has so troubled this Court so deeply for so long. The death sentence in this case violates

Article I, Sections 9, 16, and 17 of the Florida Constitution and Amendments 5, 8, and 14 to the United States Constitution.

14. WHETHER THE COURT ERRED IN PERMITTING TESTIMONY THAT RICHARD GREENE REPRESENTED APPELLANT ON CLEMENCY.

On appellant's last appeal, this Court found was error in telling the jury that appellant had been previously sentenced to death. Hitchcock v. State, 673 So. 2d 859, 863 (Fla. 1996). On remand, the state took a new approach to the same objective. It brought out on cross of Richard Greene that he had represented appellant on clemency. T 158. On direct, he had testified only that he had represented appellant on appeal. (The jury already knew, pursuant to this Court's mandate, that there had been an appeal, and that the case had been remanded for sentencing. S 25.)

The jury would conclude that the Governor and/or the Cabinet had reviewed appellant's case and rejected his case for life. That the highest political authorities of the state had considered whether this was an appropriate case for death was an improper matter to put before the jury. Compare Pait v. State, 112 So. 2d 380 (Fla. 1959) (despite lack of objection, state's comment on defendant's right to appeal was reversible error). Cf. United States v. Williams, 568 F.2d 464, 471 (5th Cir. 1978) ("Indeed, we are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged."); Weber v. State, 501 So. 2d 1379, 1382 (Fla. 3d DCA 1987) ("Courts which have confronted the discrete issue posed by the present case have uniformly concluded that the prejudice arising from the exposure of jurors to information that the defendant was previously convicted of the very offense for which he is on trial is so great that neither an ordinary admonition of the jurors nor the jurors' ritualistic assurances that they have

not been affected by the information can overcome it."); United States v. Keating, 147 F.3d 895, 899 (9th Cir. 1998) (although record indicated "beyond question" that jurors obeyed instructions and based verdict on trial evidence, retrial ordered because they learned state court had convicted defendant of same charges).

Admission of this evidence violated the Cruel Unusual Punishment and Due Process Clauses of the state and federal constitutions.

15. WHETHER THE COURT ERRED IN DENYING RELIEF BASED ON THE NEWLY DISCOVERED EVIDENCE WITHOUT CONSIDERING THE CORROBATING EVIDENCE AND CIRCUMSTANCES AND WHERE THE EVIDENCE WOULD HAVE BEEN ADMISSIBLE.

Pursuant to the state's suggestion, Judge Conrad limited the hearing so as to exclude consideration of appellant's corroborating evidence and circumstance. Thus, he erroneously considered the motion only in light of the evidence most favorable to the state, without consideration of how the new evidence would have affected the case in light of a complete record. Further, Richard Hitchcock's statement was admissible under Chambers and Green, and would have altered the outcome of the case.

16. WHETHER THE COURT ERRED IN RULING ON AND DENYING THE MOTION FOR NEW PENALTY PHASE.

As noted, Judge Perry appointed Judge Conrad to dispose of the motion based on newly discovered evidence. R 1145. Appellant objected, filing a motion for new penalty phase. T 1148. Judge Conrad denied the motion for new penalty phase, notwithstanding his limited appointment. T 1155. This was error. Judge Conrad exceeded his limited appointment.

A judge may not decide a matter to which he is not assigned. In Storrs v. Storrs, 170 So. 728, 126 Fla. 213 (1936), the county judge of Walton County disqualified himself after entry of judgment, leaving a motion for rehearing pending. The defendant then brought the motion for rehearing before the county judge of Holmes County, who entered judgment. This Court ruled that the substitute judge could not decide the matter because he had not been designated to hear it. Judge Conrad was not designated to hear the motion for new penalty phase, and erred in denying it.

On the merits of the motion, it was error to deny the motion. Under Corbett, he could not weigh the facts presented to the jury, so that a new penalty phase was required.

17. WHETHER THE COURT ERRED IN EXCLUDING FROM EVIDENCE, AND REFUSING TO CONSIDER, THE STATE'S PRIOR OFFER OF A LIFE SENTENCE.

The defense proffered the affidavit of Joe Micetich, the prosecutor at the original trial, showing the State had offered to recommend a life sentence in exchange for a plea of guilty. T 413-14, R 893-94. The judge refused to let it into evidence, and refused to consider it in sentencing appellant. T 413-18, R 1117. The offer to recommend a life sentence was relevant to the sentencing determination. Elam v. State, 636 So. 2d 1312, 1315 (Fla. 1994) (reducing to life and noting: "The state itself originally concluded that the crime did not warrant the imposition of the death penalty and agreed to a plea bargain of life imprisonment until Elam himself insisted otherwise"). If the prosecutor told the jury at the sentencing phase he recommended life, it would be relevant. The problem with the proffered evidence is not that it is irrelevant, but that it is too relevant. Barring mention of this favorable evidence violates the Cruel Unusual Punishment Clauses of the state and federal constitutions.

18. WHETHER IT VIOLATED THE SPEEDY TRIAL, DUE PROCESS, OR CRUEL UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTION TO CONDUCT THE SENTENCING PROCEEDING AND SENTENCE APPELLANT MANY YEARS AFTER THE CRIME.

A. The crime occurred in July 1976. The instant resen-tencing trial occurred in September 1996, and appellant was not ultimately sentenced to death until October 1997. During the intervening time, Florida has repeatedly denied appellant a full and fair sentencing as required by the Constitution. With the passage of time, defense witnesses have died and the state has retroactively applied sentencing circumstances to him. Florida has violated the Speedy Trial, Due Process, and Cruel Unusual Punishment Clauses of the state and federal constitutions. Art. I, §§ 9, 16, 17 and 21, Fla.Const.; amend. V, VI, VIII, XIV, U.S. Const.

The right to speedy trial applies to capital sentencing. Pollard v. United States, 352 U.S. 354 (1957), assumed the speedy trial right encompasses even noncapital sentencing, and "[o]f note, 'no federal court has held that sentencing is *not* within the protective ambit of the Sixth Amendment right to a speedy trial.'" Burkett v. Fulcomer, 951 F.2d 1431, 1438 n.7 (3d Cir. 1991) (quoting Perez v. Sullivan, 793 F.2d 249, 253 (10th Cir. 1986). Moore v. Zant, 972 F.2d 318, 320 (11th Cir. 1992) states:

> In this case, if Georgia waits too long, the state could lose the right to sentence Moore to death. Moore has speedy trial rights under the sixth amendment that would cover a death penalty proceeding. *United States v. Howard*, 577 F.2d 269, 270 (5th Cir. 1978) ("constitutionally guaranteed right to speedy trial applies to sentencing").

In Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 2696, 120 L.Ed.2d

520 (1992), although the petitioner "did indeed come up short" in showing prejudice, delay required outright dismissal. There are four relevant inquiries to determine a violation of the right to speedy trial:

> whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result.

Doggett, 112 S.Ct. at 2690 (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972)).[25] Applying the relevant factors, it is plain that relief is required.

(1) The delay was long. The penalty phase occurred in September 1996, over 20 years after the arrest. In Doggett, the "extraordinary 8½ year time lag between Doggett's indictment and arrest clearly suffice[d] to trigger the speedy trial enquiry." Id. 2691. The Court noted that "the lower courts have generally found postaccusation delay `presumptively prejudicial' at least as it approaches one year." Id. at n.1. See Madonia v. State, 648 So. 2d 260 (Fla. 5th DCA 1994) (delay of more than three years between charge and arrest "is sufficient time to make the delay `presumptively prejudicial' and require a *Doggett* inquiry"). Compare Harris v. Champion, 15 F.3d 1540, 1560 (10th Cir. 1994)("a two-year delay in finally adjudicating a direct criminal appeal ordinarily will give rise to a presumption of inordinate delay that will satisfy this

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[25] In assessing the related issue of appellate delay, "[t]he factors of *Barker* are preferred ... since the reasons for constraining appellate delay are analogous to the motives underpinning the Sixth Amendment right to a speedy trial." Harris v. Champion, 15 F.3d 1538, 1559 (10th Cir. 1994) (quoting *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980).

first factor in the balancing test"). The delay here is presumptively prejudicial.

(2) The government is more to blame for the delay. Had Florida obeyed the law, a lawful penalty phase would not have been so delayed. Appellant has continuously raised his right to a constitutionally adequate penalty phase throughout the years, but Florida has continuously thwarted his efforts.

Appellant was convicted and sentenced to death in 1977. This Court affirmed May 27, 1982. Hitchcock v. State, 413 So. 2d 741 (Fla. 1982). The Supreme Court denied review October 18, 1982. Hitchcock v. Florida, 459 U.S. 960 (1986). On February 22, 1983 he appeared before the clemency board, but was denied clemency April 21, 1983. He filed his 3.850 motion on May 3, 1983, and the trial court denied that motion May 10, 1983. This Court affirmed May 17, 1983. Hitchcock v. State, 432 So. 2d 42 (Fla. 1983). He sought habeas review in federal court on May 13, 1983. On October 18, 1984, the Eleventh Circuit affirmed denial of relief. Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984). After denial of rehearing en banc, 777 F.2d 628 (11th Cir.1985), the Supreme Court granted review and reversed. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Appellant was again sentenced to death, and this Court affirmed. Hitchcock v. State, 578 So. 2d 685 (Fla. 1990). On remand from the Supreme Court, Hitchcock v. Florida, 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992), this Court ordered resentencing. 614 So. 2d 483 (Fla. 1993). Appellant was again sentenced to death, but this Court reversed. Hitchcock v. State, 673 So. 2d 859 (Fla. 1996), leading to the instant sentencing. Each reversal has resulted from serious legal errors by Florida depriving him of a fair,

constitutional sentencing. He has continually and diligently sought a fair sentencing proceeding.

His speedy trial claim is not invalid because he exercised his right to appeal. See United States v. Loud Hawk, 474 U.S. 302 (1986) (applying Barker to delay due to interlocutory appeals). The state cannot visit blame on him for the delay when he has been proven correct in asserting that his prior penalty phases were conducted unlawfully.

(3) The speedy trial right has been asserted in due course. Appellant has always sought a constitutional trial, and has been continuously in state custody, available for trial.

(4) The delay has prejudiced appellant. The state has claimed that the delay has authorized it to develop new aggravation and apply it retroactively to appellant. The delay also resulted in death or disappearance of favorable defense evidence.

Appellant was subjected to "oppressive incarceration" and the "anxiety" under Doggett, 112 S.Ct. at 2692 (citing cases). "[W]hen a prisoner is sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." In re Medley, 134 U.S. 160, 172, 10 S.Ct. 384, 33 L.Ed.2d 835 (1890). See Lackey v. Texas, 115 S.Ct. 1421 (1995) (STEVENS, J., respecting denial of certiorari; collecting cases).

Delay prejudicing the ability to present a case violates due process. United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 691 (1982), Scott v.

State, 581 So. 2d 887, 891 (Fla. 1991) ("This is a due process claim under the fourteenth amendment rather than a speedy trial claim under the sixth amendment."). In this death penalty case, the cruel unusual punishment requirement of heightened reliability is violated by delay. Fundamental fairness and the constitution demand that one not suffer the added punishment of death when a delay prejudiced his case for life.

B. Appellant has been continuously incarcerated since July 1976 and has been under a sentence of death since 1977. The delay in carrying out his execution violates Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The torturous effects of the "death row phenomenon" (the devastating effects of a lengthy stay on death row) have been widely noted over the decades. People v. Anderson, 493 P.2d 880, 6 Cal.3d 628, 649 (Cal. 1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to the execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the [protracted] process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."); Soering v. United Kingdom, 11 Eur.Hum. Rts. Rep. 439 (1989) (European Court of Human Rights refused to extradite a German national from UK to Virginia to face capital murder charges because of anticipated time that they would have to spend on death row if sentenced to death); Vatheeswaran v. State of Tamail Nadu, 2 S.C.R. 348, 353 (India 1983) (noting the "dehumanizing

character of the delay" in carrying out an execution); Sher Singh et al. v. The State of Punjab, 2 S.C.R. 582 (India 1983) ("Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed."); Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimb. June 24, 1993) (reported in 14 Hum.Rts.L.J. 323 (1993)).

Legal commentators and mental health experts have expressed similar views. E.g. Schabas, EXECUTION DELAYED, EXECUTION DENIED, 5 Crim. L. Forum 180 (1994); Lambrix, THE ISOLATION OF DEATH ROW in Facing the Death Penalty 198 (M. Radelet ed. 1989); Millemann, CAPITAL POST-CONVICTION PRISONERS' RIGHT TO COUNSEL, 48 Md.L.Rev. 455, 499-500 (1989) ("There is little doubt that the consciousness of impending death can be immobilizing.... This opinion has been widely shared by [jurists], prison wardens, psychiatrists psychologists, and writers.") (citing authorities).

Pratt & Morgan v. The Attorney General of Jamaica, Privy Council Appeal No. 10 of 1993, 3 WLR 995, 143 NLJ 1639, 2 AC 1, 4 All ER 769 (Nov. 2 1993) (en banc) (available on LEXIS) involved appeal by two condemned men on Jamaica's death row. Sitting *en banc* for the first time in five decades, the Council unanimously held that carrying out the death sentences would be "torture," and "inhuman" and "degrading" punishment. It did not hold capital punishment cruel and unusual *per se*, but instead focused on the length of time the men had been on death row (14 years):

> There is an instinctive revulsion against the prospect of [executing] a man after he has been held under sentence of death for many years. What

> gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.

Id. at 16. The reasoning of Pratt & Morgan controls this case. British common law is the basis of our legal system. The delay at bar is cruel and unusual under the Eighth Amendment.

Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991) stressed that Article I, Section 17 of the Florida Constitution bars "cruel or unusual punishment." This Court held that a death sentence violates this provision if it is "unusual." This case clearly is. The delay in carrying out this execution violates both the Florida and United States Constitutions. A reduction to life is required.

CONCLUSION

Based on the foregoing argument and the authorities cited therein, appellant respectfully submits this Court should vacate the sentence, and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to KENNETH S. NUNNELLEY, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118 by U.S. Mail this _____ day of April, 1999.

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CERTIFICATE OF FONT

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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	)	
vs.	)	CASE NO. 92,717
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
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_____	)	

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