IN THE SUPREME COURT OF FLORIDA

JASON DIRK WALTON, :

Appellant, :

vs. : Case No. 69,389

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DOUGLAS S. CONNOR
ASSISTANT PUBLIC DEFENDER

Polk County Courthouse
P.O. Box 9000--Drawer PD
Bartow, Florida 33830

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS CONTINUED

TABLE OF CONTENTS CONTINUED

TABLE OF CONTENTS CONTINUED

TABLE OF CITATIONS

TABLE OF CITATIONS CONTINUED

TABLE OF CITATIONS CONTINUED

OTHER AUTHORITIES CITED

TABLE OF CITATIONS CONTINUED

STATEMENT OF THE CASE

The Grand Jurors of Pinellas County returned an Indictment on March 2, 1983 charging Jason D. Walton, appellant, with three counts of first degree murder in the shooting deaths of Gary Peterson, Bobby Martindale and Steven Fridella (R1-2). Subsequently, on April 6, 1983 the Indictment was amended and the case proceeded to a jury trial (R3-4).

Walton was adjudged guilty as charged on each of the three counts (R5-6). On March 14, 1984, three consecutive sentences of death were imposed by Circuit Judge William Walker (R9-12).

Appeal was taken to the Supreme Court of Florida, Case No. 65,101. In an opinion returned December 19, 1985, this Court affirmed Walton's convictions but vacated his sentences (R21-9). A new penalty trial before a new jury was ordered (R27-8).

Pursuant to this Court's mandate, a jury was impanelled and a penalty trial conducted before Circuit Judge Mark McGarry on August 12-14, 1986 (R302-869). By a vote of 9 to 3 on each count, the jury recommended that sentences of death be imposed (R116-8). At a sentencing hearing held August 29, 1986, Judge McGarry followed the jury's recommendation and imposed a sentence of death (R878).

Walton filed a timely notice of appeal on September 17, 1986 (R202). Court-appointed counsel was permitted to withdraw and the Public Defender, Tenth Judicial Circuit appointed as appellate counsel on September 23, 1986 (R207-9).

In written findings filed October 16, 1986, Judge McGarry found five aggravating circumstances - a) committed during a robbery and burglary, b) to prevent a lawful arrest, c) for financial gain, d) "especially wicked, evil, atrocious and cruel", e) cold, calculated and premeditated (R196-201, see Appendix). No mitigating circumstances were found (R200-1, see Appendix).

Pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Fla.R.App.P. 9.030(a)(1)(A)(i), Jason Walton now takes appeal to this Court.

STATEMENT OF THE FACTS

A. State's Evidence

On June 18, 1982, the Clearwater Police Department received a telephone call from 8 year old Chris Fridella (R511-13). Based upon this call, the Pinellas County Sheriff's Department responded to the address 6351 - 143rd Avenue in an unincorporated area known as High Point (R506-7). Upon arrival, the deputy sheriffs found three dead bodies in the living room of the residence (R525-6). The hands of each of the bodies had been bound behind the back with duct tape (R508,526). The young boy, Chris Fridella, who had telephoned was unharmed (R508, 525-7). Six shotgun shells were found outside the residence near the front door (R507, 704-7).

Dr. Joan Wood, Chief Medical Examiner for the Sixth Judicial Circuit, testified that she arrived on the homicide scene at 4:30 a.m. (R529-32). She examined each of the three victims at the scene and concluded that each had been shot from a distance of three to six feet with shotguns (R538-9). The position of the victims was consistent with a hypothesis that the shots were fired from the entrance doorway of the residence (R539).

During autopsies performed later, Dr. Wood concluded that the shotgun wounds were the sole cause of death for each victim (R539-40). Gary Peterson was killed by one shotgun wound in the back which injured his heart and aorta (542-3). He would have survived a minute or two after receiving the

wound and would have been conscious for maybe thirty seconds (R543). Bobby Martindale was shot twice (R543). The wound to his head would have caused virtually instantaneous death (R544). Steven Fridella died from three shotgun wounds, each of which would have been fatal (R540,550). Fridella would have been conscious for seconds and lived for a minute or two with anyone of the wounds (R551).

Detective John Halliday testified that during the night that the homicide occurred, there was a lot of rain (R555). When he arrived at the homicide scene, he had to park his vehicle at the end of the driveway because of the flooding and muddy conditions (R555). The whole house had been ransacked (R558).

Detective Halliday testified that there were no solid leads in the case until January 1983 (R559). Acting on a tip, Detective Halliday interviewed Terry VanRoyal and arrested him (R560). Then he obtained an arrest warrant for Walton on January 20, 1983 (R561). Detective Halliday proceeded to Hernando, Florida where Walton was living with Robin Fridella, ex-wife of victim Steve Fridella and sister of victim Gary Peterson, and the boy who was present in the house when the homicides took place, Chris Fridella (R561-2). Walton had left for work and was subsequently arrested at his place of employment (R562-3).

While Detective Halliday was transporting Walton to Pinellas County, Walton signed a written waiver of rights form

and made a statement to the detectives [1/] (R288,573-4). Walton admitted being present when the homicides occurred but denied any part in the shootings (R574). He stated that he, Richard Cooper and Terry VanRoyal went to the residence with the purpose of robbing the three victims (R575). Walton had heard that Fridella had a lot of money and cocaine stashed in the Pinellas County residence (R575).

Walton told the detectives that he, Cooper and Van Royal wore gloves and masks (R576). He carried a .357 magnum, while Cooper and VanRoyal each had shotguns (R576). They entered the residence through the unlocked front door and brought Peterson and Fridella into the living room with Martindale (R577-9). As Walton was bringing Peterson into the living room, Peterson asked "is that you, J.D.", and Walton replied "no" (R578). The young boy, Chris Fridella, was placed in the bathroom during the incident (R579).

Walton said that he ransacked and searched the entire house for money and drugs, but found only one marijuana cigarette (R579). Walton returned to the living room where Martindale, Peterson and Fridella had been bound with tape (R580). Walton turned on the TV set full blast so that neighbors wouldn't hear the victims if they screamed (R580). As Walton left through the front door, he heard shotgun blasts (R580).

1/ Admissibility of this statement was previously challenged and decided adversely to Walton. This Court affirmed admission of the statement into evidence in Walton's prior appeal (R24-5).

Walton agreed to let the detectives tape record his statement (R580). The taped statement was played to the jury (R582). [2]

John Gray, Jr., Walton's co-worker at Neumatic Products testified that the day after the homicides occurred, Walton told him that he had participated (R717-20). Walton told Gray that he had been approached by some people in a bar to go to a house in Clearwater and rob the occupants (R719-21). They couldn't find anything and weren't getting any cooperation, so Walton pointed his gun at the floor and pulled the trigger to scare the victims (R719-25). The gun didn't go off and Walton told the witness that he felt like he was going to fall apart (R720). Walton left the residence and was surprized when the other men shot the victims (R722-4).

Gray testified that Walton appeared to be in shock when he recounted the incident (R723). During a second conversation, about three days prior to his arrest, Walton told Gray the identity of the other participants and said that he wanted to keep his little brother out of it (R720).

On the day after Walton's arrest, Detective Halliday interviewed Jeff McCoy, Walton's younger brother (R588). McCoy admitted involvement in the homicides and three weapons (a .22 calibre rifle, a .357 magnum and a Savage shotgun) were seized from his residence (R588). Detective Halliday then confronted

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2/ The tape recording was not reported by the court reporter since it was entered into evidence.

Walton again and asked him why he hadn't mentioned the participation of McCoy (R590). Walton said that he had not wished to implicate his brother.(R591).

At this time, Walton also admitted that some other personal property was stolen from the victims' house (R592-3). He told Detective Halliday that prior to going into the residence, he attempted to fire the .357 pistol but that it misfired (R593).

A taped statement given by Jeffrey McCoy to Detective Halliday was introduced into evidence without objection and played for the jury (R595-6).[3/]

Jeffrey McCoy testified that he had pled guilty to three counts of first-degree murder in connection with these homicides (R658). As a condition of his plea agreement, he agreed to testify against the other participants (R659).

McCoy said that a plan to rob the victims had been first discussed about two weeks prior to the incident (R661). Appellant complained that Gary Peterson had broken into his trailer and stole some marijuana from him (R663). He also said that the victims had a lot of money and cocaine (R662). In this meeting and some later discussions, a plan was devised among Walton, Cooper, Royal and McCoy about how to rob the victims in their residence (R663-7).

Only Walton had previously visited the victims' residence (R664). He told the group where the victims would probably be sleeping and said that a child might be in the house (R665).

3/ Id.

Walton said that the child should be put in the bathroom so he wouldn't witness the robbery (R665). Walton also suggested that the plan be carried out on a rainy night so that no tire tracks would be left behind (R666).

The group decided to bring weapons and that Walton would carry the .357 pistol, Cooper and Royal the shotguns, and McCoy the .22 rifle (R667). Walton would search the residence and McCoy would collect the property (R667).

McCoy specifically stated that there was no plan to shoot anyone (R683). The purpose of the weapons was solely to scare the victims and prevent their resistance to the robbery (R684).

When McCoy returned from work one evening around midnight, Cooper and Royal knocked on his door saying the plan would be carried out that night (R668). The three went to Walton's trailer and then proceeded to drive to Clearwater (R668-9). It was raining very heavily (R669).

Walton entered the house first, through the unlocked front door (R671). He proceeded to Gary Peterson's bedroom and woke him up (R672). According to McCoy, Peterson said "J.D., what are you doing?" (R672). McCoy also testified that Walton didn't appear to be bothered by Peterson's apparent recognition of him (R685).

While Walton was searching the house, McCoy went to the living room where the three victims were being held (R674). At Cooper's direction, McCoy taped the victims' wrists behind

their backs (R674). McCoy went back to where Walton was searching and Walton asked him to go start the car and wait (R675). On his way out through the living room, McCoy observed that Gary Peterson was crying and saying "please don't kill us" (R675). Martindale appeared to be in epileptic seizures (R675). Fridella told McCoy, Cooper and Royal that Martindale was an epileptic and would die if he didn't get help (R675-6).

McCoy went to the car and started it up (R676). He heard a series of shots (R676). The three others returned and got into the car (R677). After a short distance, McCoy said he didn't know where he was and asked Walton to drive (R677). There was no conversation on the drive back until the vicinity of New Port Richey when McCoy asked if they were dead (R677), Cooper shook his head yes; something had happened (R677). Walton told his brother that his gun had misfired and showed him the bullet (R678). McCoy noticed a dent in the primer of the bullet and threw it out the window (R678).

McCoy testified that Walton later admitted he was pointing the gun at one of the victims (R679-80). On cross-examination, the witness clarified his testimony by conceding that Walton never said when it was that the gun misfired; it could have happened outside the victim's residence (R685-6). At no point during the discussion preceding the robbery did anyone ever propose shooting the victims under any circumstances (R683,689-90).

A witness who had testified against Walton in the original trial, Bruce Jenkins, could not be located (R635-6).

Accordingly, his prior testimony was read to the jury (R639-47). Jenkins had testified that about two weeks prior to the shooting, Walton said he was having problems in his relationship with Robin Fridella because her former husband, Steve Fridella, was seeing her (R640). Walton was afraid she might end their relationship (R641). According to Jenkins, Walton once said that the only way he could get Steve Fridella off his back was "to waste him" (R642).

The State also presented testimony from Dr. John Dwayne Pearson, a psychiatrist, who conducted several interviews with Chris Fridella to assess the impact that witnessing these homicides had on the young boy (R514-6). Dr. Pearson concluded that Chris had suffered a post-trauma stress reaction to the incident (R516). It would not be in the boy's best interest to appear in court and, in Dr. Pearson's opinion, he would not be a reliable witness (R517-8).

B. Defense Evidence

Walton's rap sheet was introduced into evidence to show that he had never been convicted of any crime prior to these homicides (R746).

Kimberly Johnson, who was a co-worker at Walton's place of employment, testified that she regarded Walton as quiet, kind and considerate (R748). The witness said that Walton was never violent, nor did he have a temper (R748).

Johnson continued to have contact with Walton after he was sent to prison (R749). In her opinion, he adjusted very well to prison, was educating himself, and would not pose a threat of violence to others (R749).

On cross-examination, Johnson was asked if Walton had ever expressed any remorse for the homicides (R753). She said that he had since his arrest (R753). The prosecutor impeached the witness by referring her to her prior answer to this question where she said that Walton didn't think he should be in jail for first-degree murder (R754-5). The witness was also impeached with prior testimony that Walton never admitted his role in the homicides to her (R754-6).

Lynn Shamber grew up with Walton and was a friend of his whole family (R759). She described Walton as a friendly person who was a follower rather than a leader (R760). When Walton was in the army, he received an award in basic training and was honorably discharged (R761). She never knew him to be a violent person or make threats towards others (R761). Since Walton went to prison, she remained in contact (R761). In her opinion, Walton's attitude towards prison was positive and if he remained in prison he would not pose a threat to others (R763).

On cross-examination, the prosecutor questioned the witness extensively regarding whether Walton had shown any remorse regarding the homicides (R764). She was asked if she was aware that Walton attended the funeral of Gary Peterson, one of the victims (R767). Over objection, the witness was asked if she knew that Walton had purchased Gary Peterson's

truck after the funeral (R767-8). The prosecutor specifically stated that this evidence was relevant to the issue of remorse (R767). The witness was also questioned regarding her knowledge of drug use by Walton (R770-1).

Carolyn Walton, Appellant's mother, testified that he grew up as a normal young man (R775). He was not a problem child and had an easy-going temperment (R775-6). Walton joined the army at age 17 and got an outstanding soldier award in boot camp (R776). He was stationed in Germany for around a year and was honorably discharged (R776-7).

When Appellant returned from military service, he started working full-time for Paul Neumatics Corporation near Ocala (R777). He was never a violent person (R777-8).

The witness said that Walton had adjusted to incarceration and would not be a threat to anyone (R779). She testified that Walton had expressed remorse for what happened and said that the planned robbery got out of control (R779).

C. State's Rebuttal Evidence

John Soule, a resident of Hernando, Florida, testified that he had known Walton for about six months prior to his arrest (R782-3). Over defense objection, he was permitted to testify that he had purchased marijuana from Walton on three occasions, a total of 1 1/2 ozs. (R783-5). Before making the marijuana purchases from Walton, the witness saw Cooper carrying a 50 lb. bale of marijuana in the direction of Walton's house

(R785-6). The witness tried a sample of Cooper's marijuana and expressed his opinion that the weed he bought from Walton was the same (R786).

John Gray, Jr. also testified that he had seen Walton sell marijuana (R790). He said that he had seen some bales of marijuana that had been soaked in sea water (R790). Walton was selling this marijuana and told the witness that it had come from the Citrus County impound (R790).

Walton told the witness that he attended the funeral of Gary Peterson (R791). Gray said that Walton never expressed any remorse for what happened (R791-2). Walton had purchased Gary Peterson's truck from the father of the victim (R792). At the time of his arrest, Walton was living with the ex-wife of one of the victims who was also the sister of another victim (R792). The 8 yr. old boy, Chris Fridella, was also residing with them (R793).

D. Prosecutor's Closing Argument

In closing argument, the prosecutor emphasized his contention that Walton showed no remorse for the crime (R797, 834-7). He also emphasized the ordeal which 8 yr. old Chris Fridella was subjected to (R803-4) and concluded that Chris "is traumatized for life" (R811). The prosecutor specifically asked the jury to "think of what happened to Chris Fridella" in deciding what penalty to recommend (R828).

The prosecutor also distorted the evidence when he told the jury that Walton told McCoy that he had put his pistol to someone's head and attempted to fire it (R806). Over defense objection, the prosecutor was allowed to argue facts not in evidence [4/] (R809-10).

The prosecutor also commented extensively on the fact that only Walton's mother and two friends were present to testify for the defense (R823). He said that if Walton "were indeed a decent human being", more defense evidence would have been brought forth (R823). He concluded that the jury shouldn't be surprized that only two people would speak favorably about Walton (R828).

E. Jury Instructions

A jury charge conference was held in Judge McGarry's chambers (R794). However, this conference was not reported by the court reporter (R887).

The actual jury instructions given varied from the standard instructions. The trial judge directed the jury that they "must consider" six aggravating circumstances (R852-3,109). The jury was instructed on both statutory aggravating circumstances §921.141(5)(d) (burglary and robbery) and §921.141(5)(f) committed for pecuniary gain) (R853-7, 109-11). When the trial

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4/ The prosecutor stated, "Steve Fridella was still showing signs of life... they weren't sure he was dead and they finished him off". (R809-10).

judge instructed the jury on §921.141(5)(i) (cold, calculated and premeditated), he defined "premeditation" but did not explain that "heightened premeditation" is required for application of this aggravating circumstance (R857-8, 112).

F. Sentencing

After the jury returned the penalty recommendation, the court deferred sentencing until an updated presentence investigation was prepared (R867).

At the sentencing hearing, defense counsel argued that the jury's penalty recommendation was tainted by the State's introduction of Walton's actions subsequent to the crimes as evidence of lack of remorse (R873). Walton made a brief statement to the sentencing judge saying he was sorry for getting involved in the crime; that he didn't kill anyone or intend that anyone be killed; and asking that he not be condemned for not showing his emotions (R874).

The State argued that Walton had "exhibited no remorse, and ... deserves the death penalty" (R875). Steven Fridella's parents also addressed the sentencing judge (R875-6). Mrs. Fridella told the court that she had met Walton after these crimes occurred on many occasions (R876). She said that he was "very quiet" and "never showed any emotions" (R876). She urged the court to sentence Walton to death (R876).

The court announced that "based upon the findings of the jury" a sentence of death would be imposed (R878). No

oral findings in regard to aggravating or mitigating factors were made by the court.

SUMMARY OF ARGUMENT

During the penalty trial before the jury, there was testimony about the impact of these homicides on Chris Fridella, an eight year old child who witnessed the incident. The prosecutor argued the impact on Chris as a reason for imposing death. Later, before the judge at sentencing, one victim's parents made statements urging a death sentence. This testimony and argument violated the Eighth Amendment as construed by the United States Supreme Court in Booth v. Maryland.

The prosecutor raised the issue of remorse on cross-examination of defense witnesses. Defense witnesses agreed that Walton had not expressed any remorse until after he had been tried and sentenced to death for the homicides. In what purported to be rebuttal, the prosecutor then introduced prejudicial testimony concerning Walton's actions between the time of the homicides and his arrest relevant to the question of remorse. The prosecutor's attempt to circumvent this Court's holding that "lack of remorse" cannot be considered in weighing aggravating factors should be rebuked.

In support of the statutory mitigating circumstance no significant prior criminal history, Walton introduced a "rap sheet" showing that he had no prior conviction for any crime. Over objection, the State was permitted to introduce testimony from two witnesses who accused Walton of having sold marijuana. This was improper rebuttal. The State cannot be permitted to introduce allegations about prior bad acts of a defendant simply

because he asks a jury to consider his lack of prior record as a mitigating circumstance.

In the prosecutor's closing argument, he commented on facts not in evidence. He further told the jury that if Walton "were indeed a decent human being", he would have more witnesses testifying for him at trial. Reference was made to defense counsel's subpoena power. Walton's Fifth Amendment right was violated because the prosecutor's comment called for him to explain why more witnesses did not testify. Most prejudicial of all, the line of argument invited the jury to conclude that everyone else who ever knew Walton would share the State's view that Walton deserved the death penalty.

The court's instructions to the jury were a doctored version of the standard jury instructions. Instead of being informed that they "may consider" a limited number of aggravating circumstances if "established by the evidence", the jury was instructed that they "must consider" six aggravating factors. This deviation from the standard instruction invaded the province of the jury and also failed to inform the jury that aggravating circumstances are limited to those of the statute. Relieving the State of its burden of proof as to the six statutory aggravating circumstances requires reversal even in the absence of objection.

The sentencing judge erred by failing to find the statutory mitigating circumstance of no significant prior criminal history. The sentencing order plainly states that he did not consider any of the extensive amount of non-statutory mitigating

evidence presented by Walton. Three of the aggravating circumstances found were not proved beyond a reasonable doubt.

ARGUMENT

ISSUE I

IN VIOLATION OF THE EIGHTH AMENDMENT, UNITED STATES CONSTITUTION, THE STATE PRESENTED EVIDENCE CONCERNING THE IMPACT OF THE CRIME UPON THE CHILD, CHRIS FRIDELLA, AND TESTIMONY BY THE SURVIVING PARENTS OF STEPHEN FRIDELLA URGING THAT WALTON BE SENTENCED TO DEATH.

In Booth v. Maryland, 482 U.S. ___, 107 S.Ct. ___, 96 L.Ed.2d 440 (1987), the Court held that admission of evidence concerning the emotional impact of the crime on the victim's family was irrelevant to a capital sentencing decision. Furthermore, admission of victim impact evidence and family members' opinions regarding the crime and the defendant violates the Eighth Amendment, United States Constitution, because "it creates a constitutionally unacceptable risk that the capital sentencing decision will be made in an arbitrary manner". 96 L.Ed.2d at 450.

Walton's penalty trial and sentencing took place many months before the Booth decision was rendered by the United States Supreme Court. There is no reason, however, why Booth should not be applied to cases pending on direct appeal in state courts at the time.

A. In the Penalty Proceeding Before the Jury

State witness, John Dewayne Pearson, a psychiatrist, testified regarding interviews and evaluations he conducted on Chris Fridella after the homicides (R515-8). He gave an opinion

that eight-year-old Chris "had suffered a post-trauma stress reaction to the incident" (R516). Chris had guilt feelings about the homicides of his father and uncle which were expressed in fantasies about the incident (R516-7). Dr. Pearson concluded that it would be traumatic for Chris to testify in court and that his testimony would not be reliable (R518).

The State also presented testimony by John Gray, Jr. that after the homicides, Chris Fridella resided with his mother and Walton (R793).

During the prosecutor's closing argument, he described the commission of the robbery preceding the homicides (R803-4). Calling the "story of Chris Fridella", "the most pointed of all" (R803), the prosecutor commented extensively upon the "emotional distress" inflicted by this incident on Chirs Fridella (R804).

Later in his argument, the prosecutor commented that Walton was responsible for making Chris Fridella "traumatized for life" (R811). In urging that death was the proper penalty, the prosecutor further stated:

> Look at the evidence. Loot at what happened to these three people. Think of what happened to Chris Fridella. Is there anything about this case, this crime that is mitigating? Certainly not.

(R828)

Dr. Pearson's testimony about the psychological impact of the homicides on Chris Fridella is clearly the type of evidence which the Booth decision termed irrelevant to the

decision whether a capital defendant should live or die. Emotional distress of the victim's family was specifically rejected by the Booth Court as a proper sentencing consideration in a capital case. 96 L.Ed.2d at 451.

The prosecutor further intensified the error by using the reputed emotional distress suffered by the young boy to inflame the jury and divert it from its proper role of weighing the legitimate aggravating factors against the mitigating evidence. It cannot be doubted that the victim impact evidence and argument might have contributed to the jury's 9-3 death recommendation for each homicide. After all, the jury in co-defendant Terry Van Royal's trial recommended life imprisonment despite the fact that Van Royal was a trigger man in the homicides. See Van Royal v. State, 497 So.2d 625 (Fla. 1986).

Accordingly, the testimony regarding emotional distress suffered by Chris Fridella combined with the prosecutor's argument urging the jury to weigh this victim impact evidence in their penalty decision violated the United State Constitution, Eighth Amendment and requires that Walton be given a new penalty trial.

B. In the Sentencing Before the Court

At the sentencing hearing before Circuit Judge McGarry, the parents of victim Steven Fridella testified (R875-6). Mr. Fridella testified in part:

> We felt desperation, we felt anguish. This was a cruel and

> vicious crime that should be paid for with the full weight of the law in Florida.

(R875)

The testimony of Mrs. Fridella followed:

> Your Honor, I'm Steven's mother. This man is very calculating, very manipulative. I met him some time after at Mr. Peterson's house. After this happened, we met him many times. He was very quiet. He never showed any emotions. He definitely knew what he had done.
>
> We want to visit out grandson. We have very little chance to see him now. I miss my son. I miss Mr. Peterson and Bobby Harcin daily.
>
> My son was precious to me because he was my only son.
>
> We are a loving family and a close-knit family, and I think that this man deserves exactly what the jury said, and I pray that you will agree with them.

(R876)

Not only did the testimony of the Fridellas relate to emotional impact on the family; it also characterized the crimes and Walton himself. This type of testimony is particularly difficult for a defendant to rebut in a sentencing hearing. See generally, Gardner v. Florida, 430 U.S. 349 (1977). Moreover, since the judge is the sentencer in Florida, the Fridellas' testimony could have made the difference in whether death was imposed. Supporting this conclusion is the total absence of

oral findings of fact by Judge McGarry when he imposed death.[1/]

In Booth, supra, the Court held that admission of such "emotionally-charged opinions ... clearly is inconsistent with the reasoned decision making we require in capital cases." 96 L.Ed.2d at 452. Accordingly, Walton's sentence of death was imposed in violation of the Eighth Amendment and must be vacated.

1/ In pronouncing sentence, Judge McGarry stated in total:

> Jason, based upon the findings of the jury that has found you to be deserving of the death sentence, nine to three, the Court now does impose the death sentence upon you, and you will be held in prison to await the Governor's warrant until your death.

(R878)

ISSUE II

THE ERRONEOUS ADMISSION OF PREJUDICIAL EVIDENCE CONCERNING WALTON'S ACTIONS AFTER THE HOMICIDES AND ALLEGED LACK OF REMORSE DEPRIVED WALTON OF A FAIR PENALTY TRIAL AND CAPITAL SENTENCING.

In Pope v. State, 441 So.2d 1073 (Fla. 1983), this Court held that "absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor". 441 So.2d at 1078. In the case at bar, the evidence of Walton's acts following the homicides (which were argued as showing lack of remorse) was not introduced in the State's case-in-chief. Rather, the prosecutor brought this evidence in on cross-examination of defense witnesses and through a witness labelled as "rebuttal". We contend that the State's strategy amounted to bringing in through the back door evidence that was inadmissible through the front.

Specifically, the prosecutor first introduced the subject of remorse as an issue for the jury's consideration in determining their penalty recommendation. Defense witnesses then said Walton showed remorse only after he had been convicted and sentenced for the homicides. Over objection, the prosecutor was allowed to cross-examine a witness regarding her knowledge of Walton's conduct between the time of the homicides and his arrest. The State then presented as "rebuttal", testimony regarding Walton's conduct prior to his arrest. The"lack of remorse" evidence was extensively argued both to the jury and the sentencing judge.

A. The State Introduced the Subject of Remorse as a Sentencing Consideration.

During the prosecutor's opening statement, he told the jury that after the homicides, "J.D. Walton moved in with Robin Fridella and Chris as if nothing had happened" (R497). (e.s.). By this remark, he showed a clear intent to introduce at some point in the penalty phase some evidence concerning Walton's conduct after the homicides. He also announced a clear intent that the jury weigh this evidence of Walton's alleged absence of remorse in determining the appropriate penalty to recommend.

The initial defense witness, Kimberly Johnson, testified in regard to Walton's non-violent temperment and his positive adjustment to incarceration (R748-9). On cross-examination, the prosecutor questioned her:

> Q. Did he ever express any remorse to you or sorrow about the crimes he had committed?
>
> A. During that period?
>
> Q. Any period of time.
>
> A. I don't know about them until after they arrested him. He has, yes, since he has been in jail.
>
> Q. As a matter of fact he told you, he told you he didn't believe he belonged in jail for first degree murder, didn't he?
>
> A. I don't remember.

(R753)

The prosecutor then proceeded to impeach the witness with her statement from Walton's previous trial when questioned concerning remorse:

"What if any remorse about this has he shown to you?

"Answer: Just that he didn't think he should be in there for first degree murder."

Was that your answer back in February of '84?

* * *

Q. Okay. And do you recall me asking on cross-examination at page 764, line 3, excuse me, beginning at page 763, line 25 and continuing to the next page,

"So, when we talk about remorse he was sorry because he didn't think he belonged in jail?

"Answer: Under those charges?

"Question: Yeah, and he never expressed to you any sorrow or bad feelings about what he had done? In fact he never admitted to you that he had ever done anything wrong?

"Answer: No, sir."

Do you recall giving those answers?

A. Yes, sir.

(R754-5)

Why defense counsel failed to object to this cross-examination concerning remorse which was beyond the scope of Kimberly Johnson's direct testimony is difficult to fathom. What is most significant, however, is that the prosecutor introduced the subject of remorse into the proceedings and its introduction was not invited by the defense.

B. Cross-Examination of Defense Witness Lynn Shamber Concerning Walton's Conduct Prior to His Arrest and Purported "Rebuttal" Testimony.

The next defense witness, Lynn Shamber, testified that Walton once told her that he regretted the incident; he admitted making a mistake (R762). On cross-examination, the prosecutor clarified that this conversation took place after February 1984 and that she had previously testified that Walton showed no remorse (R764). Then, the prosecutor continued:

> Q. Concerning remorse, were you aware the defendant attended the funeral of Gary Petersen?
>
> A. (Indicates negatively.)
>
> Q. Did you know that he bought Gary Petersen's truck from --

(R767)

At this point, defense counsel objected to the improper cross-examination (R767). There had been no evidence presented that Walton attended Gary Peterson's funeral or bought his truck. Moreover, even if this conduct was relevant to remorse in general, it was not relevant to impeach Lynn Shamber's testimony because she had already testified that Walton showed no remorse before his arrest (R764).

The prosecutor argued that he could cross-examine the witness concerning Walton's attendance at Gary Peterson's funeral and buying his truck. The prosecutor intended to call a rebuttal witness who would testify to these acts (R767). The court overruled defense counsel's objection and the prosecutor was permitted to continue:

Q. (By Mr. Geesey) All right, ma'am. Do you know or have you heard that after Mr. Petersen was murdered that the defendant bought his truck from Mr. Petersen's father, drove his truck around?

A. No, I was not aware of that.

Q. Were you aware that he moved in with Stephen Fridella's ex-wife?

A. I know he was seeing her. I didn't know they were living together.

Q. Did you know he was living with Chris Fridella, the eight-year-old boy who had been left in the house with the three dead bodies?

A. No.

Q. So, basically your information concerning his remorse consists of one short conversation subsequent to 1984?

A. Yes.

(R768)

In what purported to be rebuttal to this cross-examination testimony of Lynn Shamber, the prosecutor called John Gray, Jr. The relevant portion of Gray's testimony was as follows:

Q. Sir, did you attend the funeral of Gary Petersen?

A. Not myself didn't.

Q. Did you talk to the defendant about that?

A. Just to the fact that he had went.

Q. Okay, so he admitted to you to going to Gary's funeral?

A. Yes.

Q. What did he say about going to Gary Petersen's funeral?

A. Just that he had went.

Q. Did he say why or anything about --

A. No, sir.

Q. Did he ever express any remorse or any bad feelings over what had happened?

A. No, sir.

Q. You were present or working with the defendant up until the time that he was arrested?

A. Yes, sir.

Q. Whose truck was he driving? Who did it belong to before he purchased it?

A. Gary.

Q. Gary Petersen, one of the victims in this case?

A. Right, Petersen.

Q. Did he ever talk to you about why he bought Gary Petersen's truck?

A. No. It was a good deal.

Q. And who did he buy Gary Petersen's truck from?

A. His father.

Q. Gary Petersen's father?

A. Right.

Q. And who was Jason Walton living with at the time of his arrest?

A. Robin.

Q. And that's the girl whose ex-husband he had killed?

A. Right.

Q. And whose brother had also been murdered?

A. Right.

Q. And where was Chris Fridella, the little eight-year-old boy living during this time period?

A. At the time of the murder with his father. He was with his father.

Q. And after the murders, who did he live with?

A. His mother.

Q. And J.D. was living with them, too?

A. Uh-huh.

(R791-3)

It must be emphasized that defense witness Shamber said that she didn't know whether Walton attended Peterson's funeral, bought his truck or whom he was living with. She had only testified that after Walton was convicted, sentenced to death and incarcerated on death row, he regretted the incident. There was no predicate whatsoever for introducing this "rebuttal" evidence.

To be properly admitted in rebuttal, evidence must tend to discredit defense testimony and evidence. Kirkland v. State, 86 Fla. 64, 97 So. 502 (1923). The evidence at bar did not explain or contradict Lynn Shamber's testimony; rather it amplified her testimony that Walton had not shown remorse prior to his trial in February 1984. Cf., Carter v. State, 332 So.2d 120

(Fla.2d DCA 1976). The trial court may exercise judicial discretion to admit evidence in rebuttal that should have been produced by the State during its case-in-chief. Williamson v. State, 92 Fla. 980, 111 So. 124 (1926). At bar, however, the evidence of Walton's "bad acts" following the homicides would not have been admissible during the State's case-in-chief either. Compare, State v. Michael, 454 So.2d 560 (Fla. 1984).

C. No Valid Distinction Can Be Drawn Between Offering "Lack of Remorse" in the State's Case-in-Chief and Introducing it by Cross-Examination of Defense Witnesses and Rebuttal Testimony.

This case is very similar to Robinson v. State, 487 So.2d 1040 (Fla. 1986). In Robinson, the State cross-examined defense witnesses during penalty phase concerning two crimes alleged committed by Robinson after the homicide for which he was being sentenced. The State admitted that these alleged crimes would not have been admissible to prove the prior conviction of violent felony aggravating circumstance. This Court rejected the State's argument that the other crime evidence could nonetheless be placed before the jury under the guise of impeaching the credibility of defense witnesses. Calling this a meaningless distinction which would let the State introduce prejudicial evidence by one method which was clearly inadmissible by another, the Robinson court reversed the sentence of death and ordered a new penalty trial.

At bar, the State apparently gave lip-service to this Court's decision in Pope v. State, supra barring use of "lack of remorse" as a consideration in weighing aggravating factors when it refrained from presenting evidence that Walton attended Gary Peterson's funeral, bought his truck and lived with one victim's ex-wife following the homicides during the State's main case. But since this same evidence was introduced on cross-examination of defense witness Lynn Shamber and amplified by "rebuttal" witness John Gray, Jr., the effect on the jury was the same. The trial judge should have sustained the defense objection to mention of Gary Peterson's funeral and purchase of his truck. As in Robinson, making a distinction is meaningless.

D. The Improper Evidence Was Extensively Argued and Was So Prejudicial that Walton Was Denied a Fair Penalty Trial

As the First District noted in Donaldson v. State, 369 So.2d 691 (Fla.1st DCA 1979), improper rebuttal evidence may "spotlight unrelated past activities on the part of the appellant as a last impression, making it difficult to envision how the jury could possibly not have been influenced by such inadmissible evidence". 369 So.2d at 695. If there could be any doubt, the prosecutor made sure in his closing argument that the jury didn't forget. The prosecutor declared, "after the crime [Walton] showed no hesitation and no remorse for what he had done" (R797). The prejudicial and inadmissible evidence then became a feature of the State's summation:

> This is a man who can plan a crime, commit three murders, move in with a widow and her son who he ushered to the bathroom at shotgun. How calloused can one individual be?
>
> He goes to the funeral. He gets a good deal on the dead man's truck, he surrounds himself with everything that would make a person with a conscience remember the terrible thing they had done day-in and day-out. And does it affect him? Absolutely not.
>
> And what about remorse? This crime occurred in June of 1982. And what did you hear? One witness said, well, I talked and we really didn't talk about the case, and after I testified the last time that he never said anything about remorse except he didn't think he belonged in jail for first degree murder.
>
> Then he mentioned that he was sorry for it to me and it was a very brief conversation.
>
> Did she describe any emotion, trembling voice, tears? No, he just said that he was sorry that it happened and he's really adjusting well in prison life?

(R835-6)

The jury recommendation of death may well have been influenced by the "lack of remorse" evidence and argument. After all, Walton's co-defendant, Terry Van Royal was a triggerman in the same homicides and received a life recommendation in his penalty trial.[1/]

1/ See Van Royal v. State, 497 So.2d 625 (Fla. 1986).

E. Sentencing

Again, in the sentencing before Judge McGarry, both the prosecutor and Mrs. Fridella urged the court to consider lack of remorse as a factor to be weighed in determining sentence (R875-6). This was despite defense counsel's argument:

> It is my belief, Judge, that the jury was significantly swayed at the very conclusion of the case when evidence was introduced concerning his actions, concerning Jason's actions, by the State after the crime was committed as to his lack of remorse. That has nothing to do whatsoever with whether or not Jason deserves the death penalty.

(R873)

Under these circumstances, Walton's penalty trial and sentencing did not meet the Eighth Amendment's heightened standard for reliability in a capital sentencing decision. 2/ Both the jury recommendation and the proceeding before the judge were tainted by the improper admission of evidence concerning Walton's actions after the homicides. His sentence of death should now be vacated and a new penalty trial ordered.

2/ See generally, Caldwell v. Mississippi, 472 U.S. 320 at 340-1 (1985).

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING INTRODUCTION OF ALLEGED PRIOR DRUG OFFENSES WHICH DID NOT RESULT IN CONVICTION AS REBUTTAL TO THE MITIGATING CIRCUMSTANCE §921.141 (6)(a), FLORIDA STATUTES (1985).

As part of the defense case in mitigation, a copy of Walton's "rap sheet" was introduced as Defense Exhibits Nos. 1 and 2 (R746,294-5). The "rap sheet" shows no prior convictions for crime but shows a prior charge that was dismissed (R295).

During the State's rebuttal case, witness John Soule was asked if he had purchased marijuana from Walton and how many times (R783). Defense counsel objected to bringing in evidence of criminal activity not resulting in conviction. The prosecutor contended that the mitigating circumstance, no significant history of prior criminal activity, could be rebutted by juvenile offenses or other unadjudicated offenses. The court overruled Walton's objection (R784).

The State went on to elicit testimony from Soule that he purchased marijuana from Walton three times, a total of 1 1/2 ounces (R784-5). The marijuana smelled of salt water (R785). The witness saw Richard Cooper carrying a 50 lb. bale of marijuana which had the same characteristics (R785-6). Cooper was headed in the direction of Walton's house (R786).

State witness John Gray, Jr. then testified that he had seen Walton sell marijuana (R790). He saw a bale of marijuana that had been soaked in sea water which Walton was selling (R790-1). He heard that the marijuana had come from the Citrus County impound and was drying out in the attic of a building (R790).

A) Allowing the Jury to Hear Evidence About Alleged Prior Criminal Activity was Prejudicial and Violated Walton's Eighth and Fourteenth Amendment Rights to a Reliable Capital Sentencing Proceeding.

At the outset, Appellant recognizes that this Court has held that the sentencing judge may consider criminal activity not resulting in convictions as negating the statutory mitigating circumstance of no significant history of prior criminal activity. In Quince v. State, 414 So.2d 185 (Fla. 1982) and 477 So.2d 535 (Fla. 1985) this Court approved consideration of prior juvenile adjudications in rejection of this mitigating factor. A confession to a series of burglaries was held sufficient evidence to reject this mitigating factor in Washington v. State, 362 So.2d 658 (Fla. 1978). However, nothing in Quince or Washington can be construed as permitting the State unfettered license to bring in all alleged prior bad acts of an accused before the jury merely because he asks the jury to consider his lack of prior convictions as a statutory mitigating circumstance.[1/]

This Court has held in Fulton v. State, 335 So.2d 280 (Fla. 1976) that a witness may not be impeached by showing commission of a criminal offense for which there has been no conviction. Where a testifying defendant was cross-examined about his prior arrest record, a new trial was ordered. Dixon v. State, 426 So.2d 1258 (Fla.2d DCA 1983). Had Walton taken the stand in the case at bar, the State could not have asked him whether he had sold marijuana.

1/ Both Quince and Washington waived their rights to a jury penalty proceeding. Only the sentencing judge heard about the unadjudicated criminal acts.

Allowing the testimony of State witnesses Soule and Gray in rebuttal to the rap sheet was even less defensible. For one reason, a charge regarding the marijuana removed from the Sheriff's impound was listed on the rap sheet with the notation that it was dismissed. Secondly, impeachment of documentary evidence, such as this "rap sheet", should be limited to questions of authenticity and similar matters. The so-called rebuttal testimony simply did not contest the accuracy of Walton's "rap sheet".

In Robinson v. State, 487 So.2d 1040 (Fla. 1986) this Court vacated the defendant's death sentence where the jury was permitted to hear about other crimes that Robinson allegedly committed. As in the case at bar, the State in Robinson was aware that the other crimes were inadmissible to prove any statutory aggravating factor. The Robinson court particularly noted that it would not permit the state to introduce evidence by one method which was inadmissible by another.

At bar, the testimony accusing Walton of being a drug dealer could not have proved any legitimate aggravating circumstance. A jury which has been informed of a defendant's conviction for 3 counts of first-degree murder is not likely to exhibit impartiality in regard to accusations of other crimes. The testimony of Soule and Gray clearly was insufficient to convict Walton of any drug offense. As noted by the Robinson court:

> Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial.

487 So.2d at 1042.

The jury at bar may well have used the accusations that Walton sold marijuana in aggravation and not merely to diminish the weight given to the lack of significant criminal history mitigating factor. The jury recommendation of death does not meet the standard for reliability applicable under the United States Constitution, Amendments VIII and XIV to capital sentencing.

B) Consideration of Mere Accusations of Crime in Determining the Proper Penalty in a Capital Sentencing Proceeding Violates the Equal Protection Clause of the Fourteenth Amendment, United States Constitution.

In Gardner v. Florida, 430 U.S. 349 (1977), the United States Supreme Court focused upon the need for reliability in the information considered by the sentencer in capital proceedings. Although the precise issue in Gardner was non-disclosure of confidential portions of the presentence investigation which were considered by the sentencing judge, the Court's opinion (and particularly the concurring opinion of Justice White) shows great concern for the accuracy of information relied upon by a capital sentencer. The qualitative difference between a punishment of death and a punishment of imprisonment requires a corresponding need for reliability in the determination that death is the proper punishment. See, Woodson v. North Carolina, 428 U.S. 280 (1976).

Since 1983, sentencing in Florida courts for non-capital convictions has been pursuant to the Sentencing Guidelines, Fla. R.Cr.P. 3.701. Any entry in the criminal history of a defendant

being sentenced which did not result in a conviction cannot be scored on the guidelines scoresheet. Fla.R.Cr.P. 3.701 d.5.a)1). A sentencing judge cannot depart from the recommended guidelines sentencing range for "factors relating to prior arrests without conviction". Fla.R.Cr.P. 3.701 d.11. Thus, a defendant being sentenced for a non-capital offense has procedural protections which prohibit a sentencing judge from considering prior arrests or bare accusations of other criminal conduct.

By contrast, if the trial judge at bar did not err when he allowed the State to put on witnesses accusing Walton to selling marijuana, then a defendant being sentenced for a capital offense in Florida has fewer procedural protections. Some of the nine jurors who recommended that Walton be sentenced to death may have been swayed by the accusations of drug dealing. Certainly the trial judge's rejection of the no significant prior criminal history mitigating circumstance was completely based upon the testimony of Soule and Gray. (R200, see Appendix).

Such disparity between the treatment afforded non-capital and capital defendants cannot be reconciled with the Fourteenth Amendment's Equal Protection Clause. A conviction carries a hallmark of reliability because it signifies that a trier of fact has found that the criminal conduct alleged was proven beyond a reasonable doubt. To allow less reliable evidence (such as the mere accusations of criminal conduct offered against Walton) before the sentencer in a capital proceeding is to stand the Eighth Amendment's concern with reliability on its head. A capital defendant should not have his sentence determined upon

less reliable evidence than the sentence of a non-capital defendant. Accordingly, Walton should be granted a new penalty trial with no mention of criminal behavior which did not result in conviction.

ISSUE IV

THE PROSECUTOR'S IMPROPER REMARKS DURING CLOSING ARGUMENT VIOLATED WALTON'S RIGHTS UNDER THE FLORIDA CONSTITUTION, ART. I, §9, AND THE UNITED STATES CONSTITUTION, AMENDMENTS V, VIII AND XIV.

A. Standard of Review

In Bertolotti v. State, 476 So.2d 130 (Fla. 1985), this Court condemned the prosecutor's closing argument during penalty phase as clearly improper, yet refused to vacate the defendant's sentence of death. Bertolotti is often read as holding that since the jury's recommendation during penalty phase is advisory, only the most outrageous prosecutorial misconduct will warrant reversal for a new penalty phase proceeding. Such a reading is incompatible with the Eighth Amendment which requires heightened reliability in a capital sentencing proceeding. Caldwell v. Mississippi, 472 U.S. 320 (1985).

The correct interpretation of the Bertolotti decision is that it is a harmless error case. The Bertolotti court noted the substantial amount of evidence in aggravation and the lack of mitigating evidence. It would be fair to conclude that beyond a reasonable doubt Bertolotti's jury would have recommended a sentence of death anyway; the prosecutorial misconduct did not contribute to the penalty recommendation.

A similar standard has been adopted by this Court in regard to erroneous exclusion of mitigating evidence. In Valle v. State, 502 So.2d 1225 (Fla. 1987) this Court noted the stricter

standard applicable when the sentencing judge overrides a jury life recommendation and concluded that:

> unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new jury recommendation on resentencing. 502 So.2d at 1226.

As applied to the facts at bar, it is evident that Walton's situation is materially different from that of Bertolotti. Walton did not kill any of the victims and the jury could have concluded that he did not intend that the victims be killed. A co-defendant who actually did shoot the victims received a jury recommendation of life and an eventual life sentence. See VanRoyal v. State, 497 So.2d 625 (Fla. 1986). Moreover, there was convincing mitigating evidence presented concerning Walton's honorable military service, good employment record, non-violent disposition, lack of prior criminal conviction and good adjustment to prison. In view of these factors and the 9-3 jury split on the penalty recommendation, even a marginal amount of prosecutorial misconduct is sufficient to taint the jury's penalty recommendation.

B. The Prosecutor Commented on Facts not in Evidence.

During the prosecutor's closing argument, the following transpired:

> ... and I suggest there is a reason for the 30 second delay.
>
> Steve Fridella was still showing signs of life, so, after one shot to the armpit and the one shot to the neck --

MR. O'LEARY: Objection, Your Honor. That's comment on facts that are not in evidence.

MR. CROW: The Medical Examiner testified he would still be showing signs of life.

THE COURT: Objection is overruled.

MR. CROW: Thank you, Judge.

And the 30-second pause, they looked, they weren't sure he was dead and they finished him off.

(R809-10)

In fact, the pertinent portion of Dr. Wood's testimony was as follows:

Q. And how long could Mr. Fridella survive after sustaining those wounds?

A. Um, I can't really answer that because I don't know how rapidly the shots were inflicted. With any one of them he would have been conscious for seconds and would have lived for a minute or two.

(R551)

While state witness Jeffrey McCoy testified that there was a group of shots and "a slight pause" (later estimated at 30 seconds) preceding the final shot (R676), there was no evidence introduced as to what might have occurred during the pause. The prosecutor's suggestion that Fridella was showing signs of life so they made certain of his death is either beyond the record or rank speculation.

It is clearly improper for the prosecutor to refer to extra-testimonial facts during a closing argument. Thompson v. State, 318 So.2d 549 (Fla.4th DCA 1975); ABA Standards for

Criminal Justice 3-5.9 (2d ed. 1979). Where the prosecutor has not confined his closing argument to record evidence, Florida courts have reversed for a new trial. See Duque v. State, 460 So.2d 416 (Fla.2d DCA 1984), rev.den., 467 So.2d 1000 (Fla. 1985) and Ryan v. State, 457 So.2d 1084 (Fla.4th DCA 1984), rev.den., 462 So.2d 1108 (Fla. 1985).

In the case at bar, the prosecutor's improper assertion that after the first group of shots, Steven Fridella was still alive and therefore was shot again to make certain of his death may have caused the jury to find that the cold, calculated and premeditated aggravating circumstance had been proved. This may have tipped the scales in favor of a death recommendation for some of the jurors. Accordingly, Walton's penalty recommendation is tainted enough that it does not meet the Eighth Amendment's heightened standard of reliability in capital sentencing.

C. The Prosecutor Commented Upon Walton's Failure to Call More Witnesses On His Behalf.

In his defense, Walton called two friends, Kimberly Johnson and Lynn Shamber, as well as his mother to testify. He did not take the stand himself. The prosecutor's summation referred extensively to the number of defense witnesses produced and urged the jury to conclude that other witnesses were not produced because their testimony would be unfavorable to Walton.

The prosecutor commenced:

> Mitigating circumstances, the burden lies there, right with Mr. O'Leary, and we will talk about the nature and

> and quality of evidence he has presented having had the opportunity to put in everything he wanted about J.D. Walton. Anybody who has known him for the 20 to 30 years he has been on this earth.

(R813)

This theme was then expounded upon:

> What are the mitigating circumstances? Mr. O'Leary has the same subpoena power and has the same power to bring witnesses before you as do I. He has the same ammunition to put witnesses on the stand to prove whatever he needs to prove on behalf of J.D. Walton, a man who has been alive 24 years in 1982 and the four-year sentence.
>
> And how many people did you hear from and how much did they know about him? A friend of the family that has lived in a different city since 1977. They didn't really know his associates, didn't really go along with them, and obviously knew very little about what J.D. Walton was into. And another witness who didn't know anything about his drug involvement at all.
>
> Of all the people, of all the evidence that could have been brought forward, if this man were indeed a decent human being, that's all....

(R822-3)(e.s.)

This comment was later reiterated:

> But two people, and it shouldn't surprise you that only two people would come forward when you are dealing with the crimes that you are dealing with and the type of person that you are dealing with here. That's all they could come up with.

(R828)(e.s.)

The Fourth District, in Romero v. State, 435 So.2d 318 (Fla.4th DCA 1983), rev.den. 447 So.2d 888 (Fla. 1984), explained the law applicable to prosecutorial comment on a defendant's failure to call witnesses:

> Reference by the prosecuting attorney to a criminal defendant's failure to call certain witnesses impinges primarily upon two related constitutional rights. The first is the defendant's right to remain silent which places a concommitant obligation on the state not to comment on the defendant's exercise of that right. In this context, such a comment is prejudicial error. E.g., Gilbert v. State, 362 So.2d 405 (Fla.1st DCA 1978). The second is the presumption of innocence, again to be considered together with the state's obligation to come forward with evidence sufficient to prove the defendant guilty beyond a reasonable doubt. Thus, a comment that indicates to the jury that the defendant has the burden of proof on any aspect of the case will constitute reversible error. E.g., Dixon v. State, 430 So.2d 949 (Fla.3d DCA 1983) and cases cited therein.

435 So.2d at 319.

The second part of the Romero analysis (presumption of innocence) is not particularly relevant to the penalty phase of a capital trial. However, the right to either testify or remain silent is an essential right provided to a defendant through Art. I, §9 of the Florida Constitution and the Fifth Amendment to the United States Constitution. It is fully applicable in the penalty phase of a capital trial. See State v. Dixon, 283 So.2d 1 at 7-8 (Fla. 1973), cert.den., 416 U.S. 943 (1974).

Any comment by the prosecutor which calls for a testimonial explanation by the defendant violates this Fifth and

Fourteenth Amendment right against self-incrimination. Thus, when the prosecutor in Gilbert v. State, 362 So.2d 405 (Fla. 1st DCA 1978) argued that if the defendant hadn't been in Pensacola when the crime occurred he would probably have an alibi witness, the court reversed on the ground that the defendant's right to remain silent was violated. Similarly, in Dixon v. State, 430 So.2d 949 (Fla.3d DCA), rev.den, 440 So.2d 353 (Fla. 1983), a comment that the defendant would have called police officers to testify if they had favorable evidence was held reversible error. These cases must be distinguished from situations where the defendant implies that there are witnesses who would have provided favorable testimony had they been called at trial. In such situations, prosecutorial comment on the defendant's failure to call these allegedly favorable witnesses is proper. See e.g., Buckrem v. State, 355 So.2d 111 (Fla. 1978).

At bar, Walton in no way invited the prosecutor's comment that he would have more witnesses if he "were indeed a decent human being" (R823). The comment called for a testimonial explanation by Walton as to why he didn't present more witnesses. Most prejudicial of all was the insinuation this comment carries that everyone else who knew Walton would share the State's view that he deserved the death penalty.

The prosecutor's line of argument was so egregious that Walton's penalty trial did not have the requisite "fundamental fairness" guaranteed by the due process clauses of the Florida and Federal Constitutions. The jury recommendation of death cannot meet the Eighth Amendment's requirement of heightened

reliability in capital sentencing. Accordingly, Walton's sentence of death should be vacated and a new penalty trial ordered.

D. Cumulative Error

It might be contended that because Walton failed to object to the prosecutor's remarks about the number of defense witnesses, he has not preserved this point for appellate review. Probably the remarks were fundamental error; but if not, they should still be considered for cumulative effect.

In Pollard v. State, 444 So.2d 561 (Fla.2d DCA 1984) the court noted that the failure to object waived an improper prosecutorial argument issue. Nonetheless, the Pollard court, in reversing, declared that such errors:

> though waived, do have a cumulative effect and the combined weight of these errors should be considered with others to determine whether substantial rights of the appellant have been affected. 444 So.2d at 563.

As in Jackson v. State, 498 So.2d 906 (Fla. 1986), this Court should "conclude that the combined prejudicial effect of these errors effectively denied appellant his constitutionally guaranteed right to a fair trial". 498 So.2d at 910.

ISSUE V

THE TRIAL JUDGE'S INSTRUCTIONS TO THE JURY ERRONEOUSLY DIRECTED THE JURY TO FIND SIX AGGRAVATING CIRCUMSTANCES, IMPROPERLY DOUBLED TWO AGGRAVATING FACTORS AND WRONGLY DEFINED ONE AGGRAVATING CIRCUMSTANCE.

A. The Trial Judge Directed the Jury to Find Six Aggravating Circumstances

The Standard Jury Instructions in Criminal Cases, 2d edition 1987 direct the trial judge to instruct the penalty trial jury as follows:

> Your advisory sentence should be based upon the evidence that has been presented to you in these proceedings. The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

Fla.Std.Jury Inst. (Crim), p.78.

Instead of giving the standard instructions, the trial judge instructed the jury:

> Your advisory sentence should be based upon the evidence that has been presented to you in these proceedings.
>
> The aggravating circumstances which you must consider are:

(R852-3, 108-9)

The trial judge proceeded to instruct the jury on six statutory aggravating circumstances, those of F.S. 921.141(5)(b),(d),(e), (f),(h), and (i). (R853-7,109-12).

There are two major flaws in the rewritten jury instruction. In the first place, it fails to inform the jury that their consideration of aggravating circumstances is strictly

limited to those announced by the judge. The instruction as given implies that aggravating circumstances are open-ended; that the jury "must consider" those specified by the trial judge but could consider others. This is not the law. See, Drake v. State, 441 So.2d 1079 (Fla. 1983) (only statutory aggravating factors may be considered).

Secondly, the trial judge's instruction to the jury that they "must consider" the listed aggravating circumstances effectively invaded the jury's province as a fact finder. This Court has recognized that under the Florida capital sentencing scheme, a defendant is entitled to an advisory penalty recommendation from a jury. Floyd v. State, 497 So.2d 1211 (Fla. 1986). In Floyd, the trial judge erred by, in effect, instructing the jury that no mitigating circumstances were established by the evidence. At bar, the converse error is present because the jury was instructed that it was mandatory that they find six aggravating circumstances established by the evidence.

No matter what amount of evidence is presented, a trial judge cannot direct the jury to return a verdict of guilty in a criminal trial. United States v. Martin Linen Supply, Co., 430 U.S. 564 (1977). Jury instructions which have the effect of relieving the State of its burden of proof on an element of a crime violate the Fourteenth Amendment, United States Constitution. Sandstrom v. Montana, 442 U.S. 510 (1979). The appropriate inquiry for determining whether a constitutional violation has occurred is whether a reasonable juror could have interpreted the instruction in an unconstitutional manner. Id, 442 U.S. at 514.

A reasonable juror in the case at bar could have interpreted the trial court's instruction that the jury "must consider" the six aggravating circumstances as a direction that all six were proved by the evidence and must be weighed in aggravation. This Court has said:

> The aggravating circumstances of Fla.Stat. §921.141(6)[sic] F.S.A. actually define those crimes ... to which the death penalty is applicable .... As such, they must be proved beyond a reasonable doubt before being considered by judge or jury. State v. Dixon, 283 So.2d 1 at 9 (Fla. 1973).

Clearly the decision whether the aggravating factors were proved beyond a reasonable doubt was one that the jury should have made rather than the trial judge.

Jury instructions in the penalty phase of a capital proceeding can also violate the Eighth Amendment to the United States Constitution. See e.g., California v. Brown, 479 U.S. ___, 107 S.Ct. ___, 93 L.Ed.2d 934 (1987). Because the trial court's direction to the jury that they "must consider" six aggravating factors relieved the State of its burden of proof as to these aggravators and consequently undermined the reliability of the capital sentencing proceding, Walton's rights under the Eighth and Fourteenth Amendments, United States Constitution and Article I, Section 9 of the Florida Constitution were violated. A new penalty trial should be ordered.

B. The Trial Judge Erred by Instructing the Jury on Both Aggravating Circumstances F.S. 921.141(5)(d) and (f) Because This Was an Impermissible Doubling.

The trial judge instructed the jury on the aggravating factor F.S. 921.141 (5)(d) with further instruction on the felonies of robbery and burglary (R853-6,109-11). The judge also instructed the jury on the aggravating factor F.S. 921.141(5)(f) (pecuniary gain). It is well established that consideration of both robbery and pecuniary gain or burglary and pecuniary gain constitutes an impermissible doubling of aggravating circumstances. Provence v. State, 337 So.2d 783 (Fla. 1976); Maggard v. State, 399 So.2d 973 (Fla. 1981).

Appellant recognizes that this Court in Suarez v. State, 481 So.2d 1201 (Fla. 1985) rejected a claim of error where the jury was instructed on doubled aggravating circumstances. The Suarez court explained that only the sentencing judge's order is reviewed for improper doubling.

Nonetheless, where the jury is not only instructed on doubled aggravators but is also instructed to consider them, the instruction may have infected the weighing process and contributed to the jury's death recommendation. As this Court noted in Valle v. State, 502 So.2d 1225 (Fla. 1987), the great weight given the jury's recommended sentence and the stricter standard of review where a death sentence is imposed over a jury life recommendation requires a new jury recommendation where relevant mitigating evidence was withheld from the jury.

The same should apply where the factors in aggravation may have been given too much weight because of erroneous instruction.

The Eighth Amendment standard of heightened reliability in capital sentencing proceedings is not met where a Florida jury's death recommendation is tainted, as here, by improper instruction on the law.

C. The Jury Was Instructed on Premeditation as Part of the Cold, Calculated and Premeditated Aggravating Circumstance Instruction But Was Not Informed of the "Heightened Premeditation" Requirement.

In instructing the jury on aggravating circumstances, the trial judge gave the standard instruction on the cold, calculated and premeditated circumstance (R857,112). However, he then went on to interject the definition of premeditation which is usually given during the guilt or innocence phase of a capital trial, but not in penalty phase. See Fla.Std.Jury Inst. (Crim.), p63,79.

The problem with defining premeditation in conjunction with the cold, calculated and premeditated circumstance is the possibility that the jury was misled into thinking that the mere presence of premeditation is sufficient to prove this aggravator. The caselaw is clear that the cold, calculated and premeditated aggravator requires "heightened premeditation" which is blatantly distinguishable from the amount of premediation required to convict a defendant of first-degree murder. See, Nibert v. State, 508 So.2d 1 (Fla. 1987); Hardwick v. State, 461 So.2d 79 (Fla. 1984).

This Court has previously held that inaccurate and confusing jury instructions given during the penalty phase of a capital trial deny the defendant his right to a jury advisory

opinion. Floyd v. State, 497 So.2d 1211 (Fla. 1986). A jury instruction which informs the jury of a lower standard of premeditation than that needed to find the aggravating factor also destroys the reliability in capital sentencing which the Eighth Amendment requires. Accordingly, the jury's death recommendation in Walton's penalty trial was tainted and should be vacated because the jury instruction did not satisfy either Florida procedure or the Eighth Amendment, United States Constitution.

D. Waiver

In the transcript of the proceedings, reference is made to a jury instruction conference to be held in Judge McGarry's chambers (R794). Upon this Court's order to reconstruct the charge conference (R888), a stipulation was filed agreeing that the jury instructions had already been prepared and no objection was made to them by defense counsel(R891).

Ordinarily, under the contemporaneous objection rule established by this Court in Castor v. State, 365 So.2d 701 (Fla. 1978), errors in jury instruction will not be considered on appeal unless objected to in the trial court. However, under the circumstances presented at bar there are three reasons why the lack of objection at trial should not result in waiver of appellate review.

To begin with, the "Stipulation As To Reconstruction of Record" (R891) does not address some of the essential points regarding preparation of the jury instructions. The stipulation does not clarify whether the State Attorney's Office typed the

instructions. Neither does the stipulation clarify whether the prosecutor represented to defense counsel and the trial judge that these were the standard jury instructions. Remand to the trial court for a hearing may be required to resolve these essential facts.

Secondly, instructing the jury that they "must consider" six aggravating circumstances is egregious enough to qualify as fundamental error. Mistakes of a similar magnitude in jury instructions have resulted in reversal by Florida courts despite procedural default. See, Anderson v. State, 276 So.2d 17 (Fla. 1973)(failure to define premeditation); Alejo v. State, 483 So. 2d 117 (Fla. 2d DCA 1986)(failure to define justifiable and excusable homicide as part of the manslaughter instruction); and Webb v. State, (Fla. 4th DCA February 10, 1988)[13 FLW 421] (coercing jury to render a unanimous verdict "tonight").

The third reason why a waiver should not be found is the heightened degree of scrutiny applicable to capital sentencing decisions. Cf. California v. Ramos, 463 U.S. 992 (1983). This Court has previously held in Harris v. State, 438 So.2d 787 (Fla. 1983) that in a capital case only the defendant personally can waive instruction on lesser-included offenses. This holding has not been extended to non-capital cases. Jones v. State, 484 So.2d 577 (Fla. 1986).

Although conceding the existence of six aggravating circumstances and waiving instruction on lesser-included offenses are distinguishable, the reasoning of Harris is still relevant to Walton's situation. Walton was not present himself when the

jury instructions were approved (R794,891). Any instruction which tended to relieve the State of its burden of proof as to the aggravating circumstances should have been approved by the defendant personally in a capital case.

Accordingly, the errors in the instructions given to Walton's jury require that his sentence of death be vacated and a new penalty proceeding ordered.

ISSUE VI

THE SENTENCING JUDGE ERRED BY FAILING TO FIND APPLICABLE MITIGATING FACTORS AND FINDING UNSUPPORTED FACTORS IN AGGRAVATION.

A. The Court Should Have Found the Statutory Mitigating Circumstance of No Significant History of Prior Criminal Activity.

In rejecting the statutory mitigating factor of F.S. 921.141(6)(a), the trial court wrote:

> The defendant had a history of dealing in marijuana, amphetamines and quaaludes.

(R200, see Appendix)

There was no evidence in the record that Walton was a dealer of amphetamines or quaaludes. He had never been charged, let alone convicted, of dealing in marijuana. The sole evidence to support this assertion was the testimony of state witnesses Soule and Gray (See Issue III, supra).

In cases where the defendant had more of a criminal history than Walton the statutory mitigating factor has been found. For instance, in Salvatore v. State, 366 So.2d 745 (Fla. 1978), the defendant had a prior conviction for burglary resulting in a term of probation. He also admitted to the theft of a boat. This history of prior criminal activity was termed "not significant" by the sentencing judge. See also, Combs v. State, 403 So.2d 418 (Fla. 1981)(prior plea to burglary with term of probation not a significant criminal history); Hargrave v. State, 366 So.2d 1 (Fla. 1978)(although some evidence, no prior convictions sufficient to establish mitigating circumstance).

This Court has approved rejection of the F.S. 921.141 (6)(a) mitigating factor where there has been highly reliable evidence of an extensive pattern of criminality although the defendant had no convictions. In Quince v. State, 414 So.2d 185 (Fla. 1982) and Quince v. State, 477 So.2d 535 (Fla. 1985) the defendant's juvenile adjudications for offenses which included armed robbery and burglary were held sufficient to reject the no significant criminal history mitigator. Likewise, in Washington v. State, 362 So.2d 658 (Fla. 1978) the defendant's confession to a series of burglaries and dealing in stolen property was a reliable basis for rejecting the F.S. 921.141(6)(a) mitigating circumstance.

In the case at bar, however, there are merely accusations from state witnesses that Walton sold marijuana. The testimony would have been insufficient to prove Walton guilty beyond a reasonable doubt of any drug offense. Accordingly, the sentencing judge should have noted the lack of reliability inherent in the mere accusations and given Walton the benefit of the F.S. 921.141 (6)(a) mitigating factor.

B. The Court Failed to Consider the Non-Statutory Mitigating Evidence.

In the court's written findings in support of the death penalty, each of the statutory mitigating circumstances is listed along with the court's reason for rejection (R200-1, see Appendix). The following statement then appears:

> Considering the foregoing, this Court does affirm the findings of the jury

> recommending the death penalty, and it is so ORDERED.

(R201, see Appendix).

No mention whatsoever is made of the non-statutory mitigating evidence offered by Walton.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the United States Supreme Court wrote:

> [j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.... The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

455 U.S. at 114-5.

At bar, the sentencing judge's order plainly states that he considered only the statutory mitigating circumstances and not the substantial amount of non-statutory mitigating evidence put forward by Walton. There is a clear violation of Eddings.

Walton produced evidence of four non-statutory mitigating circumstances which should have been considered by the sentencing judge. One of these was Walton's honorable service in the army where he won an award in basic training (R761,776-7). Military service is an established factor to be considered in mitigation. Pope v. State, 441 So.2d 1073 (Fla. 1983); Halliwell v. State, 323 So.2d 557 (Fla. 1975).

A second factor which the sentencing judge should have considered was testimony about Walton's non-violent disposition

and lack of prior history of violence. (R748,761,775) In Washington v. State, 432 So.2d 44 (Fla. 1983) and Ross v. State, 474 So.2d 1170 (Fla. 1985), this Court pointed to such character evidence as significant.

Walton's record of employment, consisting of a full-time job with one employer since the time he was honorably discharged from the army (R777), should also have been considered in mitigation. McCampbell v. State, 421 So.2d 1072 (Fla. 1982).

A fourth non-statutory mitigating circumstance was evidence of Walton's positive adjustment to prison (R749,763,779). This Court has given such evidence significant weight in McCampbell, supra and Valle v. State, 502 So.2d 1225 (Fla. 1987).

Although Walton was not restricted in his presentation of the above non-statutory mitigating evidence, mere presentation is not enough. The sentencer must actually consider all relevant evidence presented in mitigation. Hitchcock v. Dugger, 481 U.S. __, 107 S.Ct. __, 95 L.Ed.2d 347 (1987). The sentencing judge's notation that he considered only the statutory mitigating circumstances when imposing sentence requires remand for a reweighing.

C. The Sentencing Judge Erred in Finding the Aggravating Factor Section 921.141 (5)(e) (to avoid lawful arrest) Applicable.

In his written findings, the sentencing judge relied heavily upon the extensive precautions taken by Walton and his three companions to avoid identification in their planned robbery (R198-9, see Appendix). Because one of the victims, Gary Peterson, may have recognized Walton despite his mask, the sentencing judge

concluded that the murders "were obviously committed to eliminate them as witnesses" (R199, see Appendix).

The actual facts surrounding Peterson's possible recognition of Walton bear repetition. In Walton's confession to Detective Halliday, he mentioned that Peterson said "is that you J.D.?" and Walton replied "no" (R578). Jeffrey McCoy's testimony at trial confirmed that Peterson apparently recognized Walton. (R672). However, McCoy emphasized that Walton did not appear to be bothered by Peterson's recognition and never said anything to the effect that the victims had to be shot because Walton was identified. (R684-5).

This Court has held in Menendez v. State, 368 So.2d 1278 (Fla. 1979) that the avoiding arrest aggravating factor is not applicable unless the State can clearly prove that "the dominant or only motive for the murder was the elimination of witnesses." 368 So.2d at 1282. A victim's recognition of the defendant does not in itself prove this aggravating factor. Caruthers v. State, 465 So.2d 496 (Fla. 1985). See also, Livingston v. State, (Fla. March 10, 1988) [13 FLW 187].

It should also be kept in mind that the two triggermen, Royal and Cooper, were unknown to the victims. Even if Peterson's recognition of Walton might lead to Walton's arrest, it would pose no great danger of arrest to Royal and Cooper. Because the State failed to prove that any of the robbers expressed concern about identification or arrest, this aggravating factor must be struck.

D. The Sentencing Judge Erred in Finding the Aggravating Factor Section 921.141 (5)(h) (especially heinous, atrocious or cruel) Applicable.

In Lewis v. State, 377 So.2d 640 (Fla. 1979), this Court discussed the parameters of the F.S. 921.141(5)(h) aggravating circumstance. Noting that "all killings are heinous", the Lewis court held that the legislature intended that the death penalty be authorized for only the "especially heinous" crime. 377 So.2d at 646.

While the murders at bar were heinous, they did not rise to the level of the "especially heinous". A similar factual pattern was presented to this Court in Riley v. State, 366 So.2d 19 (Fla. 1978). Riley and a companion came to the business where Riley was employed for the purpose of robbery. Three persons were present; they were threatened with pistols, forced to lie on the floor, and bound before being shot in the head. One of the victims miraculously survived to testify.

In finding that the crime was especially heinous, atrocious or cruel, the trial judge in Riley pointed out that the son who lived was forced to witness his father's execution. This Court disapproved the finding on the basis that the instantaneous deaths by gunshot wounds were not atrocious to the victims.

No meaningful distinction can be made between the facts in Riley and those at bar. The three victims at bar all met a relatively instantaneous death from shotgun wounds. None would have been conscious for more than seconds after the shotgun blasts

(R543,544,551). Indeed, the sentencing judge at bar also made the same observation disapproved in Riley about one victim having to witness the deaths of his two friends (R200, see Appendix). Accordingly, the sentencing court's finding that the homicides were "especially wicked, evil, atrocious and cruel" should be struck (R199, see Appendix).

E. The Sentencing Judge Erred in Finding the Aggravating Factor Section 921.141 (5)(i) (cold, calculated and premeditated) Applicable.

In Rogers v. State, 511 So.2d 526 (Fla. 1987) this Court focused upon the necessity for proof of prior calculation before this aggravating circumstance may be found. The Rogers court struck this aggravator where a premediated killing occurred during the course of a robbery but there was no evidence that the defendant "had a careful plan or prearranged design to kill anyone during the robbery". 511 So.2d at 533.

The State'e evidence at bar showed a prearranged plan to enter the victims' house and rob them. Killing the victims was never discussed as even a remote possibility (R683-4,690-1). The purpose of the weapons was to prevent resistence to the robbery. (R684).

The trial court's sentencing order relies heavily upon testimony from Bruce Jenkins that Walton was afraid that his relationship with Robin Fridella might end because she was seeing her former husband, Steve Fridella, again (R640-1). About two weeks prior to the incident, Walton allegedly told Jenkins that the only way to get Steve Fridella off his back was to "waste" him.(R642,200, see Appendix).

However, if this desire to "waste" Fridella was in fact a motive for the shootings, it was never communicated to the other participants. Royal and Cooper, the actual triggermen, had no personal reason to shoot Fridella. Walton himself didn't shoot anyone. Although the State tried to insinuate that Walton directed the shooting of Fridella, there was no evidence to support this position.

In short, the State failed to prove beyond a reasonable doubt that there was any prearranged design to kill anyone during the planned robbery. Accordingly, the cold, calculated and premeditated aggravating circumstance should be struck.

CONCLUSION

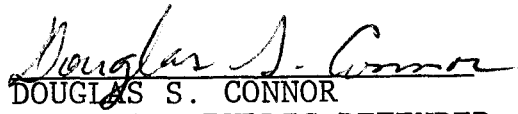
Based upon the foregoing argument, reasoning and authorities, Jason Dirk Walton, Appellant, respectfully requests this Court to grant him the following relief:

Issues I - V - reversal for a new penalty proceeding before a new jury.

Issue VI - remand for reweighing by the sentencing judge.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT



DOUGLAS S. CONNOR
ASSISTANT PUBLIC DEFENDER

Polk County Courthouse
Post Office Box 9000
Drawer PD
Bartow, Florida 33830
(813) 534-4200

COUNSEL FOR APPELLANT