IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,838

PAUL JENNINGS HILL,

Appellant,

V.

THE STATE OF FLORIDA,

Appellee.

FILED
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APPEAL FROM THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY

AMICUS CURIAE BRIEF OF THE FLORIDA CATHOLIC CONFERENCE

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATE CONSTITUTION

STATE STATUTES

MISCELLANEOUS

PREFACE

Appellant, Paul Jennings Hill, will be referred to as "Mr. Hill." Appellee, State of Florida, will be referred to as "State". Amicus Curiae, The Florida Catholic Conference, Inc., will be referred to as "Amicus". Citations to Amicus Curiae's Appendix will be stated as "App. _" followed by the appropriate page numbers. Citations to the record will be stated as follows: citations to the Transcript of Record on Appeal will be stated as "T. __"; citations to the Jury Trial record will be stated as "R. __", in each case followed by the appropriate page number.

INTEREST OF AMICUS CURIAE

Amicus Curiae is The Florida Catholic Conference, Inc. which is a Florida corporation not-for-profit, whose members are the active Roman Catholic Bishops of the State of Florida. Amicus advocates and promotes the pastoral teaching of the Bishops in such diverse areas as education, family life, health care, social welfare, criminal justice, civil rights and the economy. Of all the values the Florida Catholic Conference seeks to promote through its participation in litigation, among the strongest are the development of a decent and civil society and respect for human life.

STATEMENT OF THE CASE

The appellant, Paul Jennings Hill, was convicted of and sentenced to death for the first degree murder of Dr. John Britton and Jane Barrett. Dr. Britton performed abortions at the Ladies Center abortion facility, and Mr. Barrett was an escort to ensure the safety of Dr. Britton.

Mr. Hill had indicated an intention to assert the defense that the killing was justified as an effort to protect the lives of those of human beings. The State filed a motion in limine to preclude this defense and to prevent the defendant from "eliciting, presenting, commenting or arguing any evidence to the jury which would constitute the defense of necessity or justification". [T.116] Mr. Hill responded, *pro se*, with a lengthy memorandum and authority. [T.117-200]. He attempted to introduce evidence to support his defense of necessity or justification based on his belief that an unborn child is a human being from the moment of conception; together with scientific evidence; and further that he had a moral, religious and philosophical duty to protect an innocent life from harm, even by lethal force, if necessary. [T.124-142].

The trial court refused to allow the introduction of such evidence for purposes of establishing a defense to the charges. [T.234]

Prior to the trial, Mr. Hill insisted that he wished to defend himself in the case, and that he rejected court appointed counsel. At an extensive hearing pursuant to *Faretta v. California*, 95 S.Ct. 2525, 422 U.S. 806, 45 L.Ed. 2d 562 (1975), Mr. Hill requested his own choice of attorneys as standby counsel, but the court appointed the Public Defender's office as the standby counsel, determined his ability to defend himself, and authorized him to represent himself in the case. With the exception of the attempts to introduce evidence as to the defense of necessity or justification, Hill took no part in the trial, and as the trial judge stated, "Mr. Hill has chosen to

non-participate". [T.687] "Mr. Hill is not objecting to anything." [T.702], and that he is a "non-participant". Mr. Hill stated that he wanted to participate as little as possible so as not to be "culpable" in the process.

Nonetheless, Mr. Hill repeatedly attempted to introduce evidence as to his religious and moral beliefs and his defense of justification.

Prior to the penalty phase, the court undertook a second *Faretta* examination as to the penalty phase of the trial. Mr. Hill requested that his choice of counsel be allowed to serve as his standby counsel, instead of the public defender's office. There was no charge that the public defender's office was incompetent or not performing their job, but, "however, they just philosophically and theologically just don't agree with me." [R.662] He requested that Vincent Heuser, Esq. and Michael Hirsh, Esq. serve has his standby counsel. There was extensive dialogue and discussion with the court on that subject and the court held that it could not legally appoint the out of state counsel in that capacity. [661-671]. The issue was never directly disposed of, but was subsumed into further argument about jury instructions. The public defender's office remained as standby counsel. During the dialogue, the public defender's office did not object to the substitution, but counsel for the State did object. [R.666] The State then presented the testimony of the son and widow of the deceased victim, Mr. Barrett, who testified as to their loss resulting from the death.

At the conclusion of the State's case, Mr. Hill rested, and did not present any mitigating evidence. [R.700] There was no direct discussion with Mr. Hill either before or at the time that he rested concerning the fact that his proposed testimony about justification and defense of human life could only be argued if evidence was presented in that phase, or that the prior rulings

of the court refusing to admit that evidence were not necessarily binding during the penalty phase.

After the State's argument to the jury in the penalty phase, Mr. Hill started to argue about one's responsibilities to protect your neighbor's life and to use force if necessary. At this point, the State objected on the basis that there was no evidence to substantiate such an argument. The court commenced an extensive dialogue with somewhat confusing conclusions, but with a continued stress to Mr. Hill that his argument had to "be relevant to the issues that are presented in that particular stage"; that he had agreed at the *Faretta* hearing to follow the instructions of the court, and had agreed to abide by rulings of the court. [R.723] He concluded:

> Mr. Hill you are going to argue based on the issues and not on justifiable homicide, which has already been ruled not to be a viable and legal defense in this case. And as long as you want to make an argument that is based on the issues, sir, you can make an argument for as long as you want to make it without any interruptions. [R.723]
>
> Mr. Hill agreed to abide by that [R.724] and summarily concluded his argument.

SUMMARY OF THE ARGUMENT

This brief attacks the imposition of the death penalty on the Appellant, Paul Jennings Hill in this case on two basic grounds: First, the action of the trial court which implied to Mr. Hill that even in the penalty phase of the trial evidence could not be offered, and argument not made, as to the deeply held moral and religious beliefs that induced him to kill the victims, thereby depriving him of a fair trial. Second, the evolving standards of decency in society that involve Art. I, §17, of the Florida Constitution.

Mr. Hill was permitted to defend himself in the trial, and attempted during the guilt phase to introduce evidence as to his deeply held religious and moral belief that the victim physician was planning to perform abortions that morning, and the victim escort was assisting him; that abortion kills a living human being, and, further, that he had a moral obligation to prevent such killings, even to the extent of the use of lethal force. He also attempted to introduce scientific evidence to that effect. The trial court ruled, in limine and during the trial, against introduction of such testimony or evidence in an unequivocal and vehement manner. The Appellant raised that one point and refused to take an active part in any other phase of the proceedings. There were extensive conferences between the trial court and Mr. Hill regarding the penalty phase of the trial, but nothing was said to Mr. Hill concerning a requirement for the introduction of such evidence before he would be allowed to argue the sole point he was asserting. Nor did the trial court advise Mr. Hill that the court's prior rulings concerning such evidence in the guilt phase of the trial were not necessarily binding during the penalty phase. He rested without presenting any evidence.

When the Mr. Hill tried to argue this one point, the State objected that there was no evidence to back it up, and the trial court instructed Mr. Hill not to argue that point.

The trial court charged the jury on the aggravating circumstance "cold, calculated and premeditated murder without pretense of moral or legal justification", and based the death sentence on it. This results in conflict with various rulings of this Court, the latest of which is *Jackson v. State*,[1] which hold that a "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to excuse the homicide nevertheless rebuts the otherwise cold and calculating nature of it. Mr. Hill was deprived of raising the issue with the jury, or having it considered by the Judge.

The trial court also charged the jury, and later applied the aggravating factor "heinous, atrocious or cruel", including "additional acts that show that the crime was consciouslessness [sic] or pitiless and was unnecessarily torturous to the victim." The State argued the evidence was "a window into a soul and mind", and showed that Mr. Hill killed people because of opposition to an idea or philosophy. By not adequately enabling Mr. Hill to offer evidence of his "soul and mind", and why he killed, the trial court should be prohibited from imposing the death penalty.

Seventeen years after *Lockett v. Ohio*[2] was decided, and eight years after *Hitchcock v. Dugger*,[3] the trial court committed a fundamental *Lockett/Hitchcock error* in failing to let Mr. Hill tell his side of the story before his moral entitlement to live is forfeited. *Lockett* is not limited to mitigating evidence that conforms to politically correct moral tenets.

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[1] 648 So. 2d 85 (Fla. 1994).

[2] 98 S.Ct. 2954, 438 U.S. 586, 57 L.Ed. 2d 973 (1978)

[3] 107 S.Ct. 1821, 481 U.S. 393, 95 L.Ed. 2d 347 (1987).

Additionally, the State made an issue of Mr. Hill's mental state of mind at the time of the murders. Mr. Hill has a fundamental right to rebut to State's assertion, and show why the death sentence should not be imposed.

Lastly, Amicus argues that the evolving standards of decency in our society militate against the use of the death penalty to the extent it is utilized in Florida; that a broad consensus exists in the major Catholic, Protestant and Jewish religious leadership, as well as in the secular community, in opposition to its use in Florida; and the international community has strongly rejected the death penalty. These factors implicate the prohibition against cruel and unusual punishment in Art. I, §17, of the Florida Constitution. Some of these various authorities oppose capital punishment outright, others would not go that far, but all oppose it as it is used in Florida today, and specifically oppose it in cases such as this, where life imprisonment is sufficient to protect society.

ARGUMENT I

THE DEATH PENALTY IN THIS CASE SHOULD BE REVERSED BECAUSE MR. HILL WAS UNABLE TO TESTIFY OR ARGUE AS TO HIS DEEPLY HELD BELIEFS THAT AN UNBORN CHILD IS A HUMAN BEING FROM THE MOMENT OF CONCEPTION AND THAT HE WAS MORALLY MANDATED TO DEFEND AND PROTECT THAT HUMAN LIFE, WITH LETHAL FORCE IF NECESSARY; SUCH DEEPLY HELD BELIEFS

(A) ARE PERTINENT TO THE AGGRAVATING FACTOR, "WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION",

(B) ARE PERTINENT TO THE AGGRAVATING FACTOR, "WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL",

(C) ARE CONSTITUTIONALLY RELEVANT UNDER THE PRINCIPLES OF *LOCKETT V. OHIO*; AND

(D) ARE RELEVANT TO REBUT FACTUAL MATTERS PUT INTO ISSUE BY THE STATE. THE TRIAL COURT'S FAILURES CONSTITUTE REVERSIBLE ERROR.

It was in the penalty phase of this case where the fundamental error occurred regarding the effort of Mr. Hill to demonstrate a necessity/justification reason for his actions. The trial court had repeatedly admonished Mr. Hill as to his agreement in the *Faretta* hearing[4] to abide to by the ruling of the court and Mr. Hill acquiesced.

In the penalty phase, the trial court had undertaken another *Faretta* examination, and engaged in extensive dialogue with Mr. Hill over his request for his own standby counsel, [R.662] extensively discussed with him whether or not the public defender's office was adequate or not and eventually never disposed of Hill's request but left the public defender in place as the standby counsel. At no time in the penalty phase of the case, prior to closing argument, did the court expressly discuss with Mr. Hill, in all of the extensive discussion, the fact that he had to

[4] *Faretta v. California*, 95 S.Ct. 2525, 422 U.S. 806, 45 L.Ed. 2d 562 (1975).

introduce evidence as to his beliefs and moral conviction if he wanted to argue necessity or justification in the closing argument. While he had access to standby counsel, it was clear from the record in this case right from the beginning, that Hill was not going to contest anything in the entire case except for his conviction that unborn children are living human beings, were entitled to his protection and that he was morally obligated to defend them, even to the point of lethal force. Yet, there was no discussion whatsoever with Mr. Hill on this point, until after Mr. Hill had rested, without presenting any mitigating evidence. Subsequently, when Mr. Hill started to argue the same point that he had been raising, the State objected and the trial court again engaged in extensive dialogue with Mr. Hill addressing the fact that he had agreed that his argument had to "be relevant to the issues that are presented in the particular stage" and that Mr. Hill had agreed to this in his *Faretta* hearing. Hill, as usual, acquiesced to what the trial court stated. The trial court said,

> Mr. Hill you are going to argue based on the issues and not on justifiable homicide, which has already been ruled not to be a viable and legal defense in this case. And as long as you want to make an argument that is based on the issues, sir, you can make an argument for as long as you want to make it without any interruptions." [R.723]

Mr. Hill agreed to abide by that [R.724] and summarily closed his arguments.

It may well be that in the average criminal case, the defendant would have waived his misunderstandings of the law or procedure. But this is a death penalty case, one that is qualitatively different from a sentence of imprisonment, however long. As the U.S. Supreme Court said in *Woodson v. N. Carolina*, 96 S.Ct. 2978, 49 L.Ed. 2d 944, 428 U.S. 280, 305 (1976):

> Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

The trial court thus ignored, and the jury was never presented with, the testimony which the defendant had repeatedly attempted to present, and would clearly have presented in the penalty phase of the trial had he realized that it could not be argued in the closing arguments. This is not just some minor issue that he was not able to present, since the State argued, and had a charge to the jury on the aggravating factors. The appropriate evidence and arguments were clearly (a) pertinent to the aggravating factor, "was committed in a cold, calculated and premeditated manner, without pretense of moral or legal justification", (b) are pertinent to the aggravating factor, "was especially heinous, atrocious or cruel", (c) are constitutionally relevant under the principles of *Lockett v. Ohio*, 98 S.Ct. 2954, 438 U.S. 586, 57 L.Ed. 2d 973 (1978) and (d) are relevant to rebut factual matters put into issue by the State.

It is not asserted here that the technical requirements of *Faretta* were violated, but rather that the trial court applied a mechanistic ruling of that case, with a result that cannot be accepted: a miscarriage of justice and an inappropriate assessment of the death penalty without consideration of this essential evidence.

A. SUCH DEEPLY HELD BELIEFS ARE PERTINENT TO THE AGGRAVATING FACTOR, "WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION"

The evidence that Mr. Hill sought to introduce would have established that the "cold, calculated and premeditated murder without pretense of moral and legal justification" aggravating circumstance was not applicable to this case. A reasonable jury could have determined, based upon the medical and scientific evidence amassed since *Roe v. Wade*, 93 S.Ct. 705, 410 U.S. 113, 35 L.Ed. 2d 147 (1973), evidence which Mr. Hill sought to present to them, that Mr Hill had,

if not moral or legal justification, at least a pretense of it: a belief that the unborn child is indeed a human being, an innocent human life, deserving the same defense as a born person.[5] Amicus condemns the killing of Dr. Britton and Mr. Barrett. But whether shooting Dr. Britton and his escort was the right thing to do is not the question before this Court. The legal question before this Court is whether Mr. Hill's deep and abiding beliefs that human life begins at conception, which beliefs are rooted solidly in the mainline religious and philosophical traditions of our country and our state, and which beliefs were the basis for Mr. Hill's acts, gave his actions at *minimum* a "pretense" of moral or legal justification.

The most important recent ruling of this Court in this regard is *Jackson v. State*, 648 So. 2d 85 (Fla. 1994), in which this Court held unconstitutional the standard jury instruction on the aggravating circumstance, "cold, calculated and premeditated murder without pretense of moral and legal justification" ("CCP"). In *Jackson* this Court ruled that the standard jury instruction on CCP is unconstitutionally vague under *Espinosa v. Florida*, 112 S. Ct. 2926, ___ U.S. ____, ____ L.Ed. 2d ____ (1992). This Court formulated a substitute instruction:

> Until such time as a new standard jury instruction can be adopted, the following instruction should be used:
>
> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold, calculated,

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[5] His Holiness John Paul II writes, "For man, the right to life is *a fundamental right.* And yet, a part of contemporary culture has wanted to deny that right, turning it into an "uncomfortable" right, one that has to be defended. But there is no other right that so closely affects the very existence of the person! The right to life means the right to be born and then continue to live until one's natural end: 'as long as I live, I have the right to live."' His Holiness John Paul II, *Crossing the Threshold of Hope*, 205 (N.Y.: Alfred A. Knopf, 1994).

"[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." *Declaration of the Rights of the Child*, preamble (1959).

> and premeditated, *and that there was no pretense of moral or legal justification.* "Cold" means the murder was the product of calm and cool reflection. "Calculated" means the defendant had a careful plan or prearranged design to commit the murder. "Premeditated" means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. *A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide nevertheless rebuts the otherwise cold and calculating nature of the homicide.*

Jackson, supra, 648 So. 2d at 89-90, n.8. [emphasis added].

This instruction incorporates the same fundamental concept as *Banda v. State,* 536 So. 2d 221 (Fla. 1988), cert denied, 489 U.S. 1087, which sets forth this Court's most complete exposition of this exception to CCP:

> Florida law requires that, before a murder can be deemed cold, calculated, and premeditated, it must be committed "without any pretense of moral or legal justification." § 921.141(5)(i) Fla. Stat. (1985). [Footnote omitted.] The state must prove this last element beyond a reasonable doubt, in addition to the other elements of this particular aggravating factor. *See Jent v. State,* 408 So. 2d 1024, 1032 (Fla. 1981), *cert. denied,* 457 U.S. 1111, 102 S.Ct. 2916 [___ L.Ed. 2d ___] (1982).
>
> Our decisions in the past have established general contours for the meaning of the word "pretense" as it applies to capital sentencing....
>
> We conclude that, under the capital sentencing law of Florida, *a "pretense of justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.*

536 So. 2d at 224-225 [emphasis added].

In other words, a pretense of moral justification, the exact matter which the trial court prevented Mr. Hill from placing before the sentencer, is intended by the statute to rebut this aggravating circumstance, CCP. What evidence could possibly be more relevant?

The pretense clause means that even if one kills a victim in a cold and calculated manner, if the killer thinks he is morally or legally justified in doing so, the aggravating factor should not apply. The killer need not actually be morally or legally justified; the statute only requires that

he have *some pretense* of such justification. Indeed, paragraph (5)(i)[6] could not logically require actual legal justification as there is no such justification for a cold and calculated killing legally cognizable in Florida except for killing by the State in the electric chair. Thus it makes no sense to maintain that the clause calls for such an interpretation.

The clear command of the statutory language is that a killer should escape (5)(i)[7] application if he has some pretense of moral or legal justification. The final clause of paragraph (5)(i)[8] clearly limits the application of the CCP aggravating circumstance. If the legislature's objective had been simply to make all cold and calculated killers death-eligible convicts, it would have left the final clause off of the statute. However, the clause was included and clearly it imposes a limitation on those cold and calculated killings to which (5)(i)[9] is to apply.

The aspect of this aggravating factor --"without any pretense of moral or legal justification" -- caused reversal of cold, calculated, and premeditated in *Banda*. The prosecution evidence, including a statement by the defendant, showed that the victim had threatened to beat the defendant to death over the failure to pay a $10 debt.[10] This Court found a pretense or "colorable claim" that the murder was "motivated out of self defense, albeit in a form clearly insufficient to reduce the degree of the crime."[11]

> [A] 'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide. *Banda, supra,* 536 So. 2d at 225.

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[6] §921.141(5)(i) Fla. Stat. (1991).

[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*

[10] *Banda, supra,* 536 So. 2d at 222.

[11] *Id.* at 225.

In that case, the prosecution failed to prove this "element" of the aggravating factor beyond a reasonable doubt. As this Court interpreted the "without any pretense of moral or legal justification" portion of the circumstance, it looked to two prior cases:

> Our decisions in the past have established general contours for the meaning of the word "pretense" as it applies to capital sentencing. For instance, we have held that a "pretense" of moral or legal justification existed where the defendant consistently had made statements that he had killed the victim only after the victim jumped at him and where no other evidence existed to disprove this claim. *Cannady v. State*, 427 So.2d 723, 730-31 (Fla. 1983). We reached this conclusion even though the accused himself, an obviously interested party, was the only source of this testimony.
>
> On the other hand, we have upheld the trial court's finding that no "pretense" existed where the defendant's statements were wholly irreconcilable with the facts of the murder. Thus, we have upheld a finding that no pretense existed where the accused said the victim intended to kill him over a $15.00 debt, but where the evidence showed that the victim had never been violent or threatening and had been attacked by surprise and stabbed repeatedly. *Williamson v. State, 511* So.2d 289, 293 (Fla.1987), *cert. denied,* [485 U.S. 929], 108 S.Ct. 1098, 99 L.Ed.2d 261 (1988).

Banda, supra, 536 So. 2d at 224-225.

The sentencer in the instant case had a duty to decide whether Mr. Hill's testimony and evidence were "wholly irreconcilable" with the facts of the murder. That process should have involved a weighing of the reasonableness of Mr. Hill's beliefs that an unborn child is a human being from the moment of conception based on the scientific and other evidence he should have been allowed to present. But the testimony and the evidence were never heard.

B. SUCH DEEPLY HELD BELIEFS ARE PERTINENT TO THE AGGRAVATING FACTOR, "WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL."

The jury instruction given by the trial court to the jury with respect to the aggravating circumstance provided in §921.141(5)(h) Fla. Stat. (1991) read as follows:

> No. 3, the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanying [sic] by additional acts that show that the crime was consciouslessness [sic] or pitiless and was unnecessarily torturous to the victim. [R. 727]

The instruction is the standard one. But the jury that had to apply that instruction to the facts of the case and the facts submitted at the penalty phase of the trial suffered from an insurmountable deficit. The trial court had allowed one side, the State, to present testimony and evidence in this regard. Mr. Hill had no realistic opportunity during the penalty phase of offering evidence or argument that would rebut the State's assertions concerning his mental state, his spiritual state or his understanding of his moral duty to prevent the taking of innocent human life. The trial court had no problem in allowing the State to characterize Mr. Hill's motivations for the jury:

> His acts of killing the doctor, heinous, atrocious and cruel. The defendant's acts on July the 29th, 1994, ladies and gentlemen, are a window into a soul and mind. They are a direct reflection of exactly who and what he is and what he is capable of doing.... He killed people because of an opposition to an idea or philosophy. [R. 719-720.]

The trial court had no problem with either the evidence the State introduced to support such conclusions or the State's summation of such evidence. But moments later, when Mr. Hill

attempted to answer the State's characterization of his actions as based upon an "idea or philosophy," he was cut short by the trial court:

> Closing arguments, whether or not they are in the guilt or the innocence phase or whether they are in the penalty phase, have to be relevant to the issues that are presented in that particular stage.... What I want you to do, Mr. Hill, is make an argument that is relevant to the issues -- that we have presented. [R. 722]

The very same trial court that had just entertained the State's characterization of Mr. Hill's actions as based on "opposition to an idea or philosophy" and evidencing "a window into his soul and mind", then explicitly prohibited Mr. Hill from addressing the very same issues:

> ...it looked like the comments that you were going to make were in the direction of justifiable homicide based upon the fact that you have got a right to protect your neighbors... I'm going to take you at your word, Mr. Hill, that you are going to argue based upon the issues and not upon justifiable homicide, which has already been ruled not to be a viable and legal defense in this case. [R. 722-723]

What is clear is that in the trial court that sentenced Mr. Hill to death, looking into his soul, looking into his mind, reaching the moral conclusions of naming who and what he is, and characterizing his motivations as mere philosophies and ideas was done while ignoring Mr. Hill's repeated attempts to explain his soul, his mind, in fact, his justifications or pretense thereof. There is no better way to describe this miscarriage of justice than the words of Mr. Loveless, the court designated standby counsel from the Public Defender's Office who feared that his silence might imply his approval of the proceedings in Mr. Hill's case:

> Your Honor, I would request at this time the Court allow me to withdraw from this particular proceedings. I have sat through this and I have kept my mouth shut. I have not said a word. I have done what the Court instructed me to. We're now at the proceeding -- I think this whole thing has become, as has been described and as I very much hate to say to the Court, a complete travesty. The State is using the situation of Mr. Hill to run Russia rules of rulings of procedure and Rules of Evidence and everything that has occurred here in preparation, particularly for the penalty phase, is totally inappropriate. Your Honor, I can no longer remain quiet. I have to bring that to the attention of the Court and make it part of the record.... Your Honor I believe my position is being used

to attempt to legitimize this particular situation, and it is improper for me to be used in this fashion. [R. 680-682]

We need not present a survey of this Court's struggle to interpret and consistently apply the aggravating circumstance "especially heinous, atrocious or cruel" in order to reach a conclusion in this case. In this case it is clear that a reasonable jury, once allowed to hear Mr. Hill's explanation for his actions and the scientific and other bases for his belief that he was carrying out a moral duty to defend the life of an innocent human being, could have determined that the aggravating factor "especially heinous, atrocious or cruel" was not proved beyond a reasonable doubt.

(C) SUCH DEEPLY HELD BELIEFS ARE CONSTITUTIONALLY RELEVANT UNDER THE PRINCIPLES OF *LOCKETT V. OHIO*

Seventeen years after *Lockett v. Ohio*, 98 S.Ct. 2954, 438 U.S. 586, 57 L.Ed. 2d 973 (1978) was decided, and eight years after *Hitchcock v. Dugger*, 107 S.Ct. 1821, 481 U.S. 393, 95 L.Ed. 2d 347 (1987) was decided, the trial judge in this case committed a *Lockett/Hitchcock* error. The error, regardless of its surface justification, cannot obscure the enormity of the error's devastation on Mr. Hill's case for life. The *Lockett error* in this case was no mere technicality; the error's operation resulted in the presentation of no penalty phase defense at all.

The basic constitutional problem is that Mr. Hill's "justification" evidence was not offered in the *penalty* phase of his capital trial due to the confused and misleading rules and colloquy of the trial court. The Supreme Court's *Lockett* decision says that no relevant evidence in support of a sentence less than death may be excluded from the sentencing phase. *Lockett* gives capital defendants two rights: the right *to present* their case for life, and the right to have their sentencer

listen to and consider that evidence. *Lockett* empowers Mr. Hill to tell his sentencing jury *his* side of the story, to contextualize the homicide. The U.S. Constitution empowers Mr. Hill to tell "the rest of the story" to the jury that must decide whether Mr. Hill, the *whole* of Mr. Hill, has lost his moral entitlement to live.

As discussed above, the "justification" evidence Mr. Hill had tried to put forth was admissible to rebut the last clause of the 5(i) aggravating circumstance,[12] and was relevant to rebut the State's characterization of his acts as heinous, atrocious and cruel under the 5(h) circumstance:[13]

> The defendant's acts on July the 29th, 1994, ladies and gentlemen, are a window into a soul and mind. They are a direct reflection of exactly who and what he is and what he is capable of doing.... He killed people because of an opposition to an idea or philosophy. [R. 719-720]

It was also admissible under the principles of *Lockett*.

Generally, speaking, *Lockett* and the cases following it hold that a capital sentencing scheme must provide for an "individualized assessment of the appropriateness of the death penalty." *Penry v. Lynaugh*, 109 S.Ct. 2934, 106 L.Ed. 2d 256, 492 U.S. 302, 319 (1989). This constitutionally-compelled assessment cannot be made if the sentencer is impeded *"from considering, as a mitigating factor,* any aspect of the offense that the defendant proffers as a basis for a sentence less than death," *Lockett, supra,* 438 U.S. at 604 (plurality opinion) (emphasis omitted and added); *see also McCleskey v. Kemp,* 107 S.Ct. 1756, 95 L.Ed. 2d 262, 481 U.S. 279, 314-315, n. 37 (1987):

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[12] §921.141(5)(i) Fla. Stat. (1991).

[13] §921.141(5)(h) Fla. Stat. (1991).

> We have held that discretion in a capital punishment system is necessary to satisfy the Constitution ... [T]he Constitution requires that juries be allowed to consider 'any relevant mitigating factor,' even if it is not included in a statutory list ... If capital defendants are to be treated as 'uniquely individual human beings'... then discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed is essential. (citations omitted).

When the sentencer is unable to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation [there is a] risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett, supra,* 438 U.S. at 605 (plurality opinion); *Eddings v. Oklahoma* 102 S.Ct. 869, 712 L.Ed. 2d 1 455 U.S. 104, 118 n. 13 (1982) (O'Connor, J., concurring) ("failure to consider all mitigating evidence risks erroneous imposition of the death sentence").

Because *Lockett* guarantees the defendant a right to proffer all mitigating circumstances, the trial court must allow the defense to present evidence of any aspect of character, record, or offense that the defense wishes to proffer as a mitigating circumstance or as support for the existence of a mitigating circumstance. The trial court in this case avoided the admission of Mr. Hill's testimony and evidence in the penalty phase of the hearing, and prevented argument on it, based on a claim of irrelevancy. [R. 722, 724] The *Lockett* decision does leave open a question concerning the admission of defense evidence of mitigating circumstances: whether mitigating evidence can be excluded on the ground that it fails to comply with local rules of evidence, such as relevancy. The issue has been addressed, however, in *Green v. Georgia*, 99 S.Ct. 2150, 442 U.S. 95, 60 L.Ed. 2d 738 (1979) (per curiam), in which the Supreme Court held that the due process clause bars trial judges from rigidly applying local evidentiary rules in determining the

admissibility of mitigating evidence. The trial judge in the *Green* case had applied the local hearsay rule to exclude mitigating evidence of the defendant's minor participation in a felony-murder committed by his co-defendant.[14] The Supreme Court vacated the petitioner's sentence, holding that the "mechanistic" application of Georgia's hearsay rule in Green's capital sentencing hearing served to "defeat the ends of justice"[15] and thus violated due process.[16] The *Green* holding logically applies to all local rules of evidence and not just the hearsay rule.[17] The most significant implications of the decision, however, concern the application of local rules of relevancy. In *Lockett,* the Court noted that:

> [N]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.

Lockett, supra, 438 U.S. at 604 n. 12. Thus, the *Lockett* right to present mitigating evidence is limited to evidence that is relevant to character, record, or offense. However, the Supreme Court did not indicate whether the appropriate standard of relevancy in determining the admissibility of particular evidence is the local relevancy rule or a uniform general standard that may be more consistent with the spirit of the *Lockett* requirement that the sentencer be able to hear and

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[14]442 U.S. at 96.

[15]*Id.* at 97 (quoting *Chambers v. Mississippi,* 93 S.Ct. 1038, 35 L.Ed. 2d 297, 410 U.S. 284, 302 (1973)). In *Chambers*. the defense had sought to introduce an out-of-court statement in which the declarant apparently announced that he, and not the defendant, had committed the killing at issue. The state trial judge barred the evidence since the state hearsay rule did not contain an exception for declarations against penal (as opposed to pecuniary) interest. 410 U.S. at 299. Moreover, the state's "voucher" rule, which prohibited parties from impeaching their own witnesses, barred Chambers from calling the declarant to the stand and introducing his out of-court statement against him. 410 U.S. at 295-96. The Supreme Court held that local rules of evidence cannot be applied "mechanistically" when such rules would threaten the 'fairness and reliability [of] ... the ascertainment of guilt and innocence" and thereby "defeat the ends of justice - " 410 U.S. at 302.

[16]442 U.S. at 97.

[17]*See Collier v. State,* 244 Ga. 553, 567, 261 S.E. 2d 364, 375-76 (1979), *cert. denied,* 100 S. Ct. 1346 (1980).

consider all factors that might call for a less severe penalty than death. The *Green* decision resolves this issue and demonstrates that local relevancy requirements cannot be applied rigidly to exclude mitigating evidence. In considering whether a piece of evidence offered in mitigation of a death sentence is relevant, the courts should weight the potentially mitigating influence of the evidence against the harm that could result from the violation of the relevancy rule, and should resolve all doubts in favor of admitting the evidence.

In this case, Mr. Hill's previously proffered testimony was fundamental to the penalty phase. Based upon *Lockett* and *Green* the trial court should have assured Mr. Hill the knowing opportunity to offer the one factual basis for his actions that he had continually tried to assert. The evidence sought to be introduced by Mr. Hill would have addressed his religious belief that an unborn child is a human being from the moment of conception and that he has a moral duty to protect that innocent life from harm, even by lethal force if necessary. He also sought to introduce the scientific and other evidence that would tend to establish the reasonableness of that belief. It is obvious that a jury could have found favorable inferences from such testimony and evidence regarding Mr. Hill's character and his probable future conduct if he was sentenced to life in prison. Although it is true that any such inferences would not relate specifically to Mr. Hill's culpability for the crime he committed, there is no question that such inferences would be mitigating in the sense that they might serve as a basis for a sentence less than death.

The Constitutional purpose of the penalty phase hearing is to provide the defendant an opportunity to place before the sentencer any "facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death," *Franklin v. Lynaugh,* 108 S.Ct. 2320, 101 L.Ed. 2d 2320, 487 U.S. 164, 188 (1988)

(O'Connor, J. concurring) (citing *California v. Brown,* 107 S.Ct. 837, 93 L.Ed. 2d 934, 479 U.S. 538, 541 (1987).

That was not the mission guiding the penalty phase proceedings in this case. Any fair reading of the record in this case clearly shows that the primary concern of the trial court, even at the penalty phase hearing, was to insure that there be no testimony concerning Mr. Hill's belief that an unborn child is a human being and that he believes he had a moral duty to take the actions he took. *Lockett* is not limited to mitigating evidence that conforms to politically correct moral tenets. *Lockett* contains no reference to any particular moral theory or theories. This moral neutrality is a considerable achievement in light of the alternative. Were the justices to define mitigating evidence with reference to some particular moral theory, they could be accused of legislating their own morals, to the exclusion of other reasonably held and equally legitimate moral precepts, under cover of the eighth amendment. Nothing in the U.S. Constitution permits the courts to give credence to only some of the moral considerations which rational people might deem germane to the appropriateness of the death penalty in a particular case. As Justice Scalia has stated succinctly, the eighth amendment discloses no "objective criterion of what is mitigating." *Walton v. Arizona,* 110 S.Ct. 3047, 111 L.Ed. 2d 511, 497 U. S 639, 663 (1990) (Scalia, J., concurring in part and concurring in judgment). The *Lockett* doctrine avoids this subjective quagmire. It defines mitigating evidence by reference to the facts of the individual case and the possibility that, under some moral theory, some of those facts could conceivably give rise to an argument against imposition of the death penalty. If evidence bears on "any aspect" of the defendant's character, record or crime, *Lockett, supra,* 438 U.S. at 604 n. 12 (plurality opinion), and if it could support a reasonable argument for a sentence less than death, *see McKoy v. North*

Carolina, 494 S.Ct. 1227, 108 L.Ed. 2d 369, 494 U.S. 433, 441 (1990) ("if the sentencer could reasonably find that it warrants a sentence less than death"); *Skipper v. South Carolina*, 106 S.Ct. 1669, 90 L.Ed. 2d 1, 476 U.S. 1, 4-5 (1986) ("inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death."' (quoting *Lockett, supra*, 438 U.S. at 604 (plurality opinion)), then it is by definition mitigating evidence. The evidence that was not offered in the penalty phase of Mr. Hill's hearing bears on aspects of the defendant's character, record or crime and could support a reasonable argument for a sentence less than death. It was fatally reversible error to exclude it.

(D) SUCH DEEPLY HELD BELIEFS ARE RELEVANT TO REBUT FACTUAL MATTERS PUT INTO ISSUE BY THE STATE.

Under settled principles of eighth amendment due process jurisprudence, from *Jurek v. Texas*, 96 S.Ct. 2950, 428 U.S. 262, 49 L.Ed. 2d 929 (1976) through *Lockett v. Ohio*, 98 S.Ct. 2954, 438 U.S. 586, 57 L.Ed. 2d 973 (1978) and *Eddings v. Oklahoma*, 102 S.Ct. 869, 455 U.S. 104, 712 L.Ed. 2d 1 (1982) to *Hitchcock v. Dugger*, 107 S.Ct. 1821, 481 U.S. 393, 95 L.Ed. 2d 347 (1987), a state must assure the opportunity to present evidence of a defendant's character or record which is offered to show ***why*** he committed the offense. But the process by which Florida condemned Mr. Hill to die was unfair and unconstitutional for yet another reason. Even if the State were to be permitted, despite *Lockett* and *Hitchcock*, to impede the offering of mitigating factors which have traditionally been deemed central to the sentencing decision, the fact remains that both Florida law[18] and the State at Mr. Hill's trial placed his reasons for committing the

[18] §921.141(5)(h) and (i) Fla. Stat. (1991).

homicide at issue before the sentencing jury and sentencing judge. All that was not offered at the sentencing hearing was Mr. Hill's side of the story.

As a procedural matter, due process dictates that the defense must be allowed to review and deny or explain any factor which the sentencer is permitted to take into account in the sentencing decision. *Skipper, supra,* 476 U.S. at 5 n. 1 (1986); *Gardner v. Florida,* 97 S.Ct. 1197, 430 U.S. 349, 51 L.Ed. 393 (1977). Justice Powell of the Supreme Court would have been hard pressed to address more bluntly or more directly the error that took place in the penalty phase of Mr. Hill's case:

> As in *Gardner,* petitioner in this case was not permitted to "deny or explain" evidence on which his death sentence may, in part, have rested. *This error was aggravated by the prosecutor's closing argument...*

Skipper, supra, 476 U.S. at 10-11 (Powell, J., concurring in judgment) (emphasis added).

As noted above, during the penalty phase of the instant case the trial judge permitted the State to argue to the jury that the homicides in this case satisfied subsections (h) and (i) of Florida's capital sentencing statute,[19] that the homicides were cold, calculated and premeditated without pretense of moral or legal justification and were especially heinous, atrocious or cruel. The State argued those aggravating circumstances to the jury. The trial judge permitted the State to place Mr. Hill's mental state and moral character in issue, and to characterize Mr. Hill's motivations for the jury:

> The defendant's acts on July the 29th, 1994, ladies and gentlemen, are a window into a soul and mind. They are a direct reflection of exactly who and what he is and what he is capable of doing.... He killed people because of an opposition to an idea or philosophy. [R. 719-720]

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[19] *Ibid.*

The trial judge found such aggravating circumstance in his sentencing order. But the jury did not hear and the trial judge did not consider the testimony or actual evidence Mr. Hill sought to introduce probative of those points, even though they could not have been expected to make an accurate evaluation of the State's argument without such testimony and evidence.

Under such circumstances, the procedure followed in this case plainly violates Mr. Hill's fundamental right to a fair trial in his own defense. *Chambers v. Mississippi*, 93 S.Ct. 1038, 35 L.Ed. 2d 297, 410 U.S. 284, 302 (1973); *Green v. Georgia*, 99 S.Ct. 2150, 442 U.S. 95, 60 L.Ed. 2d 738 (1979). Once the State has made an issue of petitioner's mental state at the time of the offense, the trial court must make certain that a capital defendant has every real opportunity to rebut these State's assertions by competent evidence in the penalty phase.

In the capital sentencing context, this elementary precept of due process is embraced by the eighth amendment principle that the sentencer "must be allowed to consider on the basis of all relevant information not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek, supra,* 428 U.S. at 271. By simply holding to this mechanistic approach to the letter of the rules, thereby denying Mr. Hill an opportunity to reply, the Court compounded the already unacceptable risk "that the death penalty would be imposed in spite of factors which may call for a less severe penalty." *Lockett, supra,* 438 U.S. at 605.

Gardner v. Florida, 97 S.Ct. 1197, 430 U.S. 349, 51 L.Ed. 393 (1977), expresses the Supreme Court's recognition of the fundamental nature of the right of rebuttal in a way which is especially germane here. In *Gardner,* the Supreme Court vacated a death sentence because the Florida trial judge had imposed it after considering a confidential presentence report which defendant had not been permitted to rebut. The *Gardner* record did not reveal what was in the

presentence report, or whether the trial judge had been adversely influenced by it. The Supreme Court reversed "because of the *potential* that the sentencer *might* have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny." *California v. Ramos*, 103 S.Ct. 3446, 77 L.Ed. 2d 117, 1463 U.S. 992, 1004 (1983) (emphasis added).

What *might* have happened in one Florida courtroom in *Gardner* manifestly did happen in the Florida courtroom in Mr. Hill's case. The State was permitted to prove, and the sentencer found, that Mr. Hill committed his offense without pretense of moral or legal justification and was especially heinous, atrocious or cruel. And Mr. Hill was not given that realistic opportunity to respond.

As *Gardner* makes clear, no death sentence imposed in such a manner may be carried out. This case shows why. Even without the excluded evidence, the facts of this case may well have rendered the jury sentencing decision a close and difficult one. The jury's question to the trial judge about "life imprisonment without parole" [R. 737-738] suggests that the jury's sentencing decision was a close and difficult one. In such a case, the incremental effect of the State's speculations concerning Mr. Hill's probable mental state, moral character and motivations at the time of the offense may well have been the difference between life and death.

The death penalty for Mr. Hill should be reversed because the trial court failed to provide Mr. Hill the knowledgeable opportunity to testify as to his deeply held beliefs that an unborn child is a human being from the moment of conception and that he was morally mandated to defend and protect that human life, with lethal force if necessary, or to introduce scientific evidence as to the reasonableness of such beliefs. The trial court's actions constitute reversible error. *Lockett v. Ohio*, 98 S.Ct. 2954, 438 U.S. 586, 57 L.Ed. 2d 973 (1978).

For each of the foregoing reasons, Mr. Hill's death sentence must be reversed.

ARGUMENT II

THE DEATH PENALTY IN A CASE SUCH AS THIS CONFLICTS WITH THE EVOLVING STANDARDS OF DECENCY IN OUR SOCIETY AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AS PROHIBITED BY ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

This Court has been clear that the Florida Constitution protects individual liberties, especially in criminal cases, *Traylor v. State*, 596 So. 2d 957 (Fla. 1992). A portion of that protection is housed in Art. I, §17 of the Florida Constitution which prohibits "cruel or unusual punishments," *Tillman v. State*, 591 So. 2d 167 (Fla. 1991) [disproportionate application of the death penalty overturned]; and provides Floridians with the substantive right to be free from "excessive punishments," *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 964 (Fla. 1991). Just as the Eighth Amendment to the U.S. Constitution and its scope is not static but "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 78 S.Ct. 590, 356 U.S. 86, 101 (1958), so too the protections of Art. I, §17 of the Florida Constitution must draw their meaning from the evolving standards of decency that mark the progress of that maturing society which comprises the people of Florida. It is not unusual for the courts to accept input from respected professional organizations concerning the "evolving standards of decency" in our society and in other societies "that share our Anglo-American heritage." *Thompson v. Oklahoma*, 108 S.Ct. 2687, 101 L.Ed. 2d 702, 487 U.S. 815, 830 (1988). Amicus, a respected religious professional organization, is particularly well suited to provide this Court with indicators of contemporary standards of decency in our society that bear upon the application of the death penalty in the instant case.

The case before this Court has been formed in the crucible of culture, law and religion, a fiery nexus where the religious community and the law share common ground. The religious

community has a unique duty to provide this Court with evidence of societal standards of decency which "mark the progress of a maturing society," *Trop, supra,* 356 U.S. at 101, especially with respect to application of the death penalty under our Florida Constitution. While the evolving standards of decency that should be brought to bear upon this matter are those of the citizens of Florida,[20] the evolving standards of decency in the society of our country and in societies throughout the world are informative and helpful. *Thompson, supra,* 487 U.S. at 830-832. This Court has already determined that the death penalty is not *per se* unconstitutional under the Florida Constitution, *Raulerson v. State,* 358 So. 2d 826 (Fla.) *cert. denied,* ___ S.Ct. ___, 439 U.S. 959, ___ L.Ed. 2d ___ (1978). The question in this case is much narrower. There are no abortions being performed in men's prisons. An imprisoned Mr. Hill clearly poses absolutely no risk to society or to anyone else. If anything, his conduct at the trial would predict him to be a model, model prisoner. Evidently, even the jury suspected that society did not need to protect itself by killing Mr. Hill. The jury asked the trial judge to clarify the meaning of "life imprisonment without parole". [R. 737-738] The trial judge simply referred the jury back to the original jury instruction. [R. 745-746]

Given such facts, and the alternative of life imprisonment without possibility of parole, how can the death penalty *not* be excessive punishment under Art. I, § 17 of the Florida Constitution? Amicus will demonstrate that application of the death penalty in this case conflicts with the

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[20] See, *Fleming v. Zant,* 386 S.E. 2d 339, 342 (Ga. 1989):

> The "standard of decency" that is relevant to the interpretation of the prohibition against cruel and unusual punishment found in the Georgia Constitution is the standard of the people of Georgia, not the national standard. Federal constitutional standards represent the minimum, not the maximum, protection that this state must afford its citizens. [Citations omitted]. Thus, although the rest of the nation might not agree, under the Georgia Constitution, the execution of the mentally retarded constitutes cruel and unusual punishment.

evolving standards of decency in our society and constitutes cruel and unusual punishment as prohibited by Art. I, §17 of the Florida Constitution.

The religious community traditionally has played a pervasive and dominant role in the formation of the American social conscience. Churches and synagogues have insistently and persuasively called not only upon their own people but also upon all citizens to form a more just and humane society.[21] Not content merely to reflect the mores and prejudices of the imperfect human community, religious leaders -- both clergy and lay -- have represented, articulated, and reflected the impulse of the human spirit towards justice, compassion, and correct conduct.[22] The religious community routinely enlivens and enlightens public debate on matters presenting basic issues in American and Floridian society. Indeed, since the earliest times, religion has been "woven into the underlying texture of American politics." A.J. Reichley, *Religion in American Public Life* 169 (Washington, D.C.: Brookings Institute, 1985).[23] Religion's stewardship of moral values has led to new definitions of what is right and wrong in public policy, flowing from insights voiced by emerging religious movements.[24] Social reforms in Great Britain in the

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[21]. Joseph Cardinal Bernardin, then Archbishop of Chicago, in a presentation before the American Bar Association, noted that "the purpose of the separation of church and state in American society is not to exclude the voice of religion from public debate, but to provide a context of religious freedom where the insights of each religious tradition can be set forth and tested.... To ignore the moral dimension of policy is to forsake our religious heritage." Bernardin, "The Role of the Religious Leader in the Formation of Public Policy," 34 DePaul L. Rev. 1, 5 (1984).

[22] *Id.* at 1.

[23] "From the standpoint of the public good, the most important service churches offer to secular life in a free society is to nurture moral values that help humanize capitalism and give direction to democracy. Up to a point, participation by the churches in the formation of public policy, particularly on issues with clear moral content, probably strengthens their ability to perform this nurturing function." A.J. Reichley, *Religion in American Public Life* 359 (Washington, D.C.: Brookings Institute, 1985).

[24] For example, the first public schools were in Germany at the behest of Martin Luther. Tsaroff, Radoslav A., *The Moral Ideals of Our Civilizations* 118 (N.Y.: E.P. Dutton, 1942).

nineteenth century were brought about because the evangelical impulse, stemming from John Wesley and George Whitefield and their followers, and similarly influential leaders in other religious groups, raised the level of what human beings understood they could and should expect of each other. In short, the religious community frequently speaks to policy-makers about evolving standards of decency, policy makers listen, and public policy changes.

The issue before this Court is also a matter of great social and religious importance -- whether there is a societal consensus in Florida that it is morally, and thus constitutionally offensive (under Art. I, §17 Fla. Const.), to apply the death penalty in the instant case, a case where the defendant poses no risk to society during imprisonment and the less severe punishment of life imprisonment without parole is legally available. As stated above, that inquiry must be determined by reference to "the evolving standards of decency that mark the progress of a maturing society," *Trop, supra,* 356 U.S. at 101. The identifying standard,

> should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to public attitudes concerning a particular sentence....

Coker v. Georgia, 97 S.Ct. 2861, 53 L.Ed. 2d 982 433 U.S. 584, 592 (1977). Amicus will present specific statements of religious judicatories, organizations, and agencies of major Protestant,

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The Wesleyan/Evangelical Revival in Britain in the 18th century reshaped the social and political structures through legal reforms brought about by evangelical influence. Elie Halevy, *1 A History of the English People in the nineteenth Century* 399-400 (N.Y.: Peter Smith, 1949), quoted in Winthrop Hudson, *The Great Tradition of the American Churches* 102 (N.Y.: Harper and Bros., 1953). This same evangelical impulse fueled the growing opposition to slavery in Britain and cast opprobrium on the system of transportation of convicts to Australia. Robert Hughes, *The Fatal Shore* 162, 282 (N.Y.: Alfred A. Knopf, 1987).

Religiously inspired movements have been instrumental in many social reforms in the United States. "[C]hurch and religious groups in the United States have long exerted powerful political pressures on the state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education." *McDaniel v. Paty*, 98 S.Ct. 1322, 55 L.Ed. 2d 593, 435 U.S. 618, 641 n. 25 (1978) (Brennan, J. concurring) (quoting L. Tribe, *American Constitutional Law*, 1st ed. 866-67).

Catholic, and Jewish denominations in Florida and the United States, groups which are, as in other areas of public policy, in a unique and important position to reflect public attitudes concerning the application of the death penalty in the instant case.

The reasonable conclusion to be drawn from the jury's request that the trial judge clarify the meaning of "life imprisonment without parole", [R. 737-738] is that the jury in this case was particularly interested in the issue of whether or not it was necessary to kill Mr. Hill in order to protect society. In the recent statement of Pope John Paul II concerning the death penalty, an encyclical delivered to and on behalf of over 900,000,000 Roman Catholics around the world,[25] including 60,000,000 in the United States[26] and 1,900,000 in the State of Florida,[27] that very same concern is the core issue that determines the morality of the death penalty in our modern society:[28]

> The primary purpose of the punishment which society inflicts is 'to redress the disorder caused by the offense'.... It is clear that for these purposes to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: In other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare if not practically nonexistent."[29]

With respect to a society such as the State of Florida which provides for the safety of its citizens with a state of the art penal system and world class penal institutions, the clear import of Pope John Paul's words is synonymous with the *Letter To Christians In Florida*, jointly issued by the

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[25] *Catholic Almanac 1994* 367 (Huntington, IN.: Our Sunday Visitor, Inc., 1994).

[26] *Official Catholic Directory* (New Providence, N.J.: P.J. Kennedy & Sons, 1995).

[27] *Ibid.*

[28] *The Gospel of Life (Evangelium Vitae)*, Encyclical by Pope John Paul II, dated March 25, 1995, reported in *Origins, CNS Documentary Service*, vol. 24: no. 42, April 6, 1995, p. 689; ¶56, at p. 709; App. 1-3.

[29] *Ibid.*

bishops and other leaders of the major Christian denominations in Florida in November of 1994.[30] App. 4-7. This document specifically addressed "the increasing use of capital punishment as an instrument of public policy" and said:

> A moral consensus in opposition to the death penalty has developed within the leadership of our communions. Statements of power and grace have been made by both national and international leaders and governing bodies of the churches for which we are profoundly grateful. Our responsibility is to bring to bear upon this problem of major consequence in Florida the moral teaching of the wider Christian Community.
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> ... We hold that capital punishment is not necessary to any legitimate goal of the state, and that its use threatens to undermine belief in the inherent worth of human life and the inalienable dignity of the human estate. Our belief in the value of human life stems from the worship we offer to the Creator of human life, and from the teaching of scripture that each human is created in the image of God.
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> We affirm that the value of human life is not contingent on the moral rectitude of human beings or human institutions. It is grounded in the sovereignty of God, who alone vests His creatures with the dignity of personhood. In our theological deliberations, we have come to the conclusion that the imposition of the death penalty is inconsistent with our efforts to promote respect for human life, to stem the tide of violence in our society, and to embody the message of God's redemptive love. In times when life is cheapened and threatened on all fronts, the value and uniqueness of every human life merits profound respect, strong reaffirmation, and vigorous proclamation.
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> In time, the use of capital punishment will harden and debase our life together. It institutionalizes revenge and retribution, which are the enemies of peace. It gives official

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[30] *The Letter To Christians In Florida (A reaffirmation of the letter of November, 1984)*, was signed by:

-African Methodist Episcopal Church
-Catholic Church of the Antochean Rite
-Christian Methodist Episcopal Church
-Christian Church (Disciples of Christ)
-Church of the Brethren
-Episcopal Church
-Evangelical Lutheran Church in America
-Florida Council of Churches
-Florida District of the unitarian Universalist Association
-Moravian Church
-Presbyterian Church (USA)
-Southeastern Yearly Meeting, Religious Society of Florida
-Roman Catholic Church
-United Church of Christ

sanction to a climate of violence. It is precisely because of such longer-range concerns - especially our passionate concern for the brutalization and victimization of children and women and men -- that we raise the question whether the death penalty makes citizens safer.

Research suggests that the death penalty aggravates the level of violence in society instead of diminishing it. The abolition of capital punishment, which we favor, would nurture the public hope that the cycle of violence can be broken.

It is, after all, a part of our ministry to comfort those whose injury or whose bereavement are the result of violent crime. It is in the midst of such tragic circumstances that we become aware of the moral trap in which we find ourselves: that a commitment to wrathful retribution compounds and extends the horror of human violence, rather than subduing it.

... The wrong-doer bears responsibility to God for the infinitely valuable life of the victim, and for the suffering of the family and friends of the victim. The term of indebtedness on the part of a convicted offender is life-long.

... The fundamental issue here is the restoration of peace; peace in the hearts of the broken, peace in the hearts of the violent, peace in the hearts of all members of the community. This peace rests in the confidence that God will judge fairly and mercifully. It removes from the hands of those who govern the stain of what is at best a morally ambiguous death policy. It constitutes, in our opinion, a constructive venture in faith toward that peace which surpasses all human understanding, and which the world can neither give nor take away.

It is our conclusion that the use of capital punishment in Florida must be discontinued. We seriously question that it does any good, and we are deeply convinced that it does a great deal of harm. App. 4-7.

This position is in keeping with the overwhelming consensus position of Christian and Jewish churches nationally.[31]

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[31] In the twentieth century, the policy statements of religious bodies in the United States and Europe have come to represent the product of a significant and highly developed process that brings together biblical/theological/social science expertise with representative deliberations. The policy statements generally are the result of a long and careful process of study in which experts from theological, ethical and various technical fields, meeting over a period of years with program specialists in the denominations, research a given problem-area, prepare analyses, and draft proposed policies for the religious body. The result of this process is a well-considered and definitive statement combining the contributions of experts and the scrutiny and discussion of a widely-representative deliberative process. As such, it represents a deliberate and informed consensus. Through such deliberative processes, a large majority of religious bodies or organizations in the United States have expressed their opposition to capital punishment in the United States. These include:

There is a mistaken impression among some that the Hebrew Scriptures (sometimes referred to, in part, by Christians as the Old Testament Scriptures) mandate capital punishment. That is not the case.

> The Talmud records this discussion: The Sanhedrin that puts to death one person in seven years is termed tyrannical. Rabbi Eleazar ben Azariah says, "One person in 70 years." Rabbi Tarfon and Rabbi Akiba say, "If we had been in the Sanhedrin, no one would have been put to death." Rabbi Simeon ben Gemaliel says, "They would have (thereby) increased the shedders of blood in Israel."

-American Baptist Church in the U.S.A. (1977)
-American Ethical Union (1976)
-American Jewish Committee (1972)
-American Friends Service Committee (1976)
-Amnesty International
-Christian Church (Disciples of Christ) (1985)
-Christian Reformed Church in North America (1981)*
-Church of the Brethren (1987)
-Church Women United (1981)
-The Episcopal Church (1979)
-Evangelical Lutheran Church (1972)
-Fellowship of Reconciliation
-Friends Committee on National Legislation (1987)
-Friends United Meeting (1960)
-Lutheran Church in America (1972)
-General Conference Mennonite Church (1965)
-Mennonite Central Committee U.S. (1982)
-The Mennonite Church (1965)
-The Moravian Church (1961)
-National Board YWCA of the U.S.A.
-National Council of the Churches of Christ in the U.S.A. (1988)
-Presbyterian Church in the United States (1985)
-Reformed Church in America (1965)
-Unitarian Universalist Association (1979)
-United Church of Christ (1979)
-United Methodist Church (1980)
-United States Catholic Conference (1978)

"*The Death Penalty: The Religious Community Calls For Abolition*, (N.Y.: National Interreligious Task Force on Criminal Justice, Joint Strategy and Action Committee, 1988). *Only supports death penalty when absolutely necessary to protect society.

The Union of American Hebrew Congregations in 1959 took a position opposing the imposition of capital punishment.

> .... Jewish tradition agonized over executions.... There were so many restrictions on carrying out the death penalty in ancient Israel and Judah that by the year 70 it had been made virtually impossible in Jewish law.[32]

Current statements from the Jewish community about capital punishment are even less supportive of the death penalty:

> Present Israeli law has eliminated capital punishment. There is an exception to this law in cases of treason and genocide which has been applied *only* in the extreme situation of the Eichmann case. During the first murder trial after the establishment of the State of Israel, the two chief Rabbis urged the immediate abolition of the death penalty warning the court that it was incompatible with Jewish law.[33]

> All of the *amici* are opposed as a matter of principle to the imposition of the death penalty and support its abolition. Their position is based on their judgment as to the demands of contemporary American democratic standards, but also has its roots in ancient Jewish tradition.[34]

In short, the indicators from the major religions in our nation and in our state as to the evolving standards of decency that mark the progress of that maturing society which comprises the people of Florida is that capital punishment is not acceptable, or at best, may be tolerated as a necessary evil only in such cases where there is no other way to protect society from further harm from the offender.

The indicators from other societies "that share our Anglo-American heritage," *Thompson, supra,* 487 U.S. at 830, are also not favorable toward capital punishment:

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[32] *Judaism and the Death Penalty,* Judea B. Miller, America, vol. 167, no. 8, September 26, 1992, 183-184. App. 8-10.

[33] *Some Jewish Attitudes Toward Capital Punishment,* Jewish Peace Fellowship, Nyack, N.Y. App. 11-14.

[34] A friend of the court brief, filed by the Synagogue Council of America, composed of rabbinical and congregational bodies of Modern Orthodox, Reform and Conservative Judaism, as quoted in *Some Jewish Attitudes Toward Capital Punishment,* Jewish Peace Fellowship, Nyack, N.Y.

> ...all but one of the Western democracies, have abolished the death penalty. The exception among the Western democracies is the United States, where the death penalty still exists in many states.[35]

The death penalty remains in effect mostly in the world's more repressive nations, such as Iraq, Chile, Libya, North Korea and the People's Republic of China.[36]

On June 6, 1995, the Constitutional Court of the Republic of South Africa, a country which our society condemned and boycotted in moral outrage because it fell so far below our standards of moral decency, handed down its decision on the constitutionality of capital punishment in that country under South Africa's new constitution. *State v. T Makwanyane and M Mchunu*, Case No. CCT/3/94. The new constitution of South Africa is not specific on the validity of the death penalty and the issue was put to the land's highest court.

The court looked at what the rest of the world is doing, first noting that:

> "According to Amnesty International, 1831 executions were carried out throughout the world in 1993 as a result of sentences of death, of which 1,419 were in China...Today, capital punishment has been abolished as a penalty for murder either specifically or in practice by almost half the countries of the world including the democracies of Europe and our neighboring countries, Namibia, Mozambique and Angola." [*Makwanyane*, 17-18]

The court then addressed capital punishment in the United States, dismissing the U.S. approach as unworkable:

> The difficulty of implementing a system of capital punishment which on the one hand avoids arbitrariness by insisting on a high standard of procedural fairness, and on the other hand avoids delays that in themselves are the cause of impermissible cruelty and inhumanity, is apparent. [*Makwanyane*, 30]

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[35] *Judaism and the Death Penalty, supra.*

[36] *Death Penalty Returns in U.S., But Other Countries Spurn It,* Reynolds Holding, San Francisco Chronicle, April 13, 1992.

The court then addressed factual circumstances within its nation. Many sound familiar.

> "The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy....The power of the State to impose sanctions on those who break the law cannot be doubted. It is of fundamental importance to the future of our country that respect for the law should be restored and that dangerous criminals should be apprehended and dealt with firmly." [*Makwanyane*, 58]

In the face of such daunting and violent social ills, the court comes to a truly enlightened and profound conclusion:

> We have made the commitment to 'a future founded on the recognition of human rights, democracy and peaceful coexistence...for all South Africans.' [Citations omitted.] Respect for life and dignity lies at the heart of that commitment. One of the reasons for the prohibition of capital punishment is 'that allowing the State to kill will cheapen the value of human life and thus [through not doing so] the State will serve in a sense as a role model for individuals in society.' [Citations omitted.] Our country needs such role models....In the long run, more lives may be saved through the inculcation of a rights culture, than through the execution of murderers. [*Makwanyane*, 60-61]

In assessing the role of public opinion in the politically unpopular decision the court is about to make, the Constitutional Court of South Africa quotes U.S. Supreme Court Justice Jackson in *West Virginia State Board of Education v. Barnette:*

> The very purpose of the Bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. 319 U.S. 624, 638 [___ S.Ct. ___] (1943). [*Makwanyane*, 44]

Finally, the Constitutional Court of the Republic of South Africa holds:

> The rights to life and dignity are the most important of all human rights, and the source of all other personal rights [Citation omitted]. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others... [*Makwanyane*, 69-70]

That is the law of the land in South Africa.

In the case before this Court, Mr. Hill was morally outraged at people who were killing unborn children. He was charged and has been found guilty of killing those people to stop them from what he deeply believed to be the killing of his fellow human beings. In moral outrage, the State desires to prove the wrongness of Mr. Hill's killing by killing him -- even though the option of life imprisonment without parole is legally available, even though there is no reason whatsoever to believe that Mr. Hill would be a threat to anyone's life behind bars. If a plea to stop the insanity of "killing as a solution to killing" were legally cognizable before this Court, such a plea could be made in this case. It is not.

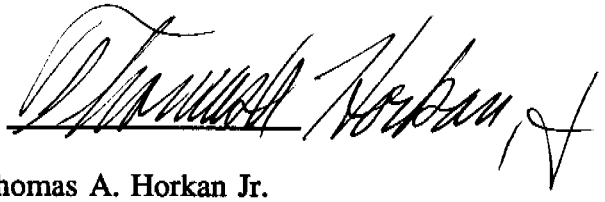
What is legally cognizable is that application of the death penalty in this case conflicts with the evolving standards of decency in western democratic society, in our American society and in our Floridian society and constitutes excessive punishment, and therefore is cruel or unusual punishment, as prohibited by Art. I, §17 of the Florida Constitution. The death penalty for Mr. Hill must be reversed.

CONCLUSION

This Amicus respectfully submits that this death sentence should be reversed. The constant attempts to argue his religious and moral convictions were to no avail to Mr Hill at the one phase of the trial where they were appropriate, because of his ignorance of trial procedure. Was he foolish to argue his own case? Undoubtedly. Did the Trial Court adhere to the letter of the Faretta doctrine? Yes. But this evidence and argument was critical to the penalty phase. It should and could have been considered, but was not.

There is a further reason why this death sentence should be reversed. The evolving standards of decency discussed herein call for reduction in the use of the death penalty in cases such as this. There is no danger of additional violence by Mr. Hill, imprisoned as he will be for the rest of his life; there is no treason in time of war, no assassination of a ruler, president or leader, no threat to the existence of the state. The Amicus respectfully urges that this death sentence be reversed.

RESPECTFULLY SUBMITTED



Thomas A. Horkan Jr.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief and appendix has been furnished by regular U.S. mail this 7th day of ~~November~~ December, 1995 to Richard Martel, Esq., Assistant Attorney General, Criminal Appeals Division, The Capitol, Tallahassee, FL 32399; Roger J. Frechette, Esq., Attorney for the appellant, 12 Trumbull Street, New Haven, CT 06511; Michael R. Hirsh, Esq., P.O. Box 329, 323 Center Street, New Haven, KY 40051; and Paul Jennings Hill, No. 459364, Florida State Prison, P.O. Box 747, R-2-N-17, Starke, FL 32091.

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