IN THE

SUPREME COURT OF FLORIDA

TERRY MELVIN SIMS,

Appellant,

vs. No. 77,616

STATE OF FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

On appeal from the Circuit Court of the Eighteenth Judicial Circuit of Florida, In and For Seminole County.

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PRELIMINARY STATEMENT

The following citation symbols will be used:

RD Record on direct appeal.
RP Record in post-conviction.

STATEMENT OF THE CASE

On April 12, 1978, the grand jury for the Eighteenth Judicial Circuit indicted Mr. Sims for crimes allegedly occurring on December 29, 1977. Count I alleged Mr. Sims killed George Pfeil by premeditated design or in the course of robbing Robert Duncan; Count II is an identical charge, except it alleges the murder occurred during a robbery of William Guggenheim. Count III charged Mr. Sims with robbing Guggenheim, and Counts IV and V with robbing Duncan. RD 843-4. Pretrial motions were heard on December 11, 1978 and denied by written order one week later. RD 952-4. Motions to suppress identifications were heard and denied in January, 1979. RD 958-60, 968-71.

Trial began January 30, 1979. The court granted a judgment of acquittal on Count V; the jury convicted Mr. Sims as charged on Counts I-IV. The jury recommended death on February 8 which sentence the court imposed on July 24. RD 1089-93, 1218. This Court affirmed. Sims v. State, 444 So.2d 922 (Fla.), cert. denied 467 U.S. 1246 (1984).

Mr. Sims filed a motion in the circuit court for relief under Rule 3.850, Florida Rules of Criminal Procedure on July 24, 1986. RP 401-24. In March, 1986, Mr. Sims filed a "Petition for Writ of Habeas Corpus" with this Court, Case number 68,422; On September 2, 1986, this Court ordered the petition dismissed pursuant to a notice of voluntary dismissal filed by Mr. Sims in August, 1986. Sims v. Wainwright, 494 So.2d 1153 (Fla. 1986)(memo). On October 19, 1987, Mr. Sims filed an "Application for Relief Pursuant to

Hitchcock v. Dugger" in this Court, Case Number 71,313. On July 12, 1989, this Court ordered that claim transferred to the Circuit Court. RP 539. Mr. Sims filed a "Supplement and Amendment to Motion to Vacate" on September 21, 1989. RP 727-30. A consolidated "Amended and Supplemented Motion to Vacate Judgments and Sentence" was filed on March 23, 1990, pursuant to court order. RP 741-832. Hearing was held thereon on May 29 and June 1, 1990 following the filing of the State's Response on May 29, 1990. The parties submitted legal memoranda, RP 938-1047, and the trial court denied all relief on February 18, 1991. RP 1071-90. Appeal was timely taken on March 15, 1991. RP 1094-9.

STATEMENT OF THE FACTS

On direct appeal, this Court described the evidence relating to the crime as follows:

> Terry Melvin Sims was convicted for the first-degree murder and robbery of George Pfeil, an off-duty deputy sheriff who entered a pharmacy while it was being robbed by Sims and three other men. Two of these other participants, Curtis Baldree and B.B. Halsell, were the state's chief witnesses. They testified that Sims and Baldree armed themselves with pistols and entered the pharmacy, while Halsell and the fourth participant, Gene Robinson, waited in a car a short distance away. Baldree said that he went to the back of the store to rob the pharmacist while Sims stayed at the front of the store watching the door. Sims ordered the customers and employees to the back of the store and into the bathroom. When Pfiel came into the store he and Sims exchanged gunfire. Pfeil was shot twice and Sims was wounded in the hip. Sims and Baldree escaped the scene and later joined their accomplices. The four men then departed the area.
>
> This account of the robbery and the shooting was confirmed by pharmacist Robert Duncan, Duncan's wife and daughter both of whom worked at the store, and two customers who identified appellant. One of the customers, William Guggenheim, testified that he tried to leave the store when he saw a man pointing a gun at the pharmacist. He was stopped by Sims who took his wallet. Guggenheim said he then saw Sims shoot a man who was entering through the front door.
>
> The main theory of the defense was mistaken identity. The defense attempted to discredit Baldree and Halsell on the basis of their bad character, drug addiction, criminal records, and the plea agreements between them and the state. The defense attacked the identification testimony of one of the customers as the product of a suggestive photographic line-up and questioned the testimony of Guggenheim on the basis of his earlier failure to choose appellant from a photographic line-up. The

> defense then presented evidence of appellant's resemblance to another individual said to be a frequent criminal associate of Baldree and Halsell.

Sims v. State, 444 So.2d 922, 923-4 (Fla. 1984). At penalty phase, "the state presented a certified copy of a 1971 Orange County conviction of assault with intent to rob." The defense case for life consisted of "witnesses who testified to appellant's good character and difficult background circumstances."[1] Id. at 924.

William Heffernan and Mark Rabinowitz were court-appointed counsel for Mr. Sims at trial. Mr. Heffernan was lead counsel, RP 133-34, and at the post-conviction hearing related the defense theory:

> [I]t came to our attention that there was a strong possibility that this was a case of mistaken identity, and that basically our defense was going to be based on a twofold thrust.
>
> First, as far as the examination of State's witnesses, to try to establish, with credible evidence for the jury, that the ability of the witnesses to recall, the civilian witnesses to recall, was tainted, or, at very best, poor.
>
> Further, that the two co-defendants that had turned State's evidence were not to be given any credibility, that they had basically sold out for thirty pieces of silver, and that their testimony was totally incredible.
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> And thirdly, from the defense standpoint to the introduction of defense witnesses to establish that there was a strong possibility that Mr. Sims had been misidentified and had been confused with another individual known as

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[1] The testimony of the four defense witnesses all concerned Mr. Sims' life after 1975. RD 789-809. The only evidence of difficult circumstances presented to the 1979 jury was that Mr. Sims had lost an eye. RD 797.

Terry Wayne Gayle.

RP 140-41. Defense counsel Rabinowitz dubbed this the "Big T, Little T defense", meaning the people involved in the group "were trying to protect their [look-alike, larger] friend, Terry Wayne Gayle, and finger Terry Melvin Sims." RP 297. The claims raised here are consistent with this defense.

The ineffective assistance claims

At the post-conviction hearing, lead counsel Heffernan testified the two attorneys labored under "a very difficult set of circumstances." RP 144. The crime charged Mr. Sims with murder of a person who had been misrepresented by the press to be a "police officer", and publicity was tremendous. Id. Security was the greatest Heffernan had seen, and even he had difficulty getting into the courtroom. RP 144-5. Mark Rabinowitz had been stopped in the hall; all the participants in the trial were searched. RP 311. In addition, Heffernan, although respecting Judge Waddell, knew him to be "very cryptic . . . a very tough judge to do business with . . . I witnessed him on several occasions, hit counsel with a hammer or a gavel for putting their hands on his bench." RP 143. Rabinowitz noted that he was "pounded" by the judge in the presence of the jury during a cross examination, RP 317-8, and was "stunned" when the court cut him off, prompting his cocounsel to object. RP 320. As Heffernan testified, "certainly counsel could not sit here and say in candor that we were calm, cool, and collected trial lawyers." RP 144. These lawyers, although experienced prosecutors, had only defended criminal cases

for about a year and a half before representing Mr. Sims; it was their first capital defense. RP 132, 291.

Suggestive identification procedures.

At trial Sue Kovec, William Guggenheim, and Colleen Duncan identified Mr. Sims as the man in the front of the store during the robbery. RD 405,421 (Duncan); 487 (Guggenheim); 505 (Kovec). At the post-conviction hearing, Mr. Sims presented evidence to show this testimony was extraordinarily unreliable and should have been excluded or thoroughly discredited.

The eyewitnesses Kovec, Guggenheim and Colleen Duncan (among others) were interviewed by the police the evening of the robbery, and their statements were introduced at the post-conviction hearing. Those statements show the eyewitnesses revealed the following. Mr. Guggenheim told police he saw very little of the man in the front of the store (whom he later identified as Terry Sims). He was at the rear for most of the robbery, held at gunpoint (by a man later identified as Baldree) and did not know a second man was involved. RP 1120. Guggenheim ran toward the front when Baldree turned away. Guggenheim was surprised by the robber in the front who stopped him and took his money; immediately after, the victim (George Pfeil) entered, the shooting began, and Guggenheim ran, seeing no more of the robber in the front of the store. Ibid. To the police that evening, Guggenheim gave a sparse description of the robber in the front. His "physical description, the best that I can give it, would be also a shortish man of about 5'7", thin probably in his 130's 140's tops, 140 or so in weight,

. . ." RP 1121. Guggenheim said he could identify the man in the back, but:

> The one at the front of the store, would be more difficult, because my, it would be much more difficult for me to identify the one in the front of the store, simply because of the emotional circumstances under which I saw him, all though I feel that if he was in a police line-up with other men of different builds and types, I could say yes, it's that man, but if you had eight men all lined up with a very close physical description, it might be hard, I don't know.

Ibid. (emphasis added).

Colleen Duncan, at the time of the robbery either fourteen or fifteen, was working the front register when the robbery happened. She did not get a long look at the man in the front. RP 1123. To police she described the man in front as "about 5'6 maybe 7 he was thin and [had on] a blue shirt and he had reddish brown hair thin on top and it kinda stood up (inaudible) whiskers . . . ." Ibid. She said he weighed "maybe a hundred, a hundred and ten", and "might have had a light jacket on" over his shirt and "he had kinda real raunchey looking pants on I think they were they had blue in them I know that and they were kinda like brown and blue and they looked old." RP 1124. Colleen Duncan, along with other witnesses, helped develop a composite of this man; the lead detective (Salerno) testified this composite was not helpful in identifying the perpetrators. RD 1177.

The third eyewitness Sue Kovec told police the events that evening happened "very quickly." RP 1118. She glanced at the man in front of the store briefly when she entered the pharmacy, before

the robbery began, and briefly saw him directing customers to the back of the store as she approached the pharmacy desk. RP 1112. She gave a general description of him to the police: the most she could say was that he was approximately five-feet-six-inches, had a very small frame, had medium brown hair, appeared to be thirty-five to forty-five years old, and was not clean shaven or well dressed. RP 1112-3. Although she said she might be able to identify the man in the front from photographs, when asked if she could help develop a composite drawing of the men, Ms. Kovec's statement to police shows she said "I don't think so." RP 1117.

The police asked the witnesses to submit to hypnosis in an attempt to elicit more information. (Inexplicably, the police had nearly every potential witness undergo hypnosis). This session was conducted on January 9, 1977 by Bruce Drazen, then a police officer with no education or training in psychology.[2] He audiotaped all hypnosis sessions.[3] At least one other officer was present during these hypnosis sessions.

Sue Kovec was put into a trance; The transcript of her hypnosis session shows Drazen told her that her mind was like a projector, "a very interesting projector because it can project whatever we suggest to it." RP 1197. Following this suggestion,

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[2] Drazen later obtained some such training, earning an Associate of Arts degree in criminal justice. RP 35-6.

[3] These tapes have since been destroyed; transcripts of some, but not all, were preserved. They were introduced in evidence at the 3.850 hearing at RP 1126-1209.

twelve days after the offense, Kovec gave new and different details from what she told police on the night of the robbery. She remembered that the man in front was a small man with a small head, wearing a checkered shirt, who had very distinctive eyes, big cheeks, a small forehead "going back," and needed cleaing and a shave. RP 1201. Kovec said the image was "fuzzy," but followed Drazen's instruction to "focus" it. RP 1202. She then stated the man had a mouth and nose that were not big in relation to his face, small ears, not a lot of hair -- looking "like a prehistoric man" -- with suntanned and wrinkled skin (like a "beach bum"). She also remembered that the man was approximately five-feet-four-inches because she looked down at him. RP 1202-3. Sue Kovec admitted at deposition that this hypnosis session brought out details not previously in her memory. RP 1419-20.

Drazen told all the hypnosis subjects their mind was like a projector that could be focused.[4] Drazen had difficulty inducing a trance in Guggenheim, but noted Guggenheim let the trance state lead him. RP 1374. Guggenheim told Drazen then that Guggenheim had difficulty visualizing the faces of the perpetrators. RP 62, 1374. During this session, Drazen testified he showed Guggenheim composite sketches of the perpetrators which were made from the descriptions of other witnesses. RP 63.

Drazen also testified at the post-conviction hearing that

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[4] Although transcripts of the Guggenheim and Duncan sessions are not available, Drazen's notes are now apart of the post-conviction record, and Drazen testified he used the same general approach with all his subjects except as he noted. RP 61.

Colleen Duncan, as a teenager, was unusually susceptible to hypnosis because teenagers are "more easily imaginative" than adults. RP 66. During the hypnosis session, Duncan went into a trance; while in this state, Drazen had an artist come into the room to render a drawing of the perpetrators. RP 1496. The subject was to 'project' an image on the paper which the artist drew. Drazen testified this induced "more or less a positive hallucination." RP 68.

Mr. Sims had become a suspect through other sources and a photo display including his pictures was shown to several witnesses in early February, five weeks after the crime. The lead detective Salerno described (at the pretrial hearing on the motion to suppress the in-court identifications) how the display was put together and the identification attempts conducted.[5] The lead detective collected about forty photos of potential suspects suggested by other agencies. RD 1179, 1202, 1205. There was no attempt to gather photos of people who looked similar; rather, the display consisted of head and torso shots of people suggested by other agencies as possible suspects who were approximately the same age. RD 1205. While most witnesses stated the suspects had a couple days growth of beard, the lead detective made no attempt to obtain like depictions. RD 1181.

Each pictured individual was presented by a single photograph, except Mr. Sims, Baldree and two others. RD 1201. There were three

[5] By the time of the post-conviction hearing, Detective Salerno was unable to reconstruct the photographic display actually used. RP 20.

photos of Sims, Baldree, and Frank Osterman, RD 1197-8, 1179, and "multiple" snaps of Bennie Tolb, RD 1199. Mr. Sims' pictures consisted of one from the state prison system, one from the drivers' license bureau, and a mug shot from the Orange County Sheriff's Office. RD 1178. Mr. Sims' driver's license photo was in color; only five or six of the forty were in color. RD 1203-4. This photo also displayed the name of Mr. Sims; none of the other photos had names on their face. RD 969, 1196.

The lead detective testified at the suppression hearing that he first showed the display to Colleen Duncan. RD 1178. She was given the photographs in a stack, but did not pick out Mr. Sims. RD 1184. The display was next shown to Mr. Guggenheim, at his home. RD 1185. Mr. Guggenheim also did not pick out any of the three photos of Sims, indeed identified the photo of another as the man in the front. RD 1186, 496. On February 8th, the lead detective showed the photos to Sue Kovec. She picked out photos of Mr. Sims; the lead detective confirmed to her that she either chose 'correctly' or picked photos of the same man. RD 1192.

The pretrial publicity in the case was extensive. Attached to the Motion to Change Venue are numerous newspaper articles relating to the crime, about the fugitive status of Sims and others, and personal stories about the victim and his family and friends. RD 876-898. Several of the articles are accompanied by pictures of Sims as a suspect, in chains after his arrest. Id.

All three of the eyewitnesses' testimony at trial showed a substantial basis for believing that the publicity and hypnosis had

created an irreparable risk of misidentification. Colleen Duncan's boyfriend was a newspaper carrier, and she had read "practically every story" concerning the crime. RD 414. Those stories, she admitted, also contained pictures of Terry Sims. RD 414. When asked whether the photos of Sims in the paper suggested to her that the man in court that day was the one who had committed the crime, she admitted: "I guess it did. But I couldn't be certain." RD 419. Similarly, Guggenheim admitted at trial that his memory was refreshed by newspaper photos of Mr. Sims.[6] RD 499. RD 499. Kovec admitted at trial that she had seen pictures of Mr. Sims on television and in the papers prior to identifying him in court. RD 510. However, she also testified that her identification of Mr. Sims derived from her view of the robber. RD 512.

Trial counsel knew of the planned in-court eyewitness identifications well prior to trial. Colleen Duncan testified at deposition in November 1978 that she could "positively" identify the man at the front of the store. RP 1497. Guggenheim said at deposition there was a "ninety percent" chance he could identify the man in front if he saw him face-to-face. RP 1471. Ms. Kovec made similar statements. RP 1419. Lead defense counsel testified post-conviction that they "appreciated the fact that they were going to try to make an in-court identification", although he

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[6] Guggenheim was deposed on November 13, 1978. After being exposed to pictures of Mr. Sims in the paper and on television, Guggenheim said the man at the front of the store "was around five seven", had thinning hair with a "red cast" to it, and his face was reddish, and thin. RP 1470, 1472. He said then that he had not seen a picture in the photo display that looked "that close" to the man he recalled, RP 1470, 1483.

thought that with the exception of Sue Kovec, the witnesses were "very shaky". RP 149.

Counsel testified post-conviction that a major part of the defense strategy was to attack the admissibility of the eyewitness testimony. RP 150-4, 299-303. Counsel filed a motion to suppress in-court identifications on January 8, 1979. RD 958-60. An evidentiary hearing was held the next day. Counsel filed a second motion that morning,[7] this one attacking the hypnosis sessions and challenging Kovec's testimony.[8] RD 1165-1210, 968-71. The legal theory was that exposure to the photo display, hypnosis, and pretrial publicity, that is, "the totality of the circumstances," required exclusion of the testimony. RP 303, 968-9.

But only a single witness (the lead detective who conducted the photo display) was called by the defense at the suppression hearing. The defense did not call the witnesses whose testimony they challenged, instead attempting to rely solely on depositions. The court upheld the prosecutor's objection to consideration of the depositions as substantive evidence. RD 1208.

No testimony was offered at the suppression hearing about hypnotism generally or the circumstances of these sessions.

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[7] This motion is stamped as filed on January 10, 1979, but the certificate shows service on the 9th and the hearing transcript shows the parties, if not the court, were proceeding on the second motion. RD 1173, 1193.

[8] Counsel had a transcript of Kovec's hypnosis session. At deposition, she admitted the hypnosis brought out new details of the robber in her mind. RP 1419-20. Duncan deposed she had been hypnotized to aid her recall. RP 1496. Counsel believed Guggenheim had been hypnotized, as reflected in their motion to suppress, although he did not mention it in his deposition.

Counsel admitted he made no attempt to contact a hypnosis expert. RP 303. At the post-conviction hearing, Mr. Sims presented evidence showing minimal investigation undertaken before trial in 1978 or early 1979 would have unearthed evidence questioning the admissibility and weight of hypnotically refreshed identifications.

Bruce Drazen, the person who performed the hypnosis in this case, was deposed by trial counsel, but that deposition was suspended when it was learned he had not brought his notes. RP 1267-8. He did tell counsel at that time that hypnosis would aid recall only "in some cases" RP 1264, **but he was never recalled to complete his deposition.** Yet Mr. Drazen was even then aware of the deficiencies with hypnotized testimony, and would have advised trial counsel at that time had he been asked. At the 3.850 hearing, Drazen testified extensively about the reliability of hypnosis, and said his thinking on the subject was basically the same in 1978. RP 51. He had been contacted by other defense lawyers to review the work of hypnotists in 1978, but refused to do so because he was then a police officer. RP 72.

Drazen defined hypnosis as "kind of a subjective state of mind, characterized by heightened susceptibility." RP 48. He finds very responsive subjects provide more detail, but also confabulate more. "Confabulation is a mixture of fact and fantasy." RP 50-1. He explained the process: "Imagination is the key. It kind of opens you up and allows you to relax and do other things." RP 67. He admits that memory hardening, (implanted certainty of the accuracy of memory) can result from hypnosis. RP 79. Drazen's

opinion on hypnotically refreshed testimony was that it was not reliable standing on its own and should not be used unless corroborated by independent evidence. RP 49, 51.

Mimimal investigation would have shown that the scientific community had determined hypnosis distorts and creates false memories, rather than improving memory's accuracy. This truth was noted as early as 1902 in the legal literature. See Ladd, Legal Aspects of Hypnotism, 11 Yale L.J. 173 (1902)(pointing out unreliability of hypnosis due to "illusions and hallucinations" that subjects experience). Numerous studies of hypnosis published years before the Mr. Sims' trial consistently so concluded.[9]

This distortion of memory produced by hypnosis has been understood for many years as the result of three interrelated factors: hypersuggestibility, hypercompliance, and confabulation. Hypnosis is, almost by definition, a state of increased suggestibility. See Underwood, Experimental Psychology 13 (1949); Hilgard, Hypnosis, 15 Ann. Rev. of Psych. 157 (Farnsworth ed. 1965). The hypnotist's subtle, often non-verbal, suggestions control each step of the hypnotic session. Hilgard, The Experience of Hypnosis at 9. Coupled with the extreme suggestibility of the hypnotized person is an extraordinary desire on the part of that person to comply with the requests of the hypnotist. The

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[9] See Stainakeer and Riddles, The Effect of Hypnosis on Long-Delayed Recall, J. Gen. Psych. 429 (1932); Weitzenhofer, Hypnotism 9-11 (1953); Orne, The Potential Uses of Hypnotism in Interrogation (in The Manipulation of Human Behavior) 194-5 (Biderman and Zimmerman, eds. 1966); Hilgard, The Experience of Hypnosis 164-75 (1968); Dilloff, The Admissibility of Hypnotically Influenced Testimony, 4 Ohio N.U.L. Rev. 1 (1977).

interaction of these two factors was articulated in the following manner in 1975 in the leading treatise on psychiatry:

> Hypnosis can be described as an altered state of intense and sensitive interpersonal relatedness between hypnotist and patient, characterized by the patient's non-rational submission and relative abandonment of executive control to a more or less, regressive, distorted state. . . . The patient's dissociated attention is constantly sensitive to and responsive to cues from the hypnotist.

A. Freedman, H. Kaplan, and B. Sadock, eds., 2 Comprehensive Textbook of Psychiatry §30.4 (2d Ed. 1975). Confabulation results from hypersuggestibility and hypercompliance. Confabulation is the process of filling in gaps in memory with false and inaccurate beliefs. See Hilgard, The Experience of Hypnosis at 164-75; Dilloff, The Admissibility of Hypnotically Influenced Testimony at 4-5. As explained by Hilgard:

> The subject under hypnosis is often eager to please by complying with the demand, explicit or tacit, that he produce a correct memory. Thus, unwittingly, the subject may comply by producing a memory out of fantasy, and formulating it in as realistic terms as he is capable.

Hilgard, The Experience of Hypnosis at 164-175. Finally, research would have shown the subject emerges from hypnosis with a deep certainty about the accuracy of the believed 'memories,' creating a witness who is unshakable in beliefs that may well be false. See Hilgard, The Experience of Hypnosis at 6-10. By 1969 as general a reference as the Encyclopedia Britannica stated:

> Interrogation and discovery of truth: Hypnosis has not been found reliable in obtaining truth from a witness. Even if it were possible to induce hypnosis against one's will, it is well documented that the hypnotized individual can wilfully lie. It is of even greater concern that cooperative hypnotized

> subjects remember distorted versions of actual events and are themselves deceived. When recalled in hypnosis, such false memories are accompanied by strong subjective conviction and outward signs of conviction that are most compelling to any observer.

9 Encyclopedia Britannica (5th Ed. 1969)(e.a.).

None of this was explored by trial counsel, despite their recognition that the hypnosis cast doubt on the reliability of the identifications as reflected in their motion to suppress the identifications in part because of the effects of hypnosis. Lead counsel Heffernan testified they did not pursue research or obtain an expert to support their motion to suppress because they were somewhat "cocky" on the idea, and were ignorant of the need for an expert to challenge hypnotically refreshed testimony. RP 153-4.

Dr. Robert Buckhout, who has extensive academic and experimental experience centering on hypnotism and eyewitness identification, RP 82-3, testified at length at the post-conviction hearing. He found that several aspects of the hypnosis sessions conducted by Drazen actually interfered with the true memories of Kovec, Guggenheim, and Duncan. Drazen imbued those witnesses with overconfidence in their abilities to recall by telling them their mind was a projector. RP 103. The suggestion by Drazen that the witness could see herself on the screen suggests super-human empowerment. RP 107. This false reassurance tells subjects the answers, 'I do not know,' and, 'I do not remember,' are incorrect and encourages pure fabrication. RP 104. The subject becomes convinced their new-found 'memories' are true. RP 105. Drazen himself was a police officer, and another officer was in the room

during the sessions. RP 54. The additional, interested observer increases bias in hypnosis. RP 107.

The hypnosis session obscured all three of the eyewitnesses' true memory, according to Doctor Buckhout. Kovec's session was a classic example of false improvement of memory by hypnosis. The interviewer's repeated explanation that Kovec could create an exact image of the person she saw on the "movie screen" of her mind led her to create details and deeply believe in their truth. RP 103-5. This was particularly true because of the presence of police officers as the interviewer and observer. RP 107. The suggestion she could focus or zoom in on parts of her memory strongly encouraged fantasy since any details would be obtained by an impossible feat. RP 107.

Colleen Duncan, a teenager, would have been especially likely to fabricate in a hypnosis session. RP 112. The presence of the sketch artist during the session increased the risk the witness would follow suggestions. RP 113. Doctor Buckhout testified such a sketch would interfere with the witness' true memory. RP 114. Guggenheim also was shown sketches drawn from the descriptions of other witnesses.

No evidence was presented in 1979 that pretrial publicity had infected the witness' memories. Their tiral testimony regarding the effect of this publicity was not presented at the suppression hearing. The suppression motion was denied. RD 972.

Defense counsel also made no objection <u>at trial</u> to the witnesses' in-court identification on any grounds. Both trial

attorneys admitted this omission was simply error on their part. RP 221, 305-6. The trial attorneys did impeach the witnesses on their exposure to pretrial publicity and on Guggenheim's and Duncan's inability to pick out Mr. Sims' photo despite its presence in a suggestive lineup as noted above. However, the jury neither was informed that these witnesses were hypnotized nor educated as to the effects of hypnosis. Lead counsel Heffernan testified he meant to cross examine the witnesses on hypnosis, and if he failed to do so, it was a mistake. RP 157.

Finally, at trial the prosecutor placed Mr. Guggenheim in a post-hypnotic state while he was on the stand, in the course of seeking his identification of Mr. Sims as the robber and killer:

> Q I want you to, if you will, Mr. Guggenheim, close your eyes. I want you to go back to that day and that evening, and I want you to run up that aisle and I want you to describe the face of that man you saw and his stature, if you will, please.

RD 483. After Mr. Guggenheim offered his description, he was asked to get up, walk around the room, and point out the robber; he identified Mr. Sims. RD 487. Dr. Buckhout testified that this was practicing hypnosis without a license, and designed to use key words to elicit a response similar to that in the previous hypnotic state. RP 111-2. The defense made no objection at trial.

Courthouse security and shackling of the defendant.

The trial began with Mr. Sims being brought before the venire while shackles bound his legs. The court convened with the venire present; the judge then went to chambers. RD 3 While in chambers, Heffernan stated:

> The only thing I want to bring up was whether he would be required to sit in court with leg irons on, and I indicated no, and we would renew our request, since we have not heard from the Court . . . whether you will entertain individual or voir dire commission.

RD 5. Heffernan testified that Mr. Sims was brought into the courtroom in leg irons and walked before the venire. RP 145-7. He objected and the court ordered the restraints removed, but denied a request for individual voir dire. RP 148. Heffernan failed to move to strike the venire out of "ignorance."[10] RP 148.

Counsel's failure to proffer questions for Baldree when cross examination was cut off by the trial judge.

During the cross examination of Curtis Baldree at trial, the following occured:

> Q. And do you know a man by the name of Terwayne [sic] Gale?
> A. Very vaguely.
> Q. Do you know what Mr. Gale looks like, sir?
> A. I'm not sure if I know him or not.
>
> MR. DICK [state attorney]: Objection. Irrelevant and immaterial.
>
> THE COURT: The objection is sustained.

RD 467-8. The court then dismissed the witness and cut off further cross examination. On appeal, Mr. Sims challenged this action as denying his right to confront Baldree. This Court denied relief because counsel failed to proffer "to show the relevance of the information it was seeking to bring out." Sims, 444 So.2d at 924.

Defense counsel testified at the post-conviction hearing that they failed to make a more detailed proffer because they were too

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[10] Rabinowitz agreed the venire had been exposed to Mr. Sims in chains, but differed in his explanation for failing to strike the venire. RP 314.

stunned by the judge's abrupt termination of cross-examination to articulate a detailed account of the relevance of the areas yet to be explored, and had been intimidated by the judge's frequently expressed impatience with their cross-examination of Baldree and were fearful of further invoking the judge's wrath by belaboring the issue. RP 161-2, 317-20.

The defense strategy for undermining the testimony of Baldree and Halsell was that the two were falsely accusing Mr. Sims in order to protect the real gunman, their friend and criminal confederate, Terry Wayne Gayle.[11] Counsel planned to seek admissions from Baldree that he knew Terry Wayne Gayle, had been involved in other drugstore robberies with him, and felt a strong sense of loyalty to him. RP 623. Counsel sought to contrast those close ties with Gayle to their minimal contact with Terry Sims. If Baldree denied these facts - as to Gayle or Sims - counsel planned to present their own witnesses to confirm as many as possible. However, counsel reasonably believed this leg of the defense would be more persuasive if they could establish at least some of the Gayle facts through admissions by Baldree.

The Giglio Claim

During his opening statement the prosecutor told the jury that B.B. Halsell "is a witness for the State, who is under a sentence

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[11] During the cross of Halsell, counsel were able to demonstrate that Halsell knew Terry Gayle and had been involved in "quite a few" crimes with him. RD 349. Halsell also admitted that he had met Mr. Sims only two or three times prior to the robbery of the Longwood Village Pharmacy, RD 340, and did not mention Mr. Sims as a participant in any other criminal activity in which Halsell had been involved. RD 337, 339, 340.

for armed robbery." RD 236. The prosecutor then elicited terms of the deal Halsell made to dispose of his robbery and murder charges arising from this affair in exchange for his testimony:

> Q. B.B., you're under a ten year sentence for armed robbery, are you not?
> A. Yes, sir.
> Q. You made a deal with the State, didn't you?
> A. Yes, sir.
> Q. And you have been charged with robbery and with murder, had you not?
> A. Yes, sir.
> Q. And our part of the deal was to cap your sentence at ten years, is that correct?
> A. Yes, sir.
> Q. And what was your part of the deal?
> A. To tell the truth about the crime.
> Q. About what crime?
> A. About the robbery-murder.

RD 299-300. On cross-examination, Halsell was asked, "And you were charged with robbery and murder, and got ten years; is that right?" RD 346. Halsell answered, "Yes, sir." Id. Later, when asked whether a former attorney for Mr. Sims had asked Halsell not to testify, Halsell claimed, "He said I already got my sentence. He said they can't do nothing to me if I don't testify against Sims."[12] RD 347. In the rebuttal portion of his closing guilt-phase argument, the prosecutor defended Halsell's credibility with the following:

> You don't believe B.B. Halsell was down here? You don't believe he committed a robbery? You think a man would put himself in State Prison for ten years for a crime he didn't commit?

RD 741. Defense counsel argued in summation:

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[12] This attorney later testified that Halsell had not been sentenced at the time of this conversation in September, and that Halsell blatantly stated he would do anything he could to get the sentence he wanted. RD 659.

> the real challenge is to go back and determine why the State felt so compelled to give these people two first degree misdemeanors, a murderer serve two years in the County Jail and another murderer is going to serve ten years in the State Prison....

RD 724.

At post-conviction, both the status and length of Halsell's sentence was shown to be very different than that revealed at trial. When he testified against Mr. Sims, Halsell had not been sentenced for his role in the robbery murder, although he had pled guilty to armed robbery. Halsell was sentenced on August 31, 1979, seven months after testifying. At sentencing, a police officer testified Halsell's life would be in danger if he were sent to prison, and Mr. Sims' prosecutor requested Halsell receive a two year jail sentence. RP 279, 316, 1523. The sentence actually imposed was fifteen years probation conditioned on serving only two years in the county jail. RP 1523. In practical terms, the sentence was time served.

The "Lock Puller" Brady Claim

At trial, Halsell and Baldree testified that the group went to Tampa to buy lockpullers from Russell and Russell Detective Agency before the robbery. RD 308, 428. The state claimed the group regularly used these lockpullers to steal cars for use in robberies. RD 236. During his investigation of the crime the lead detective Salerno gathered various documents from Joy Russell of that agency, including a receipt signed by Terry Gayle for books on how to steal cars, an address card with the name Gayle and

Robinson Repos, and a receipt signed by Terry Gayle for lockpullers. RP 22-3, 1243. Russell identified to the detective Terry Gayle's photograph as the man who signed Terry Gayle, and a photo of Eugene Robinson as the man who bought items from the store under the name, Stewart. RP 23, 25. The lead detective testified he turned over all these documents to the prosecutor. RP 27. However, the receipt signed by Gayle for lock pullers and other related items were not included in the discovery provided to the defense. RP 180-1, 339.

Ineffectiveness at penalty phase

Lead trial counsel admitted that to little preparation for the penalty phase. RP 227. He failed to explain the importance of this work to his client who stated he preferred not to have his family bothered by the proceedings. RP 231. He testified:

> The other thing I have to say is the truth is the truth is the truth.
> I had worked with Judge Waddell, as I testified to previously, and on several occasions. I remember the judge confiding in me that he could never put a person in an electric chair, he was not, per se, that way. And outside of Terry, I was more shocked as anybody in that courtroom when he sentenced Mr. Sims to death.
> That may have played some role in my lack of significant diligence, perhaps in preparing a penalty phase more effective for Mr. Sims in this particular matter.

RP 232-3.

In the affidavits now in evidence[13] several witnesses recount

[13] These affidavits were admitted as substantive evidence by stipulation to avoid the cost of transporting the out of state witnesses to the evidentiary hearing. RP 206.

much of young Terry Sims childhood.[14] The evidence never presented to the sentencing jury shows that Terry's parents, Roy and Hazel Sims, were divorced when he was four. Roy and Hazel married as teenagers, but their first marriage went poorly.[15] Roy spent a great deal of time away from the home, at least once living with another woman. Roy drank to excess, as did Hazel on occasion. RP 1544 (Margaret Hooper). The divorce occurred because Roy often beat Hazel, sometimes severely. The beatings included an instance when Roy kicked Hazel's teeth out and a time when he threw Hazel (then pregnant with Terry's younger brother) to the street, cutting her head. RP 1534 (Hazel Sims). Many of these attacks took place in the children's presence. Id. At the time, Terry had a sister, Nina, two years his senior, and brother Michael, two years his junior.

After the divorce, Roy left the area and had little contact with his children. RP 1534 (Hazel Sims); RP 1551 (Roy Sims). The children were put in foster care for a period. RP 1544 (Margaret Hooper). The children were returned to their mother's custody after she moved to a public housing complex in Charlotte, North Carolina. The family was very poor. RP 1545 (Hooper).

Hazel Sims then married Glenn Owens, but never really loved him. The family left Charlotte for the small town of Mooresville to stay with him. She married him for the support; Glenn paid for

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[14] Trial counsel testified they would have used the testimony reflected in the affidavits had they possessed it. RP 205.

[15] Roy and Hazel remarried in the late 1970s and are together presently.

her divorce from Roy. RP 1535 (Hazel Sims). Owens and Hazel had a daughter, Claudette Owens Meadows. The marriage lasted until Terry Sims was eleven or twelve when Hazel left Owens' household.[16]

During this period, Terry began to wander from home, starting at age seven. RP 1535 (Hazel Sims); RP 1545 (Margaret Hooper); RP 1548 (Michael Sims). In one case, at age eight, Terry caught a train to Asheville with another young boy. His mother tried various punishments for this behavior, including dressing the young boy in girl's dresses and tying him to the trellis in the yard. RP 1535-6 (Hazel Sims). She also took Terry to a psychiatrist for three sessions, but gave up because it did not seem to help. RP 1536 (Hazel Sims). Glenn Owens did not usually discipline the children, but on one occasion did kick Terry in the back for tracking snow in the house. RP 1536 (Hazel Sims).

After leaving Owens, Hazel and her children went back to public housing in Charlotte. The only thing in the apartment for a time was a bunk bed, chest of drawers, and some dishes; the four children and Hazel got by on $90 a month. RP 1536 (Hazel Sims). Hazel had a bad drinking problem and spent a lot of this money on alcohol. RP 1547 (Michael Sims). The children were left without a father, and a mother who provided no stability; they began to wander the streets of Charlotte and get in trouble. RP 1548 (Michael Sims); RP 1536 (Hazel Sims). Terry left school after the tenth grade.

In 1954, Hazel met Pete Cox and began to date him, eventually

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[16] She did not divorce Owens for another five years. RP 1536.

marrying him in 1959. RP 1537 (Hazel Sims). All the family members described Cox as violent. Hazel refers to him as a Dr. Jekyl and Mr. Hyde. Ibid. Claudette says Pete was "psycho" and had been hit in the head while in the Navy; he would get violent after his eyes got glassy and dark. His behavior was so bizarre, the family suspected for a time he was using drugs. RP 1540-1. Wanda Snyder, Terry's first wife who met him after Cox had moved in and Terry out, states Cox belonged in a mental hospital. RP 1552. Cox stayed drunk and beat Hazel frequently and severely. RP 1537 (Hazel Sims); RP 1545 (Margaret Hooper). Claudette says when she came home from visiting her father on weekends, she would know that Cox had beaten up Hazel again if the shades were drawn and the door shut. RP 1541 (Claudette Meadows). The beatings included black eyes and cracked ribs, and on one occasion a broken jaw; sometimes, Cox would beat on Hazel until he passed out, with Claudette waiting in the yard for the horror to stop. Ibid.

Hazel Sims' drinking also got out of control during her time with Cox. RP 1537 (Hazel Sims); RP 1548 (Michael Sims); RP 1541 (Claudette Meadows). She suffered from depression througout her life which required hospitalization on occasion. RP 1538 (Hazel Sims); RP 1548-9 (Michael Sims); 1573, 1578 (medical records). The only stable person in the family was the oldest sister, Nina; Terry depended on her a great deal. RP 1542 (Claudette Meadows); RP 1545 (Hooper). Like every child in the family, Nina fled as a teenager. Id. She did still provide support, taking Michael in for a period when he left the home at age fifteen. RP 1548 (Michael

Sims). However, Nina died around 1961. RP 1538 (Hazel Sims).

Terry did not stay long after Cox began living in the house. He had run away before to avoid the constant fighting. RP 1552 (Wanda Snyder). The final straw came one day when Cox once again began to beat Hazel. Terry, backed by Michael, told him not to hurt his mother; Cox responded by hitting Terry in the eye with an axe handle, causing it to fill with blood. Terry then left home for good at age seventeen. RP 1542 (Claudette Meadows); RP 1537 (Hazel Sims).

Although Terry had a tragic and violent childhood, he never was violent himself to those around him. RP 1538 (Hazel Sims), RP 1551 (Roy Sims), RP 1542 (Claudette Meadows), RP 1553 (Wanda Snyder). In his later youth, Terry had a somewhat successful career as an amateur boxer. RP 1551 (Roy Sims); RP 1554 (Wanda Snyder). He tried to make peace when family problems erupted. RP 1542 (Claudette Meadows). Mr. Sims' first marriage began well with Terry supporting the family and even buying a home. RP 1554 (Wanda Snyder). He was faithful and considerate to his wife, although his experiences caused him to harden emotionally and made the marriage difficult. RP 1553 (Wanda Snyder). His anger turned inward: when his wife divorced him, Terry became so distraught that he attempted suicide. RP 1554 (Wanda Snyder).

SUMMARY OF ARGUMENT

POINT I

Trial counsel failed to adequately present or preserve a meritorious motion to suppress the identifications of the three witnesses who ultimately identified Mr. Sims at trial. Counsel filed two motions, one the day before and one the morning of the suppression hearing. Counsel then argued a suggestive photo display, the hypnotism of the witnesses, and pretrial publicity made the identifications unreliable. The photo display was suggestive since it contained three photos of Mr. Sims, no attempt was made to obtain like depictions of the suspects, one of Mr. Sims' snaps was in color unlike most of the rest, and one had a name on its face, unlike every other photo. However, counsel failed to introduce evidence of the poor chance for observation witnesses had of the second robber, their scanty descriptions to police, or any evidence of their memories' state at that time. Counsel made no factual investigation of the hypnosis issue. Bruce Drazen, the hypnotist who put the eyewitnesses under his spell would have admitted, if counsel had asked, that: hypnotically refreshed testimony standing alone is unreliable; hypnosis mixes fact and fantasy in the subject's mind; it causes a firm subjective belief in the 'memories' induced (memory hardening); he showed one subject drawings of the robber created from other witnesses' descriptions; and he induced a "positive hallucination" in another witness by bringing in an artist to draw a face during hypnosis. Trial counsel discovered none of this evidence because they suspended

Drazen's deposition when he asked to retrieve his notes, and failed to resume it. A nationally recognized expert on hypnosis testified these sessions interfered with the true memory of the witnesses.

Counsel compounded their failures by not objecting at trial when the identifications were made, thus failing to preserve any issue for appeal. Counsel failed adequately to attack the identifications at trial. Counsel's strategy was to suppress or discredit them; they had no reasonable explanation for their actions and omissions.

Counsel failed to move to strike the venire after Mr. Sims' custodians paraded him in leg chains before them. Counsel failed to object timely to the massive security at the courthouse. Counsel failed to proffer the crucial areas of cross exam which counsel meant to explore to impeach a crucial state witness and advance the defense "Big T, Little T" theory, thus defaulting any review of the court's restriction of that cross. Counsel allowed the trial court to restrict counsel's voir dire and repeatedly admonish counsel before the jury without objection. Counsel failed to object to highly improper and prejudicial prosecutorial argument. Among many improprieties, the prosecutor claimed Mr. Sims "ran with" a state's witness. This argument undercut the defense that the accomplices blamed Mr. Sims because he was not well known to them and suggested Mr. Sims regularly committed crimes, all entirely without record support. Counsel failed to object because was too busy preparing closing to do so, and did not know what evidence had come in. These errors severely prejudiced Mr. Sims by allowing a verdict of guilt

based on unreliable, inflammatory, and nonexistent evidence.

POINT II

The hypnotically refreshed identification testimony, shown to be made actually unreliable by hypnosis, violates due process of the law standing on its own.

POINT III

The prosecutor elicited statements from an accomplice witness that his deal for testifying was a ten year cap and he was already sentenced. Actually, the accomplice's sentence had not been imposed, and the prosecutor requested a two year jail term, which was imposed. This knowing use of perjured testimony violated due process and well-established case law.

POINT IV

The prosecution never revealed an item with great exculpatory value, a receipt from the Russell and Russell Detective agency signed by Terry Wayne Gayle for lockpullers, purchased within weeks of the instant robbery/murder. The state's theory in presenting evidence at trial about the purchase of lockpullers from this agency, occurring after a car was stolen for use as a getaway in the instant robbery, was that the group regularly used lockpullers to steal 'hot' cars for this purpose. The receipt would have been strong objective evidence to support the defense that Terry Gayle was the true robber/murderer. Failing to reveal it violated the prosecutor's due process obligations.

POINT V

Error was committed under Hitchcock v. Dugger, 481 U.S. 393

(1987). Both the trial court and the jury's consideration of Mr. Sims' extensive aid to a local family, his successful effort at turning a young fellow inmate away from a life of crime, and the extreme disparity in treatment between him and his accomplices. Baldree threatened the pharmacist repeatedly and severely, and then struggled with and shot at him. Yet, both Baldree and Halsell, equally guilty of murder, served but two years in jail. The defense proffered evidence they were contemptuous of these sentences. This Court compounded the error in affirming despite improper findings on four of seven aggravators by relying on the trial court's crimped view of the evidence as rendering the errors harmless.

POINT VI

Counsels' ineffectiveness continued at penalty phase. Lead counsel admitted he made no investigation of Mr. Sims' background, blindly following Mr. Sims' desire not to bother his family, in the incorrect belief Judge Waddell would not sentence anyone to death. Counsel thus never discovered the severely abused, chaotic childhood suffered by Mr. Sims. Counsel failed to correct the misimpression the jury's recommendation would be given little weight in the false belief their recommendation was meaningless. Counsel failed to object to victim impact evidence and argument despite long-standing Florida case law prohibiting it. Counsel allowed the sentencing court to consider unreliable hearsay evidence of other convictions by not objecting to its use. None of these omissions were the result of any trial strategy. These

errors severely prejudiced Mr. Sims' case for life by leaving the sentencers with a warped, partial perspective on the man they believed committed a crime without severe aggravation, and left them free to cause death to be imposed to avenge the victim without feeling responsible therefore.

POINT VII

The guilt phase errors also infected the sentencing. Most particularly, the view of Mr. Sims in chains, a strong indication of state suspicion of Mr. Sims' dangerousness, harmed his defenses. The unreliable evidence of guilt also harmed his defenses to aggravating circumstances. The jury was misled on the sentence of an accomplice, a material fact to the disparate treatment of accomplices mitigator.

POINT VIII

The trial court used an unlawful conviction to find the prior violent felony circumstance.

ARGUMENT

POINT I

MR. SIMS WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17, 21 AND 22 OF THE FLORIDA CONSTITUTION.

Here, Mr. Sims has shown specific acts or omissions of counsel which fall "outside the wide range of professionally competent assistance," Strickland v. Washington, 466 U.S. 668, 690 (1984), and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

A. NUMEROUS ACTS OR OMISSIONS OF COUNSEL FELL OUTSIDE THE RANGE OF PROFESSIONALLY COMPETENT ASSISTANCE.

1. Trial counsel inadequately challenged the admissibility and credibility of the unreliable eyewitness testimony.

i. Reasonably effective counsel would have suppressed the in-court identifications of the eyewitnesses.

a. The trial court misapprehended this claim.

In the order denying relief, the court finds trial counsel properly preserved a challenge to the photo lineup and so rejects that claim without further analysis. RP 1075. It finds trial counsel's failure to follow through on the advocacy of the hypnosis issue immune from attack by miscasting the challenge as dependent on cases not yet in existence. Ibid. The 3.850 court erred in considering the suggestivity of the photo display and pretrial publicity on the eyewitnesses as an issue separate from

the challenged suggestivity of hypnosis. It also misapprehended the law, as discussed in more detail below.

b. Available evidence and law would have required the eyewitness identifications be suppressed.

The law and evidence available to counsel at the time of trial required that the eyewitness identifications be suppressed. The evidence showed impermissibly suggestive procedures were employed. The testimony of the witnesses and their statements to police on the night of the robbery/homicide show their in-court identifications were irreparably influenced by the suggestive photo display, viewing Mr. Sims' photograph as the accused in the local media, and the hypnotic 'refreshment' of their memories. This evidence was actually available to counsel or easily discoverable upon reasonable investigation.

Sue Kovec had been present at the robbery and was later hypnotized by police. Her description to the police was a general one and she only saw the robber briefly when she entered the pharmacy and again briefly when the robber at the front was herding customers to the rear. She told the police that she would probably not be able to help them draw a composite of the person she glimpsed. Her hypnosis session created new details in her description, and she first identified Terry Sims after exposure to an improperly suggestive photo display five weeks after the robbery. Her misidentification was reinforced by the lead detective's reassurances and seeing press photos identifying Mr. Sims as the robber.

The in-court identifications of Colleen Duncan and William Guggenheim were more tainted by the improper procedures. Like Kovec, neither initially gave more than a general description of the robber in the front of the store. Neither had an extended view of the robber. Guggenheim told police the night of the crime that he would have difficulty identifying the robber in the front, saying "if you had eight men all lined up with a very close physical description, it might be hard, I don't know." RP 1121. Duncan's composite drawing was not helpful in identifying Mr. Sims, showing her visualization of the robber was suspect from the beginning.

During Guggenheim's hypnotic session, he could not visualize the suspects' faces. RP 62. The police actually showed Guggenheim other drawings of the perpetrator during hypnosis, the acme of suggestive practice. Duncan's hypnosis session was even more likely to produce a biased identification: she was especially suseptible to suggestion as a teenager, and the police hypnotist brought in an artist during hypnosis to draw a face and interfere with her true memory of the event.

When given the opportunity to identify Mr. Sims in the suggestively composed photo display, Guggenheim could not pick out any of the three photos of Mr. Sims as the man who confronted him with a gun five weeks before; indeed he picked a photo of another. RD 496. Likewise, Colleen Duncan failed to pick out Mr.

Sims's photo.[17] At trial, both Colleen Duncan and Guggenheim admitted on the stand their in-court identifications of Mr. Sims were not based solely on their view of the robber. RD 419, 499.

Then-extant law shows these identifications should have been suppressed had this evidence been properly presented. "[R]eliability is the linchpin in determining the admissibility of identification testimony. . . ." Manson v. Brathwaite, 432 U.S. 98, 114 (1977). The test for suppressing identification testimony based on suggestive identification is:

> (1) did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification; (2) if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification.

Grant v. State, 390 So.2d 341, 343 (Fla. 1980), cert. denied 451 U.S. 913 (1981). When the court determines that an identification procedure is unnecessarily suggestive, the State has the burden to show the in court identification is untainted by the illegal procedure by clear and convincing evidence. Edwards v. State, 538 So.2d 440, 444 (Fla. 1989).[18] The factors for judging whether a suggestive identification procedure taints later identifications are:

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[17] The absence of identifications from the photo display does not mean it did not infect the witnesses' memories. In Marsden v. Moore, 847 F.2d 1536, 1546-7 (11th Cir. 1988), the Eleventh Circuit held the photographic identification procedure suggestive since the defendant's photo was the only male shown. The witness did not make an identification then, but did identify the defendant at trial. The in-court identification violated due process. Id.

[18] Grant and Edwards rely on pre-1979 United States Supreme Court cases and are quoted here as convenient summaries of the law.

> the prior opportunity the witness had to observe the alleged criminal act; the existence of any discrepancy between any pretrial lineup description and the defendant's actual description; any identification prior to the lineup of another person; any identification by picture of the defendant prior to the lineup; failure to identify the defendant on a prior occasion; any time lapse between the alleged act and the lineup identification; and any other factors raised by the totality of the circumstances that bear upon the likelihood that the witness' in-court identification is not tainted by the illegal lineup.

Id. at 443.

Federal courts have recognized photo lineups containing multiple photographs of a suspect are unnecessarily suggestive. Simmons v. United States, 390 U.S. 377, 383 (1968);[19] In Dobbs v. Kemp, 790 F.2d 1499, 1506 (11th Cir. 1986), cert. denied 481 U.S. 1099 (1987), the Eleventh Circuit held that showing a witness twelve photos, four of which were of Dobbs was unduly suggestive, but under the facts of the case did not lead to a substantial likelihood of misidentification.

The photo lineup in this case was more suggestive. Three photos depicted Mr. Sims, one in color, unlike 85% of the rest. One was the only photo with a name on it, identifying Terry Melvin Sims. The repetitive photos, the unusual color photo, and the singular photo with a name visible all strongly, impermissibly suggested to the witness that Mr. Sims was the suspect.

The hypnosis sessions also substantially interfered with the witnesses' true memories and so contributed to a likelihood of

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[19] See United States v. DiPalermo, 606 F.2d 17, 21 (2d Cir. 1979), cert. denied 445 U.S. 915 (1980); see also United States v. Mears, 614 F.2d 1175, 1177 (8th Cir. 1980), cert. denied 446 U.S. 945 (1981).

misidentification.[20] At counsels' fingertips was abundant information and evidence supporting their decision to attack the admissibility and suggestive nature of hypnosis in general and these sessions in particular.

First, the police hypnotist Drazen would have testified to many of the problems of hypnosis if asked. Other defense counsel had asked Drazen similar questions during this time. Drazen would have defined hypnosis as a state of heightened susceptibility, one which encourages a mixture of fact and fantasy which the subject strongly accepts as truth, and opined that refreshed testimony was unreliable standing on its own. Drazen would have described how he induced a positive hallucination in one witness. Numerous available articles, dating from 1902 forward, explained the accepted problems with hypnosis: had counsel done no more than read an encyclopedia, he would have found support for his claim hypnosis interfered with memory.

Counsel should have told the court the police hypnotist brought in an artist to draw a face while Duncan was in a trance, increasing the suggestibility of the subject. The court should have been apprised that Guggenheim was shown composite drawings of faces made by other witnesses after he said he could not visualize a face. Finally, the court should have been told that two of the witnesses would admit their identifications would not be based entirely on their view of the robber at the time of the crime.

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[20] As an independent claim, Mr. Sims separately challenges use of this evidence on the hypnosis ground alone, in Point II, below.

Sue Kovec's brief viewing of the perpetrator and honest admission that she could not help make a composite of the robber is strikingly similar to that of the witness in Edwards, supra. There, the witness had seen the face of a man for three to four seconds, part of which was spent viewing the suspect's companion. Edwards, 538 So.2d at 444. Kovec's view at the pharmacy was of similar duration. In Edwards, the description given was a general one fitting many black males. Id. Kovec's description given to police that night was also general, applicable to many white men. As in Edwards, this Court should find there is a substantial likelihood of misidentification since Kovec's viewing of the suspect was brief and her description poor.

The multiple confusing influence on Sue Kovec's true memory of the event make this case comparable to those of Williams v. Armontrout, 877 F.2d 1376 (8th Cir. 1989) and United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984). In Armontrout, the defendant challenged the admissibility of the in court identification because of the suggestive pretrial photo display and hypnotism of the witness. The Eighth Circuit held the in-court identification violated due process. In Valdez, the subject (a police officer) had been hypnotized and then made his first identification of Valdez as the person he saw near an extortion payoff drop-site. Valdez was under suspicion and the hypnosis session was not conducted with the safeguards which some courts

have required to admit hypnotically 'refreshed' testimony.[21] The Fifth Circuit held this testimony inadmissible.[22] Id. at 1203. The court so held even though a police officer with training and experience in making identifications can help save an otherwise impermissibly tainted identification. See Manson v. Brathwaite, 432 U.S. 98, 115 (1977)(photo lineup not leading to irreparable misidentification partly since witness was police officer).

Identifications by Guggenheim and Duncan were more unreliable. Their failures to identify Mr. Sims in the photo lineup, admissions of uncertainty in their memory, exposure to drawings supposedly depicting the perpetrator, and viewings of Mr. Sims' pictures in the press make the identification and in-court showup especially

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[21] In Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983), the court adopted similar guidelines. The session conducted below violated almost all of these rules, including:

1) "a neutral and detached hypnotist should be employed" Id. at 91;
2) the hypnosis should "be performed by either a trained mental health expert, psychiatrist, or psychologist," Id.;
3) "only the hypnotist and witness should be present during hypnosis," Id. at 92;
4) the subject should be examined by the hypnotist before the session to elicit what the witness recalls, Id.;
5) "some type of record of the actual session" should be preserved, preferably a videotape to record visual clues, Id.;
6) the "hypnotist should avoid reassuring remarks that might assist in stimulating the process of confabulation," Id. at 93.

The hypnotist Drazen was a police officer. At the time of the session, he had no education or training in mental health. Another policeman was present during the interviews; Drazen did not examine or record the subject's knowledge before the session; he did not videotape the session and the audiotapes and some transcriptions thereof were not preserved. Drazen constantly reassured the subjects in a way encouraging confabulation.

[22] The Fifth Circuit based its decision on the federal rules of evidence, but noted without reaching the question, that the procedure might violate due process.

unreliable. See Edwards, supra; Marsden, supra; State v. Walker, 429 So.2d 1301, 1303 (Fla. 4th DCA 1983).[23] Guggenheim's and Duncan's failure to identify Mr. Sims' multiple photos, initially poor descriptions on the night of the crime, and admission of confusion on the stand similarly show their memories were irretrievably tainted by the hypnosis and suggestive photo display. All three identifications should have been suppressed as irretrievably tainted by impermissibly suggestive procedures.

c. Failure to preserve nonfrivolous suppression issues constitute ineffective performance by counsel when resulting from unreasonable investigation and misunderstanding of the law.

In Kimmelman v. Morrison, 477 U.S. 365 (1986), the Court held counsel ineffective in a rape prosecution for failing to move to suppress a bed sheet seized from his client's apartment. Scientific tests of hairs and semen on the sheet connected the victim to the bed, contradicting the defense that the pair had not had sex, and that the victim had fabricated the claim. Counsel conducted no discovery and moved to suppress the sheet only at trial which motion was denied as late. This record rebutted any presumption that counsel had acted in a professionally reasonable manner. He:

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[23] In Walker, a robbery victim gave a general description of the suspects and did not pick the defendant's picture in a photo lineup. The victim identified the defendant at a preliminary hearing. The Fourth District found the hearing amounted to an impermissible show-up, and ordered the in-court identification suppressed because the State failed to show the circumstances, including the failure to identify the photo of the defendant, had not led to an irreparable likelihood of misidentification.

> failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search . . . Counsel's failure to request discovery, again, was not based on 'strategy,' but on counsel's mistaken beliefs that the State was obliged to take the initiative . . .
>
> The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law - or a weak attempt to shift blame for inadequate preparation.

Id. at 385.

Although trial counsel did file a suppression motion, as a result of the unreasonable investigation and misunderstanding of the law, it presented no serious question to the trial court and preserved nothing for review. This waiver of the suppression issue falls outside the realm of professionally competent action.[24]

Mr. Sims' counsel aborted their own investigation for no good reason: they adjourned Drazen's deposition, thus failing to discover that he would have testified to the detrimental effects hypnosis caused. Counsel had no reason not to continue the deposition when Drazen had retrieved his notes; failure to do so was simply lazy. Such an unreasonable failure to investigate is not professionally competent. See Morrison, 477 U.S. at 386-7.

Counsel's mistakes did not stop there. To suppress the identifications, counsel filed one motion the day before the suppression hearing and a second the morning of the hearing. Counsel could not follow the rules of evidence at the hearing.

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[24] See Smith v. Dugger, 911 F.2d 494, 497-8 (11th Cir. 1990); Rodriguez v. Young, 906 F.2d 1153, 1160-1 (7th Cir. 1990); Chatom v. White, 858 F.2d 1479, 1485-6 (11th Cir. 1988); Riley v. Wyrick, 712 F.2d 382, 385 (8th Cir. 1983); Sobel v. State, 564 So.2d 1110, 1112 (Fla. 4th DCA 1990).

Counsel never attempted to call the witnesses, present their statements to the police, or otherwise introduce competent evidence of the highly suggestive pretrial procedures to which the witnesses had been exposed. This left the record bereft of support for the claim that the procedure in substantial likelihood led to an irreparable misidentification, since the court had no idea whether the witnesses would claim to rely on their memories of the robbery, what opportunity they had to view the perpetrator, and what descriptions they gave police the night of the robbery.

Counsels' attempt to rely on the depositions not in evidence was deficient performance: counsel should have called the witnesses or at least the officers who took the witnesses statements to establish that the suggestive procedures led to a likelihood of irreparable misidentification. Counsel entered no evidence about the suggestive hypnosis sessions or how they affected the witnesses' memories because counsel did no factual research to support their claim. Counsel failed to present the evidence that both Duncan and Guggenheim admitted that their view of the pretrial publicity affected their memories of the event. The trial court was left with no choice but to deny the motion since counsel presented almost none of the available facts or law to support it.

To the extent the evidence which was introduced at the suppression hearing and by the eyewitnesses at trial supported suppression of the in-court identification, the issue was waived, anyway, by counsel's failure to object to the in-court

identification at trial.[25] Both defense counsel testified this failure to object was oversight as their strategy was to exclude or discredit the identifications. RP 221, 305-6. Waiver of issues presented pretrial by failing to object at trial is deficient performance. See Rodriguez, 906 F.2d at 1161; Riley, 712 F.2d at 385; Chatom, 858 F.2d at 1486. Waiver by failure to follow the rules of evidence is deficient performance. Counsel did not attempt to renew the motion when the witnesses' trial testimony indicated real confusion in their ability to identify Mr. Sims; this performance was deficient. See Rodriguez, 906 F.2d at 1161 (failure of counsel to move to suppress identifications when basis therefore became clear in trial was outside realm of professionally competent assistance). Counsel's ineffectiveness here is obvious, even to those with hindsight of 200/20. Counsel admitted error at the hearing below. Counsels' ignorance of the rules of evidence and preservation was at least as "startling" as the errors committed in Morrison.

The State may argue that much of the evidence which would have supported excluding the testimony in toto was elicited on cross and so the attorneys were effective. The Court rejected this analysis in Morrison. The trial performance of the attorney, "while generally creditable enough," Morrison, 477 U.S. at 386, where the attorney crossed the state's witnesses and put forward a defense,

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[25] The 3.850 court ruled the suggestive photo display issue was preserved; this conclusion is directly contrary to these cases: Robertson v. State, 94 Fla. 770, 114 So. 534 (1927); Snead v. State, 415 So.2d 887 (Fla. 5th DCA 1982); Erickson v. State, 565 So.2d 328 (Fla. 4th DCA 1990).

did not excuse his failure to move to suppress the bedsheet in question. The Supreme Court remanded the case for determination whether Morrison met the prejudice prong.[26]

Trial counsel here also failed to object to the testimony of Guggenheim, given while he was actually under hypnosis. The law in Florida is and was then that statements obtained while under hypnosis are per se inadmissible to prove the truth of the assertions.[27] Defense counsel did not object to this evidence.

Neither Spaziano v. State, 489 So.2d 720 (Fla. 1986) nor Way v. Dugger, 568 So.2d 1263 (Fla. 1990) require rejection of our claim. The 3.850 petition in Spaziano alleged that trial counsel did not discover the hypnotism, but the trial court found counsel not only discovered it, but also objected to any mention of hypnosis during trial as a strategic decision. Spaziano, 489 So.2d at 721. The uncontradicted testimony below was that counsel consciously adopted the opposite approach: to attack the identifications before and during trial as tainted, in part, by the hypnotism. But counsel totally failed to present the law and

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[26] On remand, the district court found prejudice had been established. Morrison v. Kimmelman, 650 F.Supp 801 (D.C.N.J. 1986).

[27] See Rodriguez v. State, 327 So.2d 903, 904 (Fla. 3d DCA 1976); Shockey v. State, 338 So.2d 33, 37 (Fla. 3d DCA 1976); see also Morgan v. State, 537 So.2d 973 (Fla. 1989)(psychiatric opinion based on statements made while under hypnosis admissible in part since statements not admitted for their truth).

evidence to execute their choice.[28]

In Way, the witness hypnotized was the defendant's daughter. Identity was not in question, and her pre-hypnosis statements showed her memory had not been affected by the hypnosis, so counsel had no basis to suppress the testimony. Way, 568 So.2d at 1265. Here, the witness's memories were actually affected on the robber's identity, a subject the law recognizes is especially open to suggestion. Moreover, the suggestive photo display together with hypnotism make this case to suppress the in-court identifications much more compelling than a bare hypnosis claim. This claim of ineffectiveness is based on established principles governing suggestive identification procedures, urged by trial counsel who did identify and raise the subsidiary issue that hypnosis heightens suggestibility. This is the inverse of the situation in Spaziano and Way.

ii. Reasonably effective counsel would have educated the jury on the unreliability of hypnotically refreshed testimony.

Counsel failed to educate the jury on the effects of hypnotism despite having recognized the issue. Hypnosis was mentioned but once to the jury, in that passing. RD 393. Counsel neither cross examined witnesses about their sessions nor put on evidence demonstrating the unreliability caused by hypnosis. The post-conviction judge denied this claim saying some attorneys may have

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[28] As Morrison shows, it is improper to construct a strategy not actually used by counsel because hindsight should not be used to excuse errors, just as it should not be used to find them. See Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1990) (court should not construct non-existent strategy to excuse counsel's errors).

decided not to challenge the testimony: "[d]welling on such an issue could result in an unwanted result. Jurors could have believed that hypnosis bolstered the credibility of an eyewitness. Counsel should not be faulted for not taking that chance." RP 1076. That may be true for some attorney, some place, but not in this case. The uncontradicted testimony and documentary evidence shows that counsel had decided to challenge the identifications in part because they were hypnotically refreshed. They just failed to follow through. After the fact construction of strategy by the trial court, without reference to the evidence presented on what that strategy actually was, is error. See Harris v. Reed, 894 F.2d 871 (7th Cir. 1990):

> Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses counsel does not offer . . . The role of the court is to 'evaluate the conduct from counsel's perspective at the time.'

Id. at 878, quoting Kimmelman v. Morrison, 477 U.S. at 386, quoting Strickland, 466 U.S. at 689.

Lead counsel Heffernan, who cross examined Guggenheim, testified he intended to cross on hypnosis, and if he did not, it was an error. RP 157. Rabinowitz, who cross examined Colleen Duncan and Sue Kovec, stated he thought their testimony would not be damaging, in part because of the hypnosis they underwent. RP 299. Yet, he never brought the hypnosis sessions to the jury's attention. An attorney's faith that a witness will not make a credible identification does not excuse errors in attacking that evidence. See Rodriguez, 906 F.2d at 1160 (counsel did not move

to suppress identification because he felt witness would not be credible: failure outside realm of professionally competent assistance). Had Rabinowitz known what Drazen testified to concerning hypnosis, he would have used it. RP 307. The sources listed above which show how unreliable the hypnosis is should have also been used in examining the witnesses. Counsel unreasonably failed to investigate or present their chosen strategy; this error caused counsels' performance to fall outside the realm of professionally competent assistance.

2. Trial counsel failed to protect Mr. Sims' right to a fair trial by their failure to enter timely and appropriate objections to the use of shackling and similar prejudicial security measures.

"Reasonable and prudent" is the way the post-conviction Court found the security measures it described as "tighter than usual." RP 1073. Usual it was not. This is the atmosphere of the trial as described by Judge Eaton: "Participants were subject to search, armed uniformed deputies were present in the hallways of the courthouse and SWAT team members were stationed on the roof." RP 1073; see RP 145, 221 (Heffernan), 311-2 (Rabinowitz), 270 (Robinson). Potential jurors did not have to guess for which trial the security was arranged; the police ended any guesswork by bringing Mr. Sims before them in chains.[29]

[29] The 3.850 court found the jury was present when Mr. Sims entered, but concluded jurors likely did not see the chains. RP 1074. This conclusion is without record support. There is no evidence Courtroom "B" had a solid wooden barrier in 1979, or the precise positions of the venire, the defendant, and defense table at trial. These findings, apparently based on some personal knowledge of the judge, were made without any notice or opportunity for Mr. Sims to respond.

Counsel would have succeeded in striking the venire had they but asked; not to was ineffective. Shackling has long been recognized as a practice which is an affront to the dignity of the courtroom and poison to a fair trial.[30] It is permitted as a last, not first, resort, and some kind of hearing must be held to determine its necessity. Bello v. State, 547 So.2d 914, 918 (Fla. 1989).[31] No hearing at all was held here. The court ultimately found chaining unnecessary; thus no state interest was served by it. Yet the post-conviction court found the security measures "reasonable and prudent . . . due to the nature of the charges." RP 1073. If that were so, every first degree murder case would have to be tried at Sing-Sing. Counsel permitted the entire jury venire to view Mr. Sims in irons by not requesting the court allow him to enter without fetters or moving to strike the venire after the viewing.

This situation is identical to that in United States v. Harris, 703 F.2d 508 (11th Cir. 1983). In Harris, the defendant appeared before the venire during voir dire in identifiable prison garb and his attorney objected upon noticing the identifying marks. The danger to a fair trial required a mistrial. Id. at 513. The

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[30] See Shultz v. State, 179 So. 764 (Fla. 1938); Elledge v. Dugger, 823 F.2d 1439, modified 833 F.2d 250 (11th Cir. 1987), cert. denied 108 S.Ct. 1487 (1988); see also Illinois v. Allen, 397 U.S. 337, 344 (1970).

[31] See Kennedy v. Cardwell, 487 F.2d 101 (6th Cir. 1973), cert. denied 416 U.S. 959 (1974); Elledge, 823 F.2d at 1451-2; see also United State v. Theriault, 531 F.2d 281, 285 (5th Cir. 1976), cert. denied 429 U.S. 898 (1977); United States v. Samuel, 431 F.2d 610, 615 (4th Cir. 1970), cert. denied 401 U.S. 946 (1971).

difference here is that trial counsel did not move to correct the error, a motion which would have been granted or remedied on appeal. There was no reason to fail to object except ignorance.[32]

Excessive security measures also prejudice a right to a fair trial. In Holbrook v. Flynn, 475 U.S. 560 (1986), the Court held that if the scene presented to the jurors is so inherently prejudicial as to pose a threat to a fair trial, courthouse security violates due process. Counsel objected to the excessive security as prejudicing their client only in the motion for new trial. RD 1046. Absent a contemporaneous objection, issues over security at trial cannot be raised later.[33] This failure to

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[32] Any belief on Rabinowitz's part for not moving to strike - assuming arguendo his explanation should be credited - was legally incorrect. Rabinowitz believed he could not move to strike unless he demonstrated on the record that jurors had seen the chains, but felt he could not do so without poisoning others since the court denied individual voir dire. RP 314. Rabinowitz has simply confused the requirements for striking after an outside the court accidental viewing with the deliberate in court chaining: no on the record showing is needed to strike the jury after Mr. Sims' custodians marched him into court in chains. Further, although individual voir dire might cure prejudice from knowledge of non-evidentiary matters, see Scull v. State, 533 So.2d 1137, 1141 (Fla. 1988), cert. denied 109 S.Ct. 1937 (1989), no case law exists that failure to grant an individual voir dire preserves the error for which the voir dire is requested. An appellate court would not have faulted trial counsel for not asking about prejudicial matters in the presence of the venire. See United States v. Patterson, 648 F.2d 625, 630 n.9 (9th Cir. 1981)(if questioning only creates prejudice, court should dismiss juror).

[33] Trial errors require a contemporaneous objection specific enough to apprise the trial court of the nature of the objection. Jackson v. State, 451 So.2d 458 (Fla. 1984). The failure to object to state indicia of guilt or dangerousness waives the issue, unless the error is fundamental. Torres-Arboledo v. State, 524 So.2d 403, 409 (Fla.), cert. denied 109 S.Ct. 250 (1988) (requiring a prisoner to stand trial in prison garb waived by failing to object). Thus, this failure waived the issue.

correct the prejudice from the excessive security by alerting the court to the problem falls outside the range of professionally competent assistance.

3. Counsel failed to adequately confront Curtis Baldree on his deliberate misidentification of Terry Sims, and to proffer additional areas of impeachment when cross examination of Baldree was improperly cut off by the trial judge.

On direct appeal, this Court rejected the claim that Mr. Sims' right to cross examine a witness had been restricted by the trial court, holding trial counsel made an inadequate proffer of the restricted matters Sims, 444 So.2d at 924. Post-conviction, trial counsel Rabinowitz testified he failed to make the proffer out of shock, and because he was stunned by the trial court's continual interruptions of his examination. RP 317-21. He has now testified about the questions he would have proffered. Most important, he intended to explore the connection between Baldree and Terry Wayne Gayle to support the theory that Gayle, not Sims, committed the robbery and establish bias on Baldree's part for Gayle. RP 322. He also planned to bring out the conflict of Baldree's testimony with that of Joyce Gray who said the group was not in Georgia on the day Baldree said they were. RP 322. He would have emphasized Baldree's relationship with Robinson by bringing out a prior burglary of the drugstore in this case which burglary was committed by Robinson, Baldree and another. RP 323-4. Rabinowitz planned to explore the details of Baldree's prior record which Baldree had minimized on direct. RP 325.

The defense is entitled to show that another person committed

the crime. See Rivera v. State, 561 So.2d 536 (Fla. 1990). The restriction of cross examination of a state witness on matters germane to a defense or the testimony on direct violates the Florida and Federal rights to confront adverse witnesses. See Coxwell v. State, 361 So.2d 148 (Fla. 1978). Counsel is also entitled to impeach state witnesses through questions about their prior convictions and about conflicts in their testimony. Had these questions been proffered, the law clearly permitted counsel to put them to the witness. The failure of trial counsel to proffer the evidence to impeach Baldree and show another committed the crime resulted in the evidence never being presented. There was no reason to fail to make the proffer, and the error directly affected the defense theory that Baldree was motivated to lie to protect his friend who committed the crime, Terry Wayne Gayle, who looked similar to Mr. Sims. Attorney error in these circumstances amounts to ineffective assistance. See Roth v. State, 479 So.2d 848 (Fla. 3d DCA 1985)(attorney failed in homicide prosecution to bring out evidence that deceased had learned about self-electrocution shortly before death by electrocution).

Alternatively, the court's action constituted the constructive denial of the right to counsel. In Davis v. Alaska, 415 U.S. 308 (1974), the Court held that denial of the right to cross examination was per se reversible error. In Cronic, 466 U.S. at 659, the Supreme Court described the Davis decision as an example of constructive denial of counsel by preventing the lawyer from assisting the accused. Likewise, the action of the court in

cutting off counsel in this case was a constructive denial of counsel requiring retrial, even without the showing of prejudice made below.

4. Counsel's unreasonable failure to object to improper judicial and prosecutorial comment, argument and instructions.

(i) Improper judicial comments were left uncorrected.

The court below prefaced its denial of this claim by saying:

> It should be stated at this point that the trial judge was a veteran of the bench who was known for his iron control of courtroom presentation. It is obvious from the transcript that he was at his best, or his worst, depending on the perspective of the reader.

RP 1078.

From Mr. Sims' "perspective," the trial judge's comments sabotaged any opportunity he had for a fair trial. The trial court in this cause repeatedly and unnecessarily belittled defense counsel before the jury, destroying the impartiality of the tribunal and depriving Mr. Sims a fair trial. During voir dire, the court twice interrupted defense counsel.[34] The first time, the court admonished counsel, incorrectly, that his question was an incorrect statement of the law and continued:

> THE COURT: I believe you told me that in the event you were selected to sit you would base your verdict on those things and those things only; is that correct?
> MRS. BLYTHE: Right.
> THE COURT: I believe her counselor. I hope you do.

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[34] Judge Waddell was recently reversed for improperly restricting voir dire. See Green v. State, 575 So.2d 796 (Fla. 4th DCA 1991). Counsel's failure to object to the judge's restriction here waived this issue.

RD 44. A short while later, the court again admonished counsel, improperly, and suggested counsel distrusted the jurors before the panel:

> MR. HEFFERNAN: Thank-you.
> Will you all agree to base your verdict on the evidence or lack thereof?
> THE COURT: Excuse me, counselor, I again, that's not the correct law. These jurors are covenanted with the Court in the event they are selected to sit, they will base any verdict they bring on the testimony coming from the witness stand and the additional evidence received by the Court, and the Court's instructions on the law. These things and these things only. Is that correct, ladies and gentlemen?
> (All nod.)

RD 65.

Four times during opening, the trial court admonished defense counsel not to argue, all four times in front of the jury. RD 240, 241, 242, 245. Three of the times, the court's comments in the presence of the jury went beyond merely sustaining an objection, and the comments suggested defense counsel was misstating what would transpire:

> THE COURT: . . . This is not your opportunity to be persuasive, as I indicated earlier. Just give us the facts, Sgt. Friday.

RD 241. Without objection, the court interrupted counsel shortly after, telling him he was "editorializing" and to just give the facts. RD 242. Finally, the court showed it did not consider the opening worth listening to by responding to a State objection by saying:

> THE COURT: Mr. Rabinowitz, I would rather not admonish you again. Please give us the facts, conclude, and sit down.

RD 245.

During cross exam of state witnesses, the court indicated a belief in the unimportance of the questions asked and cut off a legitimate line of inquiry. Heffernan attempted to impeach Halsell by a prior inconsistent statement:

> Q: Did you ever tell the police there was nobody there when you went to drop off the car?
> A: I don't remember.
> Q: Let me help you refresh your memory.
> MR. DICK: Objection, Your Honor. You cannot impeach a witness on I don't remember.
> THE COURT: I believe his testimony was when they dropped the car off there was nobody there, Mr. Heffernan. Please, let's move on.

RD 352. Counsel obliged. During the cross examination of Baldree, the court continually interrupted the exam and denigrated defense counsel's questioning. Counsel attempted to impeach Baldree with a prior inconsistent statement in which he admitted owning a gun despite his denial at trial of owning one.

> Q. Okay. Did you own it?
> A. No sir.
> Q Haven't you previously testified, sir, that that gun was given to you as a present by Gene Robinson during Christmas?
> A. I stated that Gene Robinson left the gun there approximately two weeks before the robbery happened down here. I didn't say he had gave it to me or left it for Christmas.
> THE COURT: Let's move on Mr. Rabinowitz.

RD 455-6. Shortly after, the court sustained a relevance objection and again told counsel to "move on." RD 456. Then, while Heffernan questioned Baldree on the details of the extensive planning for the robbery - which Baldree had minimized on direct, RD 428-9 - the court without objection from the state said:

> THE COURT: Let's move on, Mr. Rabinowitz, please.
> MR RABINOWITZ: Okay.
> THE COURT: I've had enough of that, Mr. Rabinowitz.

> Let's move on. This has gone far enough. Let's move on.
> MR. RABINOWITZ: Yes, Your Honor.
> MR. HEFFERNAN: Your honor, may counsel approach the bench?
> THE COURT: No. Move on.

RD 460-1. Then, again without objection from the State, the court admonished counsel about impeachment.

> Q Do you recall having made the statement that he never did come to the back of the store?
> A I don't recall it.
> THE COURT: Let's move on, Mr. Rabinowitz. He said he doesn't recall making the statement. If you wish to impeach him, there's a way to do it. Let's move on, please.
> MR. RABINOWITZ: Your Honor, can I --
> THE COURT: You move on.

RD 462. The court again admonished counsel before the jury: "Mr. Rabinowitz, he's already testified to all this once. I heard him. Please, let's don't be so repetitious. Please move on." RD 463. The court repeated this admonition again. RD 466.

> [A] trial court should avoid making any remark within the hearing of the jury that is capable directly or indirectly, expressly, inferentially, or by innuendo of conveying any intimation as to what view he takes of the case or that intimates his opinion as to the weight, character, or credibility of any evidence adduced.

Leavine v. State, 147 So. 897, 902-3 (Fla. 1933). The conduct of the trial judge is a dominant factor at trial; comments which "might result in inhibiting counsel from giving full representation to his client or that might result in bringing counsel into disfavor before the jury at the expense of his client" must be avoided. Hunter v. State, 314 So.2d 174, 175 (Fla. 4th DCA 1975).

The comments of Judge Waddell inhibited counsel from representing his client. The comments to the jury venire left counsel with two options: to abandon queries on what opinions

jurors might have about the case or to seem to disparage the jurors' honor. His comments to counsel during cross of state witnesses caused two problems. It implicitly conveyed to the jury that the judge did not consider the questions and answers important. Especially the comments of the court in regards to the details of planning for the robbery explicitly stated the judge's view of the evidence: he "had enough of that." RD 460. The repeated orders to move on conveyed the message that the evidence was a waste of time. In this sense, the court's comments were similar to those in Millett v. State, 460 So.2d 489, 490-2 (Fla. 1st DCA 1984). In Millett, the court repeatedly stated the defendant/witness was being unresponsive and evasive in response to objections by defense. Such statements could be construed as comments on the witness's credibility and were error.

The second problem caused by the repeated admonitions of defense counsel by the court was that it communicated to the jury that counsel was in the wrong and destroyed the impartiality of the tribunal. Although at times courts must rebuke counsel before the jury, the better practice is to have the jury retire.[35] The court abuses its discretion if rebukes are repeated or severe, and the jury unnecessarily hears them.[36] Interruptions by the court throughout the trial are an improper interjection of the court as

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[35] Olive v. State, 179 So. 811, 813 (Fla. 1938); Jones v. State, 385 So.2d 132, 134 (Fla. 4th DCA 1980).

[36] McCrae v. State, 549 So.2d 1122, 1123 (Fla. 3d DCA 1989); Wilkerson v. State, 510 So.2d 1253, 1254-5 (Fla. 1st DCA 1987); Tyndall v. State, 234 So.2d 154, 155 (Fla. 4th DCA 1970).

an adversary of defense counsel and deny the defendant a fair trial.[37] The trial court erred by repeatedly admonishing counsel in the jury's presence. The court positively refused to go out of the jury's presence to hear argument. The error is plain.

Trial counsel failed to object to these attacks. Either the court would have granted a cautionary instruction upon timely objections or the case would have been reversed on appeal and tried before an impartial tribunal. Either way, the failure to object waived claims of error short of fundamental error and allowed the court to influence the jury's choice. See e.g. Herzog v. State, 439 So.2d 1372, 1376 (Fla. 1983)(citing cases).

No strategic or tactical reasons could justify such an omission. Heffernan admitted the judge was intimidating. RP 143. Rabinowitz admitted being stunned after being "pounded" by the court before the jury. RP 319-20. These reasons for not objecting were not the effective assistance of counsel.

In addition, the actions of the trial court significantly interfered with counsels' ability to assist their client. As such, they constitute a constructive denial of counsel requiring relief even with no showing of prejudice. Walberg v. Israel, 766 F.2d 1071, 1075-6 (7th Cir.), cert. denied 474 U.S. 193 (1985); see Cronic, 466 U.S. at 659. The judge's statements in the instant case actually interfered with counsel's presentation of the defense case. This denied Mr. Sims counsel.

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[37] See Pollard v. State, 444 So.2d 561, 562 (Fla. 2d DCA 1984); Keane v. State, 357 So.2d 457, 458 (Fla. 4th DCA 1978).

(ii) Counsel unreasonably allowed improper and prejudicial prosecutorial comment.

While denying relief for harmless error, Judge Eaton nevertheless found the comments challenged here "all . . . improper." RP 1079. Argument by the prosecutor during summation improperly denied Mr. Sims a fair trial in a number of ways. First, the prosecutor stated his personal belief and the belief of the 'state' that Mr. Sims was guilty of the offense.[38] Such comments are clearly improper. Grant v. State, 171 So.2d 361, 365 (Fla. 1965), cert. denied 384 U.S. 1014 (1966);[39] The prosecutor vouched for the credibility of his witnesses.[40] Case law could not be clearer that such personal vouching for witnesses violates the prosecutor's ethical obligations and prejudices a defendant.[41] The prosecutor referred to nonrecord facts and implied he had

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[38] "If you do not believe he committed first degree murder or robbery, the State would ask you to acquit him, because that's what we believe he did." RD 696(emphasis added). "All we had was Curtis Baldree and B.B. Halsell. We hoped and we knew or we wouldn't be here that we had the right man. RD 738(emphasis added).

[39] See also George v. State, 539 So.2d 21 (Fla. 5th DCA 1989); Price v. State, 267 So.2d 39, 40 (Fla. 4th DCA 1972).

[40] Referring to Halsell and Baldree, the prosecutor told the jury, "So I don't vouch for their character, but I vouch for their truthfulness and vouch for their truthfulness because it has a ring of truth." RD 698. Later, the prosecutor said, "I cannot . . . Mr. Guggenheim is a powerful witness. I think he ran up to the front of that store. And I think he was confronted by Mr. Sims. I don't think he got up there and perjured himself . . ." RD 733.

[41] Garrette v. State, 501 So.2d 1376, 1379 (Fla. 1st DCA 1987); Richmond v. State, 387 So.2d 493 (Fla. 5th DCA 1980); Silvestri v. State, 332 So.2d 351, 355 (Fla. 4th DCA), aff'd 340 So.2d 928 (Fla. 1976).

greater knowledge of the evidence than what he presented.[42] This was error. [43] And the prosecutor told the jury that defense counsel was employing a "smokescreen," RD 733 and was attempting to confuse the jury. RD 740. Such attacks on counsel and his defense have no place in a fairly conducted trial.[44]

Heffernan was responsible for objecting during the closing arguments by the State. RP 188. During the summation, he was not paying close attention because he was working on his own close. RP 190. Counsel testified he simply overlooked some objections.

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[42] Defending his witness's credibility, the prosecutor informed the jury, "Curtis Baldree, at first, denies even knowing Sims. Although we know he did, because we know from the Jacksonville police department he used to run with him." RD 735. The State presented no evidence that the Jacksonville police saw or knew Mr. Sims and Baldree ran together. The prosecutor told jurors that the police and prosecutors wanted to know who was in the front of the store, and "they knew that Curtis Baldree had that information." RD 698. This statement implied police knowledge beyond the record. A witness described a wound he had treated on a man looking like Mr. Sims several days after the robbery as an old wound, RD 669; the prosecutor told the jury without any evidentiary support that, "A traumatic wound that is four days old is old to him . . . So old to him is not old to us." RD 731-2.

The prosecutor also made reference to a fact not in the record that was untrue. "The State did not know, when we picked this jury, whether or not Mr. Guggenheim would identify Terry Sims." RD 737. Defense objected that the remark referred to matters not in evidence and was overruled; defense did not point out that Guggenheim had stated at deposition that Guggenheim was 90% sure he could identify Mr. Sims. RP 1471.

[43] See Bradham v. State, 41 Fla. 541, 26 So. 730, 732 (1899); Clinton v. State, 53 Fla. 98, 43 So. 312, 317-8 (1907); Pope v. State, 496 So.2d 798, 803 (Fla. 1986), cert. denied 480 U.S. 951 (1987); Huff v. State, 437 So.2d 1087, 1090 (Fla. 1983); Crayton v. State, 536 So.2d 399 (Fla. 5th DCA 1989).

[44] See Adams v. State, 192 So.2d 762, 764 (Fla. 1966); Cooper v. State, 413 So.2d 1244, 1245 (Fla. 1st DCA 1982); Waters v. State, 486 So.2d 614, 616 (Fla. 5th DCA 1986).

RP 191, 195, 195, 196.[45] Some he believed would be overruled, but admits an objection was needed to preserve the issues. RP 193. No decisions were made to not object: the prosecutor was allowed free reign. This Court on direct appeal refused to address a challenge to this argument solely because no objections had been lodged. Sims, 444 So.2d at 924; RP 1828-35, 1893-1903, 1928-31. Omitting these objections fell outside the wide range of professionally competent assistance.

B. THE ERRORS UNDERMINE CONFIDENCE IN THE VERDICT OF GUILT.

The post-conviction court viewed the evidence as rendering any error harmless because of the "eye witness testimony from three eyewitnesses who positively identified Sims at trial and two accomplices." RP 1080. The referenced evidence has been called into serious question here and elsewhere, but the best evidence that the errors did undermine confidence in the verdict is the testimony by the lawyers who actually prosecuted this case. Joel Dick testified "We knew we were somewhat weak on the eyewitness identification. We knew that accomplice testimony is not that trustworthy. . . ." RP 282. Asked if the case was a "sure winner," Dick responded "Well, we wouldn't have cut the deals with Baldree and Halsell if we felt it was a sure winner." RP 283. Robinson was more sanguine about the evidence, but also said "We certainly weren't in the hallway making any prediction or taking

[45] Heffernan and the prosecutor, Robinson, erroneously believed there was evidence in the record tieing Sims to Baldree. RP 265. The 'Jacksonville officer' who testified never made this statement. RP 681-8.

any bets, but we thought we had a significant case against Mr. Sims." RP 266. The prosecutors accurately identify the weaknesses of the evidence. No physical evidence connected Mr. Sims to the crime in any way. Only three highly questionable eyewitness identifications together with the testimony of two drug-abusing, convicted felons who sold their souls for their testimony linked Mr. Sims to the crime.

The trial court's determination that the failure to object to improper arguments by the state was not prejudicial ignores the harm.

> The prejudice to a defendant of inviting conviction on facts . . . dehors the record is counter to the basic precept of fairness. From the representative of the United States, a sovereign whose duty is to govern impartially, and a person in whom the average jury has confidence that he will faithfully observe his trust, the thrust of the statements, in the context made, destroyed fairness and equal justice.

United States v. Grossman, 400 F.2d 951, 956 (4th Cir. 1968).[46] The prosecutor was attempting to shore up his witnesses and rebut Mr. Sims' theory of innocence when he claimed Mr. Sims and Baldree 'ran together.' At least one court holds "remarks regarding the defendant's guilt or a witness' credibility, if based on information not adduced at trial, require reversal per se." United States v. DiLoreto, 888 F.2d 996, 999 (3d Cir. 1990). The Eleventh Circuit holds when a prosecutor in essence testifies during closing

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[46] See Berger v. United States, 295 U.S. 78, 85-9 (1935); see also Williams v. State, 515 So.2d 1042 (Fla. 3d DCA 1987)(defendant deprived of effective assistance when attorney failed to object to police officer relating hearsay of coconspirator because state allowed to substitute more credible witness for declarant).

by bringing out material not in evidence, the Writ will be granted since such evidence violates the confrontation clause. Hutchins v. Wainwright, 715 F.2d 512, 515 (11th Cir. 1983), cert. denied 465 U.S. 1071 (1984). The untruthfulness of a statement referring to matters outside the record aggravates the error. See United States v. Meeker, 558 F.2d 387, 390 (7th Cir. 1977)(holding untruthful implications from prosecutor's questions required mistrial even though objection sustained and curative instruction given). Connecting the expression of belief in the accused's guilt with references to matters outside the record seriously prejudices a defendant since the jury may conclude the nonrecord evidence must be weighty. See Thompson v. State, 318 So.2d 549, 552 (Fla. 4th DCA 1975). Furthermore, this testimony from the prosecutor strongly suggested that Mr. Sims and Baldree were engaging in crimes together. Argument that the defendant is guilty of other crimes, unsupported by the record is so extraordinarily prejudicial as to be fundamental error. See Sherman v. State, 255 So.2d 263, 265 (Fla. 1971).[47]

Had counsel been effective, the eyewitness identifications, in reasonable probability, would have been excluded due to the suggestive photo display and hypnotic interviews. This error standing alone creates sufficient prejudice to undermine confidence

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[47] See also Simmons v. State, 139 Fla. 645, 190 So. 756 (1939), Ryan v. State, 457 So.2d 1084, 1090 (Fla. 4th DCA 1984), and United States v. McBride, 862 F.2d 1316, 1319 (8th Cir. 1988)(such argument is plain error).

in the verdict.[48] Absent the eyewitness identifications here, the swearing supporting the state's theory of guilt in this case came from two disreputable witnesses, addicts with long criminal histories, who avoided prison and murder convictions by testifying.

At the least, the jury should have heard the very hypnotist who put the witnesses under his spell testify to his belief that their testimony is unreliable standing alone, that he had induced a positive hallucination in one witness, and that another witness had been unable to visualize a face. The jury should have heard other evidence of the problems caused by hypnosis. Had counsel been effective, the jury would not have been exposed to the improper, desperate summation when the prosecutor vouched for his witnesses, disparaged defense counsel, expressed a personal belief in the guilt of the accused, and referred to facts outside the record, one of which was untrue. The jury would not have been led to believe the judge thought defense evidence was insubstantial. Effective counsel would have conducted a thorough exam of the jury, eliminating those prejudiced by publicity and pro-death penalty feelings. And, effective counsel would have insured the jury

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[48] In Morrison v. Kimmelman, 650 F.Supp. 801 (D.C.N.J. 1986), the district court (on remand from Morrison, 477 U.S. 365) found the failure of the attorney to suppress a bedsheet prejudicial. The victim testified she had been raped by Morrison, but he denied sexual relations occurred, claiming the victim lied. The evidence from the bedsheet was not entirely inconsistent with the defense, but made it less credible. Morrison, 650 F.Supp. at 808; see also Chatom, 858 F.2d at 1487(finding ineffectiveness when state's circumstantial evidence case depended heavily on results of atomic absorption test that lawyer inadequately challenged). However, since Morrison amounted to a swearing match between the victim and the defense, the court found the error undermined confidence in the outcome. Id. at 809.

deciding Mr. Sims' fate had not been exposed to the defendant being hauled into court in irons. Mr. Sims had no trial at all.

The prejudice to Mr. Sims from these multiple errors are similar to those in Marks v. State, 492 So.2d 681 (Fla. 4th DCA), rev. denied 500 So.2d 545 (Fla. 1986), State v. Smith, 547 So.2d 131 (Fla. 1989), and United States v. Rusmisel, 716 F.2d 301 (5th Cir. 1983). In Smith, this Court held the lineup was conducted unconstitutionally, and that the error was not harmless beyond a reasonable doubt.[49] The evidence linking the defendant to the crime consisted of the questionable identification, an in-court identification, and the testimony of a codefendant who had been given a deal to testify. Other evidence suggested others not charged were involved. This Court held: "we believe there is a reasonable probability that the improper lineup evidence 'contributed to the conviction.'" Smith, 547 So.2d at 135, quoting State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986)(emphasis added).

In Marks, the defense counsel unreasonably failed to present an alibi defense and failed to have photographs from a photo lineup suppressed which would have aided the identification defense presented. The trial court found, however, that the errors did not sufficiently prejudice Mark's case; the Fourth District Court of Appeals reversed. In Rusmisel, the prosecutor repeatedly brought

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[49] The "beyond a reasonable doubt" harmless error standard of Smith is easier to meet than the reasonable probability standard governing ineffective assistance of counsel cases, but the similarity of Smith's facts with those here and this Court's analysis of the harm in Smith make the comparison apt.

out irrelevant facts about the marijuana defendant's drug usage and that of his friends, and argued without objection that Rusmisel was a 'cult' leader; the Fifth Circuit held the attorney's failure to object prejudiced Rusmisel.

The errors in the trial are even more egregious and shake confidence in the verdict: this Court should order Mr. Sims' conviction vacated due to the ineffectiveness of his counsel.

POINT II

THE USE OF UNCONSTITUTIONALLY UNRELIABLE HYPNOTICALLY INDUCED TESTIMONY AGAINST MR. SIMS AT HIS CAPITAL TRIAL VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17, 21 AND 22 OF THE FLORIDA CONSTITUTION.

This Court has held that its prophylactic per se ban on the use of hypnotically refreshed testimony is to be given prospective effect only. Bundy v. State, 471 So.2d 9, 18 (Fla. 1985). However, the testimony given at trial was so unreliable and so critical to the state's case that due process, the right to confront witnesses, and freedom from cruel and unusual punishment require this court grant relief now.[50]

The testimony of Dr. Buckhout and the police hypnotist Drazen establish that the hypnotic sessions in the instant case actually and substantially interfered with the witnesses' true memory. Certainly, if this Court discovered that a piece of physical evidence had been fraudulently created and harmful to the defense,

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[50] These rights are guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution, and Article I, sections 9, 16, and 17 of the Florida Constitution.

it would order relief. See State v. Burton, 314 So.2d 136 (Fla. 1975); State v. Glover, 564 So.2d 191, 193 (Fla. 5th DCA 1990). It should do so where evidence is grossly warped by police procedures which create false memories.

Dr. Buckhout testified that the hypnotic sessions conducted in this case led to memory hardening, making the witnesses impervious to cross examination. Kovec admitted her image of the robber was 'fuzzy,' but sharpened it at the hypnotist's command. The defendant could not confront these witnesses. Also, the hypnotist admitted he showed one witness portraits drawn from the desciptions of other witnesses. He and an artist drew a picture during the hypnotic session of Duncan, strongly interfering with her memory. The three eyewitness identifications, all tainted by the hypnotic sessions, were key to the state's case. Admitting such unreliable testimony destroyed the trial's fairness.[51] The testimony of Kovec, Duncan, and Guggenheim is similarly tainted, and relief should be granted.

POINT III

MR. SIMS' CONVICTIONS AND SENTENCE VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17, 21 AND 22 OF THE FLORIDA CONSTITUTION, BECAUSE OF THE PROSECUTOR'S KNOWING USE OF PERJURED TESTIMONY IN HIS TRIAL, AND HIS FAILURE TO DISCLOSE THE ACTUAL BARGAIN EXTENDED TO JAMES HALSELL FOR HIS TESTIMONY.

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[51] See Little v. Armontrout, 819 F.2d 1425, 1434 (8th Cir.), vacated 835 F.2d 1240 (1987)(en banc). In Little, a panel of the Eighth Circuit ruled the admission of unreliable hypnotically refreshed testimony violated due process because the procedures were too suggestive. The en banc court vacated this holding and left the question open, instead reversing because the state had not provided the defendant a hypnosis expert.

Through testimony and argument, the prosecutor misled the jury into believing that the sum total of the deal with B.B. Halsell was that he had pled guilty with a sentence capped at ten years, and, at the time of trial, had already been sentenced to ten years in prison. In fact, Halsell had not been sentenced. In fact, the State planned to request that Halsell's sentence be two years. In fact, Halsell was sentenced to two years which, with credit for time served, freed him soon after he performed as prearranged at Mr. Sims' trial. Mark Rabinowitz, who happened to be present for Halsell's sentence, testified that the state misled the defense and jury regarding what sentence Halsell would receive.[52] At the sentencing of Halsell, the lead detective in the investigation requested that Halsell not be sent to prison because his life would be endangered. RP 316. Mr. Sims' prosecutor requested Halsell receive the same sentence as Baldree, i.e. two years.[53] Id. Heffernan confirmed that he had been surprised by this sentence. RP 173. At trial, Heffernan clearly assumed the sentence would be ten years, as shown by his question:

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[52] The testimony of prosecutors Dick and Robinson do not conflict with that of Rabinowitz. Robinson stated he told the defense that the State had agreed to a ten year cap. RP 263. However, he admits 'everybody' expected Halsell to get two years. RP 278. Dick also believed that Halsell would not get more than two years. RP 284. He felt Halsell would not be sent to prison because it would be too dangerous for him. RP 286-7. Both Dick and Robinson justify not mentioning their expectations as to Halsell's sentence or their planned recommendations therefore because the judge would sentence the defendant. RP 279, 285.

[53] At the time of trial, Baldree had pled guilty to misdemeanors; his maximimum sentence could have been two years in jail. RD 445-6.

Q And you were charged with robbery and murder and got ten years; is that right?
A Yes, sir.

RD 346. The misuse of the false evidence bolstering Halsell violated due process.

At the time he testified, Halsell had a not too mysterious motivation to please the state with his performance, since he had not been sentenced. Halsell's ultimate sentence, two years for armed robbery in which a man was shot to death, disgracefully confirms Halsell's motivation to "do well" for the state in the Sims case. Despite the state's representations in Mr. Sims' trial that the only consideration conferred in exchange for his testimony was that he would be sentenced to no more than ten years in prison (and had already been so sentenced) the state had actually promised much more. By agreeing to a sentencing ceiling and by holding his sentencing open until after he testified, the state plainly conveyed to Halsell he could help himself by testifying effectively. This was a dirty deal. The proof is in the pudding. The prosecutor's office subsequently played a crucial role in obtaining for their stooge Halsell a sentence amounting to time served.

The fair trial element of the fourteenth amendment Due Process Clause demands that a prosecutor "refrain from improper methods which are calculated to produce wrongful conviction ...," Berger v. United States, 265 U.S. 78 (1935), and "manipulation of the evidence [which is] likely to have an important effect on the jury's determination," Donnelly v. DeChristoforo, 416 U.S. 637,

647 (1974). It is law that the knowing use of materially false testimony by a prosecutor is fundamentally unfair. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). Promises to a witness "if disclosed and used effectively, [] may make the difference between conviction and acquittal." Bagley v. United States, 473 U.S. 667, 679 (1985). Accord, Napue, 360 U.S. at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend"). Put another way, jurors understand:

> [t]o think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large.

Washington v. Texas, 388 U.S. 14, 22-23 (1967).

In this case, the jury was aware that a deal had been struck with the state's witness, but was misinformed on its details in a way which improperly bolstered the witness's credibility. The obligation of a prosecutor concerning promises made to obtain testimony is to reveal the entire substance of such deals.[54] Brown

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[54] Nor does Francis v. State, 473 So.2d 672 (Fla.), cert. denied 474 U.S. 1094 (1985) conflict with this rule. In Francis, the witness told the jury she expected as a result of her testimony that her 25 year minimum mandatory sentence would be vacated for a new trial or she could plead guilty to another charge or get a pardon. In fact, the State planned to stipulate to a collateral attack on the conviction. This detail was not brought out, but this Court rejected a collateral attack on Francis's conviction on the basis of use of false testimony because Francis's jury knew the

(Joseph Green) v. Wainwright, 785 F.2d 1457, 1465 (11th Cir. 1986); Smith v. Kemp, 715 F.2d 1459, 1463 (11th Cir.), cert. denied, 104 S.Ct. 510 (1983) (State must affirmatively correct testimony of a witness who fraudulently testifies that he has not received a promise of leniency in exchange for his testimony); United States v. Bigeleisen, 625 F.2d 203, 208 (8th Cir. 1980).[55]

The jury for Mr. Sims never was told that Halsell would be skipping out the door soon after the jury condemned Mr. Sims to the electric chair; instead it was led to believe Halsell had already been sentenced, and that it was ten years. The jury was led to believe ther was no hammer over Halsell's head because his sentence was already imposed, was not advised of the state's plan to speak on Halsell's behalf, and grossly misled on the eight year difference between the sentence revealed at trial and that actually imposed. These are substantial misrepresentations. A fair trial is conducted only when the state has fully disclosed any understanding or agreement, not just a fraction. Haber v. Wainwright, 756 F.2d 1520, 1524 (11th Cir. 1985). The state hid the ball here, and should not be rewarded for its sleight of hand.

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substance of the deal. Francis's counsel fully attacked the witness as testifying in exchange for saving 17 years of time in prison. Id. at 675. Here, by contrast, the jury did not know the substance of the deal or even that sentencing was still open.

[55] In Bigeleisen, the Court of Appeals held that even though the prosecutor had discussed in some detail a witness's deal with the state in opening, when the witness denied any deal, the prosecutor's failure to tell the jury the government had promised to intervene with the Parole Commission on behalf of the inmate left a substantial misimpression in the minds of the jurors. Id. at 208.

The lie to the jury that sentencing had already occurred removed a promising line of impeachment. See United States v. Sanfilippo, 564 F.2d 176 (5th Cir. 1977). In Sanfilippo, the Court of Appeals held that a prosecutor's misstatement the defendant had been sentenced violated due process.

> Mori had the Ellswick prosecution "hanging over his head." If he did not testify, presumably he would have been prosecuted in that case. If he did testify, he would not have been prosecuted. One can hardly imagine a more compelling fact that the jury should have in order to properly evaluate whether a witness of doubtful credibility was in fact being credible in his trial testimony.

Id. at 179. But Halsell testified under just such a threat, a fact never revealed to the body deciding his credibility.

There is every reason to believe this falsehood affected the verdict, making it material. "It is a constitution we deal with, not semantics. `The thrust of Giglio and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving testimony . . .'" Brown, 785 F.2d at 1457 (citations omitted). The law requires that the conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict." United States v. Bagley, 473 U.S. 667, 679 n.9 (1985)(emphasis supplied); United States v. Rivera Pedin, 861 F.2d 1522, 1529 n.13 (11th Cir. 1988).

The evidence was not overwhelming. Mr. Sims defended on the basis that Baldree and Halsell accused him falsely to protect their associate Terry Gayle and themselves, and that Terry Gayle looked like Mr. Sims, leading to the misidentifications of eyewitnesses. Because Mr. Sims' fate was of no concern to Baldree and Halsell,

when the police informed them that Mr. Sims was the prime suspect, they, knowing Sims and Gayle were similar in appearance, found Mr. Sims to be a convenient scapegoat. In assessing this degree of prejudice or materiality, "the disclosure is even more important when the witness provides the key testimony against the accused. See Giglio, 405 U.S. at 154-55." Haber, supra, 756 F.2d at 1523. The defense theory could easily have been accepted by the jury had the accomplice witnesses been discredited.

The materiality of the misrepresentation is also shown by the prosecutor's reliance on it during summation. In closing, the prosecutor specifically boosted Halsell's credibility by arguing Halsell would not have testified falsely only to put himself in prison for ten years. The government cannot strike a foul blow and then claim it did not hurt. Cf. Sanfilippo, 564 F.2d at 179 (error could not be harmless where prosecutor urged jury to consider false testimony). Accord, DeMarco v. United States, 928 F.2d 1074, 1076-77 (11th Cir. 1991).[56]

There was no waiver of objection to this due process violation. Defense counsel believed the ten year sentence was a done deal at the time of trial, and so saw no reason to object. RP 175 (Heffernan), 315 (Rabinowitz). Counsel did not know and were not advised the government would recommend the two year deal.

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[56] As in United States v. Barham, 595 F.2d 231 (5th Cir. 1979), cert. denied 450 U.S. 1002 (1981), Mr. Sims' guilt or innocence depended on whom the jury believed. In Barham, the former Fifth Circuit held a misstatement which bolsters the credibility of a witness when the verdict turned on the credibility of state versus defense witnesses cannot be harmless beyond a reasonable doubt. Id. at 243.

This belief could hardly be unreasonable since the prosecutor himself deliberately elicited from the witness the statement he was "under a ten year sentence." RD 299. Defense counsel cannot be held responsible for uncovering the falsity absent actual knowledge of it. See United States v. Harris, 462 F.2d 1033, 1035 (10th Cir. 1972).

Counsel probably believed Halsell's sentence had been imposed,[57] but even if not, no waiver could be imputed for their failure to object to the deliberate elicitation and use of false testimony by the state. When a prosecutor deliberately elicits and misuses false information the conviction must be vacated as a violation of due process.[58] As the former Fifth Circuit holds:

> Rather than just an error of omission, there was an additional error of commission - the misleading questions posed to two of the witnesses which, in the unusual circumstances of this case, reinforced the deception. This factor . . . undermines the Government's argument that defense counsel waived the false evidence issue. While defense counsel can certainly be charged with knowledge of his files, he cannot be held responsible for the manner in which the Government prosecutes its case.

Barham, 595 F.2d at 243 n.17. The prosecutor's errors of

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[57] Heffernan's question at trial indicated his belief Halsell had been sentenced. RD 346. Heffernan testified at post-conviction he certainly would have impeached the witness had he known sentence was still an open question. RP 175. Rabinowitz stated he believed Halsell would go to prison and was surprised at the two year jail sentence. RP 315. Halsell clearly had not been sentenced in November when he was deposed six weeks before trial. RP 223-5. Nothing indicates that counsel asked at trial whether Halsell had been sentenced; since the prosecutor elicited the statement that Halsell had been sentenced, the reason for confusion on defense counsel's part is attributable to the prosecution.

[58] See Demarco v. United States, 928 F.2d 1074, 1076 (11th Cir. 1991); Mills v. Scully, 826 F.2d 1192, 1195 (2d Cir. 1987); Barham, 595 F.2d 231.

commission here, in eliciting and arguing the false testimony likewise cannot be charged to Mr. Sims.

POINT IV

MR. SIMS' CONVICTIONS AND SENTENCE VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17, 21 AND 22 OF THE FLORIDA CONSTITUTION BECAUSE THE PROSECUTION DELIBERATELY WITHHELD EXCULPATORY DOCUMENTARY AND TESTIMONIAL EVIDENCE.

The police in this case had documented proof in their file linking Eugene Robinson with Terry Wayne Gayle, and Gayle to the crime here. But that document was not disclosed. The evidence would have substantially corroborated the defense theory in this case that it was Gayle who participated in the robbery, and that Gayle looked like Mr. Sims. The withholding of such evidence violates the rule that material, exculpatory evidence held by the prosecution must be disclosed. Brady v. Maryland, 373 U.S. 83 (1963); Bagley, 473 U.S. 667.

Lead detective Salerno picked up various documents from Joy Russell of Russell and Russell, a Tampa detective agency, including a receipt signed by Terry Gayle for books on how to steal cars, an address card with the name Gayle and Robinson Repos, and a receipt signed by Terry Gayle for a Chrysler lockpuller. RP 22-3; RP 1243. The defense was never given access to the crucial document, a signed receipt which showed that Gayle and Robinson together purchased **lock pullers** from the very people from whom Robinson bought lock pullers to steal cars for robberies in the instant case. This receipt showed that Terry Gayle and Robinson regularly bought lock pullers. The prosecutor in opening explained this

group's modus operandi:

> These men . . . went to Tampa, the evidence will show, to purchase lock pullers for the purpose of stealing General Motors vehicles. And the purpose of those lock pullers was to steal vehicles that are called cool cars [sic] in the jargon of the trade. They leave them around the scene of the robbery for getaways.

RD 236. The receipt and related documents would have been admissible to corroborate testimony that Terry Wayne Gayle engaged in drugstore robberies with Robinson's group when the Longwood Village robbery/murder occurred, in support of the defense that Gayle was the robber, as attested to by defense counsel. RP 179-85; 336-37.

Florida and Federal courts have long held that evidence tending to show a third party committed the offense must be admitted. See Lindsay v. State, 69 Fla. 641, 68 So. 932 (1915).[59] The exclusion of such evidence violates due process and the right to present a defense. See Chambers v. Mississippi, 410 U.S. 284 (1973); Pettijohn v. Hall, 599 F.2d 476, 480 (1st Cir. 1979).

'Reverse-Williams Rule'[60] evidence which shows like crimes committed by the third party is admissible to show that party committed the offense charged.[61] This Court recently held in Savino

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[59] See also Corley v. State, 335 So.2d 849 (Fla. 2d DCA 1976); United States v. Robinson, 544 F.2d 110, 113 (2d Cir. 1976); Holt v. United States, 342 F.2d 163, 165-6 (5th Cir. 1965).

[60] Williams v. State, 110 So.2d 654 (Fla.), cert. denied 361 U.S. 847 (1959).

[61] §90.404(2)(a), Fla.Stat. (1989); see Rivera v. State, 561 So.2d 536, 540 (Fla. 1990); State v. Savino, 567 So.2d 892 (Fla. 1990); Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982); Pahl v. State, 415 So.2d 42 (Fla. 2d DCA 1982); Robinson, 544 F.2d at 113.

that admissibility of 'reverse Willims Rule' evidence must be judged by the same standards as Williams Rule evidence propounded by the state. If Terry Gayle were on trial, evidence that he bought lock pullers from the same detective agency the group used in the instant case, using the name of a company tying Gayle to the leader of the group in what is obviously a front business operation to ease the theft of cars for robberies, when such purchase occurred within weeks of the charged offense, would be admissible to show plan, modus operandi, and identity. See Davis v. State, 87 So.2d 416 (Fla. 1956); Moore v. State, 324 So.2d 690, 691 (Fla. 1st DCA 1976), aff'd., 343 So.2d 601 (Fla. 1977). In Moore, the state used evidence that the defendant and others had pried open a vending machine at a gas station on the night before they were charged with having pried open a machine at a different station. The evidence was relevant because it showed a common scheme or design. Moore, 324 So.2d at 691. The use of equipment from one incident to perpetrate an offense makes that evidence especially probative. See Lewis v. United States, 771 F.2d 454, 456 (10th Cir. 1985); United States v. White, 645 F.2d 599, 602-3 (8th Cir. 1981). In White, two men were charged with bank robbery and kidnapping after a bank executive was taken from his home and forced to retrieve money from his bank. The car used in the kidnap was stolen. The government introduced evidence that the police seized a 'dent puller,' as device used to steal cars, from the codefendant's mobile home; the court upheld its use. Similarly, evidence that Gayle purchased lock pullers around the

time of the charged offense would be relevant when such a device was used to steal a car for use in drug store robberies to show Gayle participated in the charged offense.

The omission of the most crucial document, one which had reverse-Williams rule value, significantly harmed the defense. The prosecution obviously realized the relevance of the documents since some were provided. If there is a reasonable probability that the suppressed evidence affected the outcome, then it is material and its suppression violates due process. See Bagley, 473 U.S. at 682; Arango v. State, 497 So.2d 1161, 1162 (Fla. 1986). The prejudice in this instance is similar to that described in Arango v. State, 467 So.2d 692 (Fla.), vacated 474 U.S. 806 (1985), on remand, 497 So.2d 1161 (Fla. 1986). In Arango, the State failed to reveal a gun found under the victim's window which had been purchased a few days before by a man using a Hispanic name. Arango's defense was that he and the victim were overpowered by three Latino males who fled, one by jumping from the balcony, after the shooting. The suppression of the gun allowed the prosecutor to argue no physical evidence supported Arango's account, that it was a complete fiction. Id. at 694. The failure to reveal the gun affected the outcome of the case, in reasonable probability. Arango, 497 So.2d at 1162. Similarly, the defense could adduce no evidence below, aside from connecting Gayle to the gang and testimony that Gayle resembled Mr. Sims, to support the theory that Gayle, not Sims, committed the murder. The one piece of evidence proving the defense theory was never disclosed.

POINT V

THE SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17, 21 AND 22 OF THE FLORIDA CONSTITUTION BECAUSE THE TRIAL JURY, JUDGE AND REVIEWING COURT WERE LIMITED IN THEIR CONSIDERATION OF MITIGATING CIRCUMSTANCES.

A. THE JURY INSTRUCTIONS AND PROSECUTORIAL ARGUMENT PREVENTED THE JURY FROM FULLY CONSIDERING THE MITIGATING EVIDENCE.

On this claim, the 3.850 court found "[t]he instructions given to the jury do not meet the requirements of Hitchcock [v. Dugger, 481 U.S. 393 (1987)]." RP 1084.[62] However, the court - by finding the presentation of nonstatutory mitigating evidence made the error harmless -ignored the central teaching of Hitchcock.

Hitchcock definitively answered the issue presented in this case: whether the jury and judge were unconstitutionally restricted from considering relevant defense evidence regarding the appropriate sentence. Hitchcock's counsel presented evidence going to both statutory and nonstatutory mitigation. In summation, defense counsel told Hitchcock's jury:

> that in reaching its sentencing decision, it was to "look at the overall picture . . . consider everything together . . . consider the whole picture, the whole ball of wax."

Hitchcock, 481 U.S. at 398. The prosecutor, however, told the jury to consider the mitigating circumstances by number and discussed the statutory mitigators item by item. The jury was then told:

by the trial judge that he would instruct them "on the

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[62] The Court below did not directly address the claim that the trial judge and this Court were also limited in their consideration of mitigation, but ruled that any instructional error was harmless. RP 1085.

> factors in aggravation and mitigation that you may consider under our law." [cite omitted] He then instructed them that "[t]he mitigating circumstances that you may consider shall be the following . . ." (listing the statutory mitigating circumstances).

Id. The unanimous Court concluded:

> We think it could not be clearer that the advisory jury was instructed not to consider . . . evidence of nonstatutory mitigating circumstances . . . .

Id. at 398-9.

In this case, defense counsel also presented and argued nonstatutory mitigation. In summation, the prosecutor argued:

> You have also previously been made aware that the jury is the trier of facts and that the Court instructs the jury on what the law is. And it is their sworn duty to apply the law as they understand it to the facts, the evidence which they have heard.
>
> The Legislature of the State of Florida on behalf of the people of the State of Florida have established criteria, two categories, aggravating and mitigating circumstances. I would like to discuss with you briefly the various categories which I feel you will hear and highlight some of what we would suggest to you were significant portions of the evidence that related to them.

RD 809-810(e.a.). The prosecutor continued, as did the prosecutor in Hitchcock, by ticking off the statutory mitigating circumstances by number and dismissing them as not backed by the evidence. RD 810-813. The prosecutor ended by discussing "the last criteria," the age of the defendant. RD 812. These arguments ensured that the jury would believe they could not go beyond the statutory list. See Downs v. Dugger, 514 So.2d 1069, 1072 (Fla. 1987); Booker v. Dugger, 520 So.2d 246, 248 (Fla.), cert. denied 486 U.S. 1061 (1988). Such a restriction on a capital defendant's case for a

life sentence violates the Lockett rule.[63]

The law as explained by the trial court to the jury here precluded the consideration of the evidence. At the beginning of the penalty phase, the Court explained the procedure to the jury:

> You're instructed that this evidence is presented in order that you might determine . . . [a]nd second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.
> At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors and aggravation and mitigation which you may consider.

RD 787 (e.a.). After the evidence and arguments, the trial court instructed the jury:

> The mitigating circumstances which you may consider if established by the evidence among others are these:

RD 826. The court continued with a list of the statutory mitigators. RD 826-7. There can be no doubt the jury believed it was restricted to the statutory mitigation because the jury requested "a printed copy of the State Law as it applies to the criteria for aggravating and mitigating circumstances." RD 832-3, 1039. The judge repeated the faulty instruction on mitigation, listing as mitigators only statutory criteria. RD 834-5. In essence, the court's instructions and the prosecutor's arguments are identical to those condemned by the Supreme Court in Hitchcock.

The state may argue the words "among others" in the jury instruction means there was no limitation. This Court squarely rejected the argument in Way v. Dugger, 568 So.2d 1263 (Fla. 1990).

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[63] Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); see Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied 441 U.S. 956 (1979).

In Way, the jury was instructed:

> Among the mitigating circumstances you may consider, if established by the evidence, are:
>
> 1. The defendant has no significant history of prior criminal activity.

Way, 568 So.2d at 1266 n.5 (e.a.). This Court held this instruction erroneous under Hitchcock. Id. at 1266. The instruction in this case was virtually identical.

Other cases applying Hitchcock support Way's holding; this Court finds no error when the court instructs on a catch-all mitigating circumstance. See Harich v. State, 542 So.2d 980, 981 (Fla. 1989); Card v. Dugger, 512 So.2d 829, 830 (Fla. 1987). If the trial judge explicitly tells the jury they can consider anything at all, then the Court has found no Hitchcock error. See Adams v. State, 543 So.2d 1244, 1247 (Fla. 1989)(Court instructed, "The aggravating circumstances . . . are limited . . . However, there is no such limitation on the mitigating factors you may consider."); Martin v. Dugger, 515 So.2d 185, 187 (Fla. 1987)(Instruction: "there is no such limitation on the mitigating [as opposed to aggravating] factors which you may consider" upheld). However, telling the jury "you may consider the following mitigating circumstances" followed by the statutory list has been construed as a direction not to consider other factors. See Waterhouse, 522 So.2d at 344; Morgan, 515 So.2d at 976; see also Lucas v. State, 490 So.2d 943, 946 (Fla. 1986)(error to instruct jury only on statutory mitigators). The Eleventh Circuit holds:

> That the trial judge did not state that the statutory list was exhaustive, however, did not save the

> instruction. Hitchcock . . . holds that the Lockett rule is violated where, as here, the jury is not instructed to consider nonstatutory mitigating factors as well as the mitigating factors enumerated in the statute.

Ruffin v. Dugger, 848 F.2d 1512, 1518 (11th Cir.), cert. denied 109 S.Ct. 872, 879 (1988)(e.a.). The two words "among others" similarly do not "save" the instruction here.

Additional facts here informed the jury they could not venture beyond the statutory list of mitigating circumstances. The judge responded to an expression of concern by a juror in voir dire about the death penalty by telling the venire, "But, we are not here to concern ourselves with good people or bad people. All we are here is to concern ourselves with conduct." RD 77-8. The prosecutor's cross examination of defense witnesses in the penalty phase had the purpose, inter alia, to show that the witness could not establish statutory mitigation. RD 793-4, 804-5. The prosecutor objected, successfully, in the jury's presence, to evidence of the codefendants' attitudes towards their sentences as irrelevant and immaterial.[64] RD 791-2. These questions and objection sustained by the court denigrated the importance of the nonstatutory mitigating evidence as well as constituted a plain restriction on the mitigating evidence actually excluded. See Cooper v. Dugger, 526 So.2d 900, 901 (Fla. 1988) (Lockett violated by repeatedly sustaining relevancy objections).

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[64] The prosecutor did not object to other testimony going exclusively towards nonstatutory mitigation, content to rely on his cross showing the evidence did not relate to statutory mitigation and knowing the jury instructions and his argument would not allow use of the testimony.

B. THE TRIAL COURT DID NOT CONSIDER NONSTATUTORY MITIGATING FACTORS.

The 3.850 court did not rule on the claim that the trial court violated Hithcock. Comparing this case with Hitchcock shows the trial judge limited his consideration of the mitigators. In Hitchcock, the trial court gave the above-quoted instruction and explictly noted in the sentencing order he considered only the statutory mitigating circumstances. In this case, the court gave a similar instruction and the sentencing order only considered statutory mitigation:

> IT IS the finding of this Court after weighing the aggravating and mitigating circumstances that there are sufficient aggravating circumstances as specified in 921.141 and insufficient mitigating circumstances therein that a sentence of death is justified.

RD 1093 (e.a.). This statement by the trial court that it considered only the statutorily enumerated mitigators is sufficient to show unlawful limitation. See Morgan v. State, 515 So.2d 975, 976 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656, 659 (Fla. 1987). Also, the trial judge sustained the only objection made by the prosecutor to defense evidence at the penalty phase on grounds of irrelevancy and immateriality. RD 791-2.

The trial court knew of Lockett, having denied a motion to declare Florida's statute unconstitutional, but before Songer was issued. RD 954. However, the trial court was not persuaded that Florida law allowed consideration of nonstautory mitigation. The prevailing view before Songer was that Florida law restricted mitigating circumstances. See Hitchcock, 481 U.S. at 397. Lockett was a plurality opinion. Nothing in the record shows court or

counsel were aware of Songer at all.[65] The trial judge could well believe that Cooper v. State, 336 So.2d 1133 (Fla. 1976) limited consideration of mitigators and that the plurality opinion in Lockett would not cause a change of law in Florida.[66] See Heiney v. Dugger, 558 So.2d 398 (Fla. 1990). In Heiney, the Florida Supreme Court found the judge's order - substantially the same as the trial judge's order here - showed restricted consideration of mitigators even though it, also, was issued after Songer. Id. at 399 n.2. Since there is at least "some ambiguity" in the trial court's understanding of the role of nonstatutory mitigation, Hitchcock error occurred. See Steinhorst v. State, 574 So.2d 1075, 1077 (Fla. 1991). The trial judge's sentencing order plainly finds him limiting mitigation to the statute's factors: when the judge explicitly confines himself to statutory mitigation, Lockett error occurs, even if Songer had been issued. See Copeland v. Dugger, 565 So.2d 1348, 1349 (Fla. 1990);[67] Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990).

The restriction of mitigating circumstance also infected this

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[65] The trial court denied the Lockett motion on December 18, 1978, RD 953, three days before Songer's rehearing and modification was issued. Songer, 365 So.2d at 700. Sentencing was had in early February, 1979.

[66] Counsel's motion to declare the statute unconstitutional relied on Cooper's interpretation of state law. RD 926-7.

[67] In Copeland, this Court found, as the state conceded, that Hitchcock error occurred when the sentencing order was couched exclusively in terms of statutory mitigators, even though the claim had previously been rejected because Copeland's sentencing occurred after Songer which had clarified Florida law. See Copeland v. Wainwright, 505 So.2d 425, 427 (Fla.), vacated 484 U.S. 807 (1987).

Court's review which gave no more consideration to the nonstatutory mitigation than that of the trial court. On review, this Court struck or merged four of seven aggravators. Sims, 444 So.2d 922. The Court applied its harmless error rule which holds errors in aggravating factors harmless when no mitigating factors are found by the trial court. Id. at 925-6. "Finding no statutory mitigating circumstances, the trial judge found that the aggravating circumstances outweighed any mitigating considerations." Id. at 925 (e.a.) In fact, there were nonstatutory mitigating factors which the trial court did not find because it was unconstitutionally restricted. This Court must at least revisit its prior decision and either review the improper findings of aggravators and independently determine the mitigators, or remand for resentencing by the trial court. Failure to do one or the other violates the Eighth Amendment requirement of meaningful appellate review. See Parker v. Dugger, 111 S.Ct. 731 (1991).

C. THE HITCHCOCK ERROR IN THIS CASE PREJUDICED MR. SIMS' CASE FOR LIFE.

The 3.850 court held the Hitchcock error harmless, relying in part on the now discredited "mere presentation' standard.[68] It

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[68] The theory that presentation of nonstatutory mitigation suffices to show that the judge considered them was rejected in Hitchcock, as this Court has explicitly recognized. See Downs v. Dugger, 514 So.2d 1069 (Fla. 1987). Downs noted:

> Hitchcock rejected a prior line of cases issued by this Court, which had held that the mere opportunity to present nonstatutory mitigating evidence was sufficient to meet Lockett requirements. Under this "mere presentation" standard, we routinely declined to consider whether the judge or jury actually weighed the evidence.

Id. at 1071.

states "[h]ere, as in Delap, while the instruction was inadequate, the defense was not prevented from presenting factors which were considered to be mitigating." RP 1084-85. This conclusion simply misreads Delap.[69] In Delap, there was record evidence that the judge actually went beyond the statutory mitigating circumstances. The prosecutor in Delap told the jury that nonstatutory mitigation could be considered. Here, the prosecutor argued and emphasized that any evidence before the jury was not relevant to the statute, the jury felt itself so restricted as shown by its question on the statute's mitigation, and the court explicitly confined its sentencing order to statutory mitigation.

The mitigators were strong and validly considered aggravators weak. The 3.850 court found the Hitchcock error harmless in part because "it is not clear why any of [the four areas of nonstatutory mitigating factors] should be considered mitigating." RP 1084. This analysis fails to consider one of the most powerful nonstatutory mitigating factors. The two codefendants, fully involved in the planning and execution of the armed robbery, equally guilty of first degree felony murder, and one of whom threatened, struggled with, and fired a shot at the pharmacist received two years of jail time for their offenses. Such an extreme disparity in their sentences powerfully mitigated Mr. Sims'

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[69] Even if Delap were similar to this case, its harmless error analysis is suspect since the Eleventh Circuit granted the Writ, finding that error prejudicial. Delap v. Dugger, 890 F.2d 285, 304-6 (11th Cir. 1989), cert. denied 110 S.Ct. 2628 (1990). This Court recognizes Eleventh Circuit constitutional precedent is highly persuasive. See State v. Hamilton, 574 So.2d 124, 130 (Fla. 1991).

sentence.[70] See O'Callaghan v. State, 542 So.2d 1324 (Fla. 1989); Brookings v. State, 495 So.2d 135 (Fla. 1986); Herzog v. State, 439 So.2d 1372, 1381 (Fla. 1983). In O'Callaghan, this Court found the Hitchcock error prejudicial. Four people beat up one Vick and put him in a van. They drove Vick to a secluded location where O'Callaghan shot him to death. The same jury that sentenced O'Callaghan to die found one of the others guilty of second degree murder. The jury knew that a third person got immunity and the fourth had not been charged. O'Callaghan, 542 So.2d at 1326. On direct appeal, this Court found O'Callaghan had previously been convicted of robbery with violence. It found the crime occurred during a kidnap, the extensive beating and brutality against the victim made it especially heinous, atrocious, or cruel (HAC), and O'Callaghan acted in a cold, calculated, and premeditated manner (CCP), essentially executing the victim. O'Callaghan v. State, 429 So.2d 691, 696-7 (Fla. 1983). Nonetheless, the failure to permit the jury to consider the disparate treatments of his codefendants was harmful Hitchcock error. 542 So.2d at 1326. Mr. Sims has

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[70] This Court has stricken jury overrides in at least 17 cases in whole or in part because the jury reasonably relied on disparate sentencing of a codefendant. Malloy v. State, 382 So.2d 1190 (Fla. 1979); Neary v. State, 384 So.2d 881 (Fla. 1980); Barfield v. State, 402 So.2d 377 (Fla. 1981); Smith v. State, 403 So.2d 933 (Fla. 1981); Stokes v. State, 403 So.2d 377 (Fla. 1981); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Hawkins v. State, 436 So.2d 44 (Fla. 1983); Herzog, 439 So.2d 1372; Thompson v. State, 456 So.2d 444 (Fla. 1984); Brookings, 495 So.2d 135; DuBoise v. State, 520 So.2d 260 (Fla. 1988); Callier v. State, 523 So.2d 158 (Fla. 1988); Harmon v. State, 527 So.2d 182 (Fla. 1988); Spivey v. State, 529 So.2d 1088 (Fla. 1988); Pentecost v. State, 545 So.2d 861 (Fla. 1989); Fuente v. State, 549 So.2d 652 (Fla. 1989); Dolinsky v. State, 576 So.2d 271 (Fla. 1991).

similar mitigation and his three aggavators are less serious.[71] As in O'Callaghan, this Court should find the Hitchcock error prejudicial. Also, the court refused to admit evidence that Halsell and Baldree were contemptuous of their sentences, more evidence that their culpability for the crime was greater. See Cooper v. Dugger, 526 So.2d 900 (Fla. 1988)(excluding evidence that defendant easily led shows codefendant dominated and so more culpable was prejudicial error).

Contrary to the post-conviction court's opinion about what should be mitigating, Mr. Sims' attempt to talk a young man out of crime shows his compassion for and desire to help others, a nonstatutory mitigator. Campbell v. State, 571 So.2d 415, 419 n.4 (Fla. 1991). It also shows Mr. Sims could successfully adjusst to prison. See Skipper v. South Carolina, 476 U.S. 1 (1986). Likewise, Terry's aid to a family in distress and teaching the children is mitigation justifying a life sentence. Fead v. State, 512 So.2d 176, 179 (Fla. 1987). Comparison with Cooper, supra,

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[71] On appeal this Court upheld three aggravators which were before the jury: committed (1) in the course of a robbery/for pecuniary gain, (2) to avoid arrest/hinder law enforcement, and (3) after a conviction for another violent felony. Considerable evidence showed the robber did not know the victim was a security officer and shot in reaction to him reaching for his gun. RD 314, 350, 353 (Halsell, outside store, did not recognize victim approaching pharmacy was policeman); 353 (Sims told Halsell he was not sure if the deceased was a policeman); 437 (Baldree relates Sims statement he was not certain victim was policeman); 473 (witness outside pharmacy did not realize victim was policeman). The jury could reasonably have found the avoid arrest aggravator unproven or weak on this record. The only prior violent felony actually proven to the jury was a then-eight year old third degree felony, a 1971 conviction for aggravated assault. RD 788; §784.021(1)(b), Fla.Stat. (1975).

also shows that the Hitchcock error here was prejudicial. In Cooper, the defendant proffered evidence of his prior employment history, potential for rehabilitation, and the codefendant's reputation for violence. Cooper, 526 So.2d at 901-2. Cooper and a codefendant shot a police officer to death during a getaway from a robbery; his valid aggravators were slightly stronger than Mr. Sims: he had two prior armed robberies and commited the crime during a robbery to avoid arrest. Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976). Factually, the mitigation and aggravation are very similar to Mr. Sims; as in Cooper, this Court should find the error prejudicial.

The error was especially harmful because the court and jury relied upon improper aggravating factors which this Court found were invalid on appeal. Judge and jury relied on the especially heinous, atrocious, or cruel nature of the offense although this quick death by gunfire killing was not especially heinous, atrocious, or cruel. Sims, 444 So.2d at 925-6. The prosecutor heavily relied on HAC in urging execution:

> But there's another side to it . . . when Mr. Duncan and Miss Kovec were up there.
>
> How many nightmares are these people going to have? They are going to have to bear that the rest of their lives. The children that were in that store, running around, trying to get in a bathroom and hide, cowering. Poeple who didn't belong there. Who came in with guns . . .
>
> Then, when a police officer came on the scene, and attempted to retreat, this man pursued him and shot him, not once but twice.
>
> Yes, initially he may have thought this man was a bus driver or someone else in uniform. But how about . . . when George Arthur Pfeil is backing up and pulling out his service revolver? What is the mental impression a normal person gets at that point in time?

RD 816. Arguing an offense was HAC due to the effects on other victims was wrong.[72] Arguing for HAC because the victim was a police officer was improper. See Brown v. State, 526 So.2d 903, 907 (Fla. 1988)(citing cases). Instructing on HAC when inflammatory evidence and argument is introduced but does not show it is prejudical error. See Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990). Judge and jury also twice improperly doubled the same facts as two aggravators, that the homicide was for pecuniary gain and committed during a robbery and was committed to avoid arrest and to hinder law enforcement. Sims, 444 So.2d at 925-6. These errors show prejudice from the Hitchcock error. See Jones, supra.

POINT VI

COUNSEL'S INEFFECTIVE REPRESENTATION RENDERS MR. SIMS' DEATH SENTENCE UNLAWFUL UNDER FLORIDA LAW, THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17, 21 AND 22 OF THE FLORIDA CONSTITUTION.

A. TRIAL COUNSEL UNREASONABLY FAILED TO INVESTIGATE, DEVELOP AND PRESENT ADDITIONAL EVIDENCE IN MITIGATION.

The childhood of Terry Melvin Sims was a tragic, violent, and impoverished one, but the jury never knew due to counsel's unreasonable failure to investigate. Trial counsel is required to conduct a reasonable investigation of his client's case. See Strickland, 466 U.S. at 690-1; State v. Lara, 16 FLW S306 (Fla. May 9, 1991); Thompson v. Wainwright 787 F.2d 1447, 1451 (11th Cir.

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[72] Cherry v. State, 544 So.2d 184, 188 (Fla. 1989); Clark v. State, 443 So.2d 973, 977 (Fla. 1984); Riley v. State, 366 So.2d 19, 21 (Fla. 1978).

1986). In this instance, counsel admitted at the post-conviction hearing he had a duty to investigate Mr. Sims' background. RP 232. He further admitted he did not do so, or clearly explain the need to do so to his client, because he fully expected the judge to override a death recommendation.[73] RP 232-3. Trial counsel both stated the undiscovered evidence was consistent with their strategy at penalty phase and that they would have used the evidence had they known it existed. RP 205, 330.

This case is similar to Stevens v. State, 552 So.2d 1082 (Fla. 1989). In Stevens, counsel obtained a life recommendation from the jury, but then presented no evidence or arguments to the court in support of the recommendation in the belief that the judge would inevitably impose death, but that the decision would be overturned automatically on appeal. The evidence which counsel failed to discover closely matches that not discovered here, including: an abused and neglected childhood, a drinking problem, and kindness and concern towards those who knew him. Id. at 1085-6. Counsel also failed to correct misrepresentations by the state concerning his client's past. These failures, made in ignorance without any investigation, were unreasonable and affected the outcome to a reasonable probability. Id. at 1087-8.

Trial counsel also unreasonably believed the trial judge would ultimately impose life despite any jury recommendation. Counsel

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[73] Although Mr. Sims indicated he did not want his family disturbed, counsel had not explained to him the importance of the testimony. Counsel simply followed his client's desires without any investigation: such a choice is not reasonable or effective. See Thompson, 787 F.2d at 1451; Lara, 16 FLW at S307.

relied on this unreasonable belief in deciding not to investigate Mr. Sims' background and so failed to discover the multitude of mitigating factors described above. The judge and jury never knew Terry saw his mother continually beaten by spouse abusers. The decision makers were never told Roy Sims was physically absent and Hazel Sims had a serious alcohol and emotional problem and was emotionally absent from the home. They were ignorant of Terry's time in a foster home. Neither did they know Terry had to raise himself and began running away from home at age seven, nor that he had been beaten out of his house by a mentally deranged stepfather at age seventeen. They did not know of Terry's history of concern and nonviolence, despite his past, for those he loved. They were ignorant about the death of his older sister before Terry turned twenty who provided the only measure of stability to his childhood. They were not aware of his attempted suicide after the divorce. They knew nothing of the positive things Terry had done for his mother and family. There can be no confidence in a sentencing decision made without this evidence. The failure of trial counsel to investigate resulted in jury and judge ignorance of Terry's background sufficient to undermine confidence in the sentencing decision. Ibid; see Bassett v. State, 541 So.2d 596 (Fla. 1989); Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir. 1988).

B. COUNSEL UNREASONABLY FAILED TO INFORM THE JURY OF THE IMPORT OF ITS RECOMMENDATION AND TO OBJECT TO INSTRUCTIONS AND ARGUMENT THAT DENIGRATED THE JURY'S ROLE IN THE DEATH SENTENCING DECISION.

The jury was led to believe its role in the sentencing process was purely advisory, allowing it latitude to express community

outrage over the well-publicized death of George Pfeil without feeling responsible for its recommendation that Mr. Sims be sentenced to death. From jury selection through final instructions, the jury was repeatedly misinformed about the importance of its recommendation. The court explained to prospective jurors the bifurcated nature of the trial, telling them that if the case went to penalty phase, they would be expected to "recommend" whether or not death should be imposed. RD 18, 125-26. One prospective juror, Dickson said he could be fair, but as to penalty, opined without correction that "the judge, he'll be the judge and not me." RD 171.

Introductory instructions at the penalty phase advised the jury they had a significantly diminished role in the sentencing process than is actually the case under Florida law. Just before the jury was to hear evidence bearing on its life or death decision, the judge told them he was the sole sentencing decisionmaker:

> ... The final decision as to what punishment shall be imposed rests solely with the judge of this Court. However the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

RD 786-7 (emphasis supplied). The prosecutor reinforced the instruction, encouraging the jury not to take its role seriously:

> MR. ROBINSON: Thank you, Your Honor.
>
> Ladies and gentlemen of the panel, as the judge has indicated to you, you will be called upon to render an advisory opinion with respect to the recommendation of mercy or no mercy.

RD 809 (e.a.). Finally, seconds before the jury retired to

consider what was to ultimately be a death verdict, they were misinformed again,as the court referred to their decision as a "recommendation" and an "advisory summons." RD 828, 829, 837-38.

Actually, the court was to give the 'recommendation' great weight, not overriding it unless the facts demanding death were so clear and convincing that no reasonable person could differ on punishment. See Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). This misimpression, unreasonably allowed by defense counsel, violated Florida statutory and constitutional law and the Eighth Amendment's guarantee of a reliable sentencing hearing. Caldwell v. Mississippi, 472 U.S. 320 (1985); Blackwell v. State, 76 Fla. 124, 79 So. 731, 735-6 (1918);[74]

Counsel at trial failed to object because he mistakenly believed the jury's role was purely advisory. RP 211. Such a mistake was unreasonable and accounted for counsel's failure to correct the jury's misimpression. Given the weakness of the aggravators and strength of the mitigation this error undermines confidence in the outcome of the proceeding.

C. COUNSEL UNREASONABLY FAILED TO OBJECT TO VICTIM IMPACT EVIDENCE AND ARGUMENT.

The court below summarizes it best: "Not satisfied with the improper comments previously noted, the prosecutor had to comment

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[74] See also Adams v. Dugger, 804 F.2d 1526, modified 816 F.2d 1493 (11th Cir. 1987), reversed on procedural grounds, 109 S.Ct. 1211 (1989); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied 109 S.Ct. 1353 (1989); and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988)(en banc), cert. denied 109 S.Ct. 1355 (1989); but see Combs v. State, 525 So.2d 853 (Fla. 1988); Reed v. State, 560 So.2d 203 (Fla. 1990).

on the [e]ffect that the decedent's death had upon his family." RP 1085. The prosecutor's argument is described as the "outer limits of impermissible prosecutorial conduct as it relates to victim impact." RP 1087. It is more like the Twilight Zone.

The prosecutor in this case asked a defense witness if she was aware that George Pfeil had children. RD 800-1. In his summation, the prosecutor invited the jury to consider the nightmares of the witnesses to the crime, RD 814-5, and the plight of Pfeil's children. RD 816. He specifically told the jury to consider what Pfeil would say if he could testify, and that his family was left with nobody to help fix up their house. RD 816-7. In short, the prosecutor invited the jury to put Mr. Sims to death based on inflammatory evidence and argument about the effect of the crime on the deceased's family, not the circumstances of the offense or characteristics of the defendant.

This evidence and argument violated plainly established Florida law which holds that "The fact that deceased may have had a family is wholly immaterial, irrelevant, and impertinent to any issue in the case". Rowe v. State, 163 So. 22, 23 (Fla. 1935); see Lewis v. State, 377 So.2d 640, 643 (Fla. 1980); Harris v. State, 191 So.2d 58, 60 (Fla. 1st DCA 1966)(discussing cases). The basis for the rule is to assure a dispassionate trial. Welty v. State, 402 So.2d 1159, 1162 (Fla. 1981). The evidence and argument constituted non-statutory aggravation, violating the established rule against considering aggravation not going to a statutory factor. See Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977).

Counsel has no explanation for failing to object to this inflamatory, improper evidence except "ignorance." RP 210.[75] Relief is warranted.

D. COUNSEL UNREASONABLY FAILED TO OBJECT TO JUDICIAL AND PROSECUTORIAL ARGUMENT, COMMENT AND INSTRUCTIONS WHICH FAILED TO INFORM THE JURY THAT THE ALTERNATIVE TO DEATH WAS A LIFE SENTENCE WHICH INCLUDED A MINIMUM MANDATORY OF 25 YEARS.

The jury was not told by the judge or prosecutor that a life sentence meant Mr. Sims would be imprisoned twenty-five years without possibility of parole. The availability of parole is common knowledge among jurors. See Paramore v. State, 229 So.2d 855, 860 (Fla. 1969), sentence vacated 408 U.S. 935 (1972)(Furman relief). The proffered testimony of Dr. Radelet shows that a statistically significant number of uninformed jurors believe a life sentence means release much earlier than twenty-five years, but that when properly instructed on the 25 year mandatory minimum, are less inclined to impose a death sentence. RP 246-50, 1870-2.

Florida today instructs capital sentencing juries that a life sentence means no possibility of parole for twenty-five years. Fla.Std.Jury Instr.(Crim.) Penalty Proceedings - Capital Cases F.S. 921.141. This Court holds this instruction is a correct statement of the law and properly given. See Stewart v. State, 549 So.2d 171, 175-6 (Fla. 1989); see also Henderson v. State, 789 P.2d 603, 606-7 (N.M. 1990)(failure to give requested jury instruction on

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[75] The prejudicial effect was compounded by counsel's argument comparing his client's life with that of George Pfeil. RD 822-3. This gave a defense stamp of approval to the prosecutor's tactic, undercutting the force of the positive character traits of Mr. Sims the jury did hear.

meaning of life sentence violated Eighth Amendment); Paduano and Smith, Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty, 18 Colum. Human Rights L.R. 211 (1987). A trial court may instruct a jury on the meaning of the tweny-five year minimum mandatory portion of the defendant's sentence, see Downs v. State, 572 So.2d 895, 900-1 (Fla. 1991), but the defendant may not put on evidence about it. See Lucas v. State, 568 So.2d 18, 20 n.2 (Fla. 1990). Thus the jury should be given a limited picture of the meaning of a life sentence by way of jury instructions, but the jury here was left in the dark.

The mandatory nature of the alternative life sentence is relevant in this case. Age is a statutory mitigating factor. §921.141 (6)(g), Fla. Stat. (1987). A powerful mitigating factor is the age the defendant will be at his earliest release date. Mr. Sims would be 62 in 2004, after the mandatory twenty five years.

The failure of trial counsel to request a jury instruction which would substantially lessen the likelihood his client would receive the death penalty falls outside the realm of competent assistance. Trial counsel recognized the mitigating value of a twenty-five year minimum mandatory sentence and argued it (once) to the jury, RD 818, but sought no instruction from the Court to correct the common misperception that life-sentenced defendants are soon out on the streets.

E. COUNSEL PERMITTED THE SENTENCING COURT TO CONSIDER A PRIOR VIOLENT FELONY WHICH HAD NO PROPER EVIDENTIARY BASIS.

The trial court considered a 1958 common law robbery

conviction in aggravation. RD 1091. No evidentiary basis existed for this conviction: the trial court depended on the hearsay report of the presentence investigation to substantiate the conviction. Defendants have the right to confront witnesses against them at a capital sentencing hearing. See Rule 3.780, Fla.R.Crim. P.; Rhodes v. State, 547 So.2d 1201 (Fla. 1989). Defendants have a right to a reliable sentencing hearing to insure the punishment is not cruelly or unusually inflicted. See Proffitt v. Wainwright, 685 F.2d 1227, 1254 (11th Cir. 1982), modified 706 F.2d 311 (1983). Use of unsubstantiated hearsay on a PSI violates these rights.[76] See Id. Had counsel objected, he would have prevented the court from considering this alleged prior violent felony. This error affected the result in reasonable probability. See Burr v. State, 576 So.2d 288 (Fla. 1991).

POINT VII

GUILT PHASE ERRORS REQUIRE VACATION OF THE DEATH SENTENCE AS WELL.

The ineffectiveness of counsel at guilt also infected the reliability of the sentencing proceedings. The unnecessary use of shackles and excessive security measures prejudices a capital sentencing proceeding because it evidences a suspicion on the state's part that the defendant threatens the proceedings. See Elledge v. State, 823 F.2d 1439, modified 833 F.2d 250 (11th Cir.

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[76] This error violates the defendant's rights to due process, a fair trial, and a reliable sentencing hearing. These rights are guaranteed by the Fifth,, Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and Article I, sections 9, 16, 17, 21, and 22 of the Florida Constitution.

1987), cert. denied 108 S.Ct. 1487 (1988). The display of this suspicion constitutes nonstatutory aggravating factors based on unreliable, untested, non-record facts.

Evidence which proves innocence of aggravators by tending to show another codefendant committed the offense is admissible and relevant, even if it also establishes a defense to the charge. See Downs v. State, 572 So.2d 895, 899 (Fla. 1990); see also Douglas v. State, 575 So.2d 165, 167 (Fla. 1991)(credibility of state's main guilt witness could reasonably be considered by sentencing jury). It violates the heightened reliability required in death sentencing proceedings. See Beck v. Alabama, 447 U.S. 625, 637 (1980).

The use of unreliable identification testimony, tainted by a suggestive photo lineup, hypnosis, and media pictures of the accused helped establish statutory aggravators. The failure of trial counsel to keep out this evidence and the fundamental error in using the hypnotically refreshed testimony infected the jury and court findings in aggravation. Similarly, the failures of counsel in not completing a cross examination of a witness, in not eliminating exposure of jurors to state suspicion of Mr. Sims, shown by the leg irons and excessive security, and in failing to correct comments of the court and prosecutor all harmed Mr. Sims' chances for a life sentence by prejudicing his case that he was not guilty of the aggravating circumstances. The inability to show that another committed the crime, caused by the state's nondisclosure of the receipt for lock pullers signed by Terry

Gayle, also harmed Mr. Sims' chances for life by making the aggravators easier to find.

The knowing use of false testimony by the prosecutor in his guilt summation, that Halsell had been sentenced to ten years, also prejudiced Mr. Sims' most powerful mitigating factor: the disparity of the sentences received by his codefendants. The more extreme disparity of receiving two years in jail as opposed to ten years in prison, despite guilt of felony murder is patent. The jury was misinformed on a relevant mitigating factor requiring at least that Mr. Sims be provided a new sentencing hearing before a properly informed jury.

POINT VIII

USE OF THE UNLAWFUL PRIOR CONVICTION IN AGGRAVATION IN IMPOSING A SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17, 21 AND 22 OF THE FLORIDA CONSTITUTION.

Mr. Sims' counsel failed to correct the trial court when it considered a hearsay statement as the only evidence of a prior violent felony conviction as establishing an aggravating circumstance. See Section VI(E), above. The trial court's error was also fundamental. It violated the right to confront witnesses and have a reliable sentencing hearing. As such, it can be raised at any time.

CONCLUSION

WHEREFORE, Mr. Sims respectfully moves this Court vacate his judgments of guilt for first degree murder and robbery and vacate his sentence of death, and remand for further proceedings not inconsistent with its opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by First Class Fed Ex U.S. Mail to Kellie Nielan, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Daytona Beach, Florida 32114, this 29th day of August, 1991.

Of counsel