IN THE SUPREME COURT OF FLORIDA

JAMES SAVAGE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 75,494

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

JAMES HUDSON SAVAGE, Appellant, v. STATE OF FLORIDA, Appellee.	)	No. 79,494

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On December 13, 1988, the fall term grand jury, Brevard County, indicted James Hudson Savage for first-degree murder, armed robbery, and sexual battery. (R3357) Prior to trial, Mr. Savage unsuccessfully attempted to exclude certain physical evidence and DNA test results. (R3395-99) Savage also unsuccessfully sought to suppress statements made at the time of his arrest. (R3107-10,3435)

The defense requested prior to trial that any requests for funds for expert assistance be conducted on an ex parte basis. (R1941,3451-76) When the state objected (R1958), the court refused to accept motions not served on the prosecution. (R1964,2080)

The case proceeded to a jury trial before the Honorable Lawrence V. Johnston, Eighteenth Judicial Circuit. The trial court rebuffed Appellant's request for individual voir dire. (R3400)

During the trial, the court overruled numerous defense objections and allowed the state to admit certain evidence. (R986,1024,1071,1102,1115,1118-19,1121,1126,1132,1262-65,2099)

The trial court also denied a requested instruction dealing with James Savage's intoxication at the time of the offense. (R1423,1471) The court instructed the jury as to the maximum and minimum penalties on all lesser-included offenses over the vehement objection by defense counsel. (R1446-7,1523) Additionally, the trial court attempted to define "reasonable doubt" for the jury. (R1541)

At the conclusion of the state's case-in-chief, defense counsel moved for a judgment of acquittal which the trial court denied. (R1352-66,1370) Following deliberations, the jury returned with verdicts of guilty as charged on each of the three counts. (R1599-1602,3448-50)

A penalty phase commenced on December 11, 1989. (R2263 et. seq.) The trial court excluded many defense witnesses and much mitigating evidence at the penalty phase. (R2422-92,2393-2418,2506-37,2550-68,2625-6) The court also allowed the state to introduce evidence that James Savage had been released from prison only 23 days prior to the crime. (R2571-91)

James Savage's lead counsel at the penalty phase, Mr. John Delgado, was forced to refrain from any further participation

shortly after that phase started. The state forced Delgado to withdraw when they threatened him with criminal prosecution. (R2647-66,2818-19)

The trial court instructed the jury on two aggravating circumstances over defense objection. (R2198-2233,2994,3540)

Despite the many hardships suffered by the defense during the penalty phase, the jury returned with an overwhelming 11-1 recommendation that James Savage deserved to live the rest of his life in prison. (R3580) The trial court chose to ignore this mandate and sentenced James Savage to death. (R3580-88) The trial court found: (1) that the murder was cold, calculated and premeditated without any pretense of any moral or legal justification; (2) that the murder was committed while the defendant was engaged in the commission of a sexual battery; (3) that the murder was committed for pecuniary gain; (4) that the murder was especially heinous, atrocious and cruel; and (5) that the defendant had previously been convicted of a prior violent felony. (R3581-3)

In mitigation the trial court found that James Savage was under the influence of extreme mental or emotional disturbance at the time of the murder. (R3583) The court also found that James' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, although not substantially. (R3584) Although the trial court apparently accepted the unrebutted evidence that James Savage had a mental age of fourteen at the time of the offense, the court declined to find

any link between that fact and the crime. (R3584) The trial court also found many non-statutory mitigating circumstances, including: (1) emotional abuse as a child; (2) an unstable early life; (3) childhood beatings; (4) James Savage's forcible cross-racial and cultural adoption; (5) James' exposure to racism; and (6) the harsh discipline of his adoptive parents. (R3584-5) The trial court declined to give any significant weight to this overwhelming mitigating evidence. (R35) The trial court sentenced James Savage to two consecutive life terms on the robbery and the sexual battery. (R3574-7) James Savage filed a timely notice of appeal on February 1, 1990. (R3589-90) This Court has jurisdiction pursuant to Article V, Section 3(b)(1) of the Florida Constitution.

STATEMENT OF THE FACTS

GUILT PHASE

On November 25, 1988, Marcia Denius discovered the body of Barbara Ann Barber in the alley behind Barber's interior design shop in Melbourne. (R992-1002) Barber's clothes were in disarray. (R1100) A subsequent autopsy indicated that Barber died as the result of asphyxiation due to strangulation. (R1149-50)

At the time of the murder, James Savage was a transient in the Melbourne area. He had been spotted in the vicinity of Barber's shop during the evening hours of November 23, 1988. (R1241-43) After the crime scene had been processed, officers Plymale and Baker began scouting the downtown area hoping to find people with information about the crime. (R1247-50) In a way more reminiscent of Casablanca's "rounding up the usual suspects" than an arrest based on probable cause, Plymale and Baker encountered Savage and several other transients loitering in a picnic area. Although everyone denied knowing anything about the crime, Detectives Sarver and Nichols arrived at the scene, and transported Savage to the police station. (R1250-54) After several hours of detention, interrogation, and gathering of physical evidence, the police were of the opinion that they had insufficient evidence to charge Savage with the murder. (R1255,1719-20,1696)

The authorities ultimately arrested James Savage and charged him with violation of probation. (R1751-60) Following the conclusion of the proceedings below, the Department of Corrections revealed that James Savage had not been on probation after all.

(See attached appendix) After his arrest, Savage made certain incriminating statements indicating that he was present at the scene when another individual murdered Barber in the course of robbery. (R1277-95) At the jail the next day, Savage gave another statement indicating that he acted alone. (R1296-1311) Savage had been drinking and smoking crack cocaine for several days prior to the incident. (R1309) He intended to steal Barber's car in order to buy more cocaine. Barber surprised him during the course of the theft and the incident turned violent. The police admitted that James was docile, cooperative, and remorseful. (R1307-8)

PENALTY PHASE

The prosecution of James Savage created as much publicity as any recent capital murder case in the State in recent years. The public interest was sparked less by the crime itself than by the actors involved. On the one side, the victim was a well-respected local business woman; on the other side the accused, James Savage -- unfortunately so named as a result of his adoption by the Rev. Graeme and Nesta Savage -- was the only full-blood aboriginal Australian in the State, on trial for his life.

That the jury would find James Savage guilty was a foregone conclusion, as a result of the saturation publicity detailing his confessions. However, an attentive jury comprised of a cross-section of the community -- from a member of the National Rifle Association (NRA) to a woman who had herself been adopted -- opted by an overwhelming eleven-to-one vote for life.

It is no secret why the jury thought this case deserved life. They heard some, although not all, of the rather shocking circumstances of James' adoption into a white family. A white officer of the "Aboriginal Welfare Board" had threatened his aboriginal mother, Beverly Moore, with prosecution for adultery if she did not give her new-born son up for adoption. (R2316-32,2351-71)

Fate chose then to torment the baby, then named Russell Moore, with the adoptive name of James Savage, which he bore to America when his new parents moved. If a defenseless minority is more likely than average to bear the burden of discrimination, James became a minority of one in the State of Florida. Even his own adoptive father -- put on the stand as a witness by the prosecution at the penalty phase -- called him "Nigger" and beat him, for adolescent misdeeds committed by his white siblings. (R2372-91,2914-25)

Rev. Savage became a minister at the Florida State Prison, where James now resides under sentence of death. While the family lived here, James met discrimination in the local church, in school and in every walk of life. (R2760-5) His private escape from the age of eleven on, uncurbed by his adoptive parents, was to turn to the bottle. (R2766-7,2795)

James' family went back to Australia. However, he later returned to Starke as a prisoner, where he learned still more destructive forms of addiction. It was when he came out of this experience that James Savage was allegedly involved in the crime charged in this case. At the time of this crime, his whole life

revolved around his next "fix" of crack cocaine. (R2830-5) Adding on top of all this James' schizoid personality and other mental problems, it is small wonder that the jury voted for life. (R2770-1)

SUMMARY OF ARGUMENTS

Mr. Savage submits his brief in two sections. The first section addresses the reason why his sentence of death should be reversed and remanded for entry to a sentence of life without the possibility of parole for twenty-five years. Initially, Mr. Savage contends that the trial court should not have overridden an 11-1 jury vote for life in the face of the overwhelming evidence presented in mitigation. Tedder v. State, 322 So.2d 908 (Fla. 1975). The mitigating evidence included James Savage's traumatic, formative experience as the only full-blooded Aboriginal in the State of Florida. The undisputed evidence also demonstrated that Jim Savage became incapacitated due to the overwhelming abuse of mind-altering drugs, including alcohol, marijuana, and crack cocaine which he used for a solid two weeks prior to the murder. James Savage suffers from brain damage as a result of his continual abuse of alcohol beginning at the tender age of eleven. His mental age had arrested at approximately fourteen at the time of the crime. Additionally, James Savage showed great remorse for his actions. Following his arrest, he cooperated fully and completely with the police. The trial judge discounted some of this mitigating evidence and gave little weight to the rest of it.

The trial court also improperly considered certain evidence in elevating Savage's sentence to death. He relied upon hearsay evidence which Savage had no opportunity to rebut. The trial court also relied in part on Savage's violation of probation. The state

has now admitted that Mr. Savage was not on probation at the time of the crime.

The trial court also excluded critical evidence in mitigation. The jury never heard about the historical roots of Aboriginals and their contemporary problems set in this cultural context. The trial court considered evidence that pertained only to James Savage's first six years of life as "too remote in time." (R2491) The trial court also allowed the jury to improperly consider non-statutory aggravating factors, specifically that Savage had been released from prison only twenty-three days before the crime occurred.

John Delgado, Mr. Savage's lead counsel at the penalty phase, felt forced to exclude himself from most of the trial after the state threatened to prosecute him for a criminal charge that had no basis in fact. During a recess, Mr. Delgado made a passing remark to Mr. Savage's adoptive father who was called as a witness for the prosecution. The state refused to back down from their position and insisted that they intended to pursue criminal charges as well as bar sanctions. As a result of these very real threats by the state, Mr. Delgado excluded himself from any further participation at the trial. The state's action resulted in a denial of counsel at a critical point in the proceedings.

Over defense objection, the trial court instructed the jury concerning the aggravating circumstances dealing with heightened premeditation and cruelty. In spite of the jury's life recommendation, the trial court found these two aggravating

circumstances in sentencing James Savage to death. The evidence clearly does not support the finding of heightened premeditation. The unrefuted evidence establishes that James Savage intended only to steal the victim's car. Only after she caught him in the act did the episode turn violent. Savage challenges the jury instructions on both of these aggravating circumstances based on constitutional grounds. The bare-bones language of the instructions failed to adequately channel the jury's discretion in its decision relating to the imposition of sentence.

In the second portion of this brief, Mr. Savage challenges his conviction. In doing so, Mr. Savage maintains that, upon retrial, he could not be subject to the death penalty once again. Bullington v. Missouri, 451 U.S. 430 (1981). To hold otherwise would violate fundamental Double Jeopardy principles provided by the federal and state constitutions.

James Savage challenges on various grounds the admissibility of physical evidence and statements. The physical evidence was obtained from Mr. Savage during his detention at the police station prior to any Miranda warnings. Due to his cultural background, low intelligence, and recent status as a state prisoner, James Savage believed that he was under arrest and not free to refuse the detectives' requests. The totality of the circumstances rendered his consent involuntary.

Mr. Savage also challenges the admissibility of this evidence based on a Giglio violation. The police eventually arrested Mr. Savage based on a violation of probation. After trial and

sentencing, the Department of Corrections finally revealed that Mr. Savage was not on probation at the time. (See attached appendix) This renders the arrest illegal and all the fruits thereof inadmissible. At the very least, this Court should remand for a hearing to determine the nature and scope of the state's subornation of perjury in this case.

James Savage also challenges the trial court's failure to conduct individual and sequestered voir dire. The extraordinary nature of this case required sequestered examination of the venire. The overwhelming publicity in this case is revealed by the fact that over 92% of the first group of jurors knew about the case. Many of the potential jurors admitted to a subconscious bias, indicating that they thought that James Savage was apparently guilty. Some potential jurors had already decided that James was without doubt guilty. Prior to being excluded, other jurors heard these opinions expressed. This is one of the truly extraordinary cases, where the trial judge was required to allow exhaustive voir dire of the saturation publicity in an individual, sequestered setting.

When the police initially stopped James Savage, James made a comment to an officer questioning why he was being detained. Mr. Savage stated, "I've been standing around before when people have been murdered, and I haven't been arrested." (R1272) The trial court allowed the state to introduce this evidence over vociferous defense objection. The evidence was certainly not relevant to any

issue at trial. Any perceived minimal relevance is certainly outweighed by the probative value.

Reversible error also occurred when the trial court denied a defense request regarding James Savage's intoxication at the time of the offense. Florida requires the presiding judge to charge the jury upon the law of the case. A defendant is entitled to a jury instruction on any theory of defense, if there is evidence in the record to support it, regardless of how weak or improbable it may be. Voluntary intoxication is a defense to first degree murder. The state did not refute the evidence established by Mr. Savage's statements that he had been smoking crack cocaine at the time of the offense. The instruction was therefore justified.

James Savage's only defense at the guilt phase was his contention that the murder was second rather than first-degree. Over defense counsel's objection, the trial court instructed the jury on the maximum and minimum penalties for all lesser-included offenses. Defense counsel correctly contended that, should the jury realize that the trial court could place James on probation (an unlikely occurrence in any event), if they returned a guilty verdict for second-degree murder. The rules of criminal procedure and the holdings of this Court reveal that error occurred. The plain language of the rule authorizes such an instruction only for crimes charged. Since defense counsel made a timely and specific objection and pointed out the obvious prejudice, James Savage's convictions must be reversed.

The defense requested that any requests for funds for assistance be conducted on an ex parte basis. The state objected, and the court refused to accept motions not served on the prosecution. In order to meet the burden required before funds will be granted, the defense was forced to make extensive disclosures of the evidence and strategy which supported their requests for funds. Various expert assistance was denied because counsel allegedly made an insufficient showing of need, constrained by the necessity of maintaining some level of confidentiality in the defense camp. Mr. Savage contends that the trial court's actions on this issue violate the dictates of Ake v. Oklahoma, 470 U.S. 68 (1985).

Savage also contends that the trial court erred in instructing the jury as to what was meant by the term "reasonable doubt." Condemnation of any attempt to define the term is almost universal, because the definition engenders more confusion than the term itself.

Savage also challenges the introduction of inflammatory, color photographs of the victim that undoubtedly inflamed the jury. The photographs were gruesome and unnecessary. Likewise, DNA "fingerprint" evidence was allowed by the trial court. The reliability of this type of evidence has recently been called into question. Admittedly, this case may not be the best with which to test the admissibility of such critical evidence. If this evidence is to be admitted in Florida courts, a full evidentiary hearing

should be held to air the conflicting reports on the reliability of the DNA method.

Finally, Savage challenges the sufficiency of the evidence. There was no corroboration of James Savage's purported statement that he had committed robbery. Furthermore, the only evidence as to the accused's state of mind were the alleged statements. These unrebutted statements established that Savage committed the crimes from the impulse to secure his next "fix" of crack cocaine. This establishes at most second-degree murder.

ARGUMENT

James Savage discusses below the reasons which, he respectfully submits, compel the reversal of his conviction and death sentence. Each issue is predicated on the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 of the Florida Constitution, and such other authority as is set forth.

SECTION 1: THIS COURT SHOULD VACATE JAMES SAVAGE'S DEATH SENTENCE AND REMAND FOR IMPOSITION OF A SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE FOR TWENTY-FIVE YEARS.

Mr. Savage respectfully submits his brief in two sections. The first section addresses the reasons why his sentence of death should be reversed and remanded for entry to a sentence of life without the possibility of parole for twenty-five years.

Section Two, which addresses various fundamental constitutional violations in the first phase of his trial, is filed contingent on this Court's ruling on an important issue which remains open in the State of Florida: Whether, where an 11-to-1 jury recommendation of life was improperly elevated to death by the trial judge, a second effort to impose a death sentence would violate the double jeopardy clause?

Mr. Savage respectfully suggests that a second death sentence would be unconstitutional. However, if this Court should decide that the jury override in his case was improper, but reversal of the guilt phase issues could result in a second trial with life at

stake, Mr. Savage wishes to forego the serious challenges to his conviction.

I. THE TRIAL COURT SHOULD NOT HAVE OVERRIDDEN AN 11-1 JURY VOTE FOR LIFE IN THE FACE OF OVERWHELMING EVIDENCE IN MITIGATION.

Jurors who sit on a capital case often come close to the facts of a homicide for the first and last time. As a result, some may be horrified by the fact of murder, and feel compelled to vote for the death penalty because they have never encountered such a crime before.

In contrast, the tragedy of Barbara Barber's death resulted in an unequivocal 11-1 jury vote for life. (R3580) This must be ascribed to the truly remarkable nature of this case: the sorry tale of an Australian Aboriginal, called "Nigger" by the father who beat him, adopted -- where Truth is stranger than Fiction -- into a family with the surname "Savage," and raised a Stranger in a strange land.

If any capital murder prosecution can be classified as a "life" case, this is the one. In Tedder v. State, 322 So.2d 908 (Fla. 1975), this Court held that "a jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Id. at 910.

As set forth below, several clear and convincing reasons supported the decision of eleven reasonable jurors when they voted for life. This Court must reaffirm the Tedder standard, as it has frequently done in the past.

A. The first, unique mitigating circumstance: James Savage's traumatic, formative experience as the only full-blood Aboriginal in the State of Florida.

Russell Moore was born in Australia on January 31, 1963. His mother Beverly did not want to give him up, but she had admitted to authorities that she had engaged in pre-marital sex with Jim's father, Frank Whyman. She testified that she was forced to give him up (R2666), since if she did not allow the adoption to go through she and Frank would face police action. (R2327)

By one of those unhappy quirks which renders truth stranger than fiction, the young Russell Moore was forcibly adopted into a family named Savage, his first name changed to James. By Jim Savage's sixth birthday, he moved with the family -- Rev. Graeme Savage, his wife Nesta and their son and daughter, Grettin and Glenise -- to Florida. Once again, Fate took a devious course, and Rev. Savage became the head chaplain to the Florida State Prison (R2668, 2680), where Jim Savage is now scheduled to die.

Sad though it indubitably is, it goes without saying that the person who is "different" is often the one who is hated and despised. Our history leaves no room to doubt that black men and women have often borne the brunt of such spleen. However, at least the black person could return to the black community for

moral and cultural support. Likewise the Native American -- denigrated for years as the savage Red Indian scalping the hapless associates of John Wayne, and only recently demoted to the shiftless and drunken welfare recipient -- could always seek support from the other victims of the same racial stereotyping.

Jim Savage stands -- or more frequently "cringes when approached by a man" (R2752) -- all alone. He may be the only full blood Aboriginal in the United States. As such, one witness told the jury, he suffered:

> [a]bsolute cultural isolation in not . . . being able to identify with any other aboriginal person here. He has said that he couldn't relate to the black community because he wasn't a black American. He couldn't relate to the native American communities because he wasn't a native American.

(R2611-12)

Adopted by a white family, taken to a foreign land, Jim Savage had three strikes against him. Even in Australia, being an Aboriginal adopted by a white family would have been the first strike. Jim would probably have become one of the ninety percent of Aboriginals adopted by whites whose developmental disorientation would lead them to commit a crime of some sort. (R2607)

The second and third strikes came when the Savage family moved to a town described as a "haven for the KKK." (R2760) There, he suffered discrimination at the hands of those who did not want a "black boy" in their church, even if he were the son of the minister. (R2378) While he "was routinely called Nigger and other names" (R2761) by the local people, the worst was yet

to come. His own adoptive father would beat him with a belt (R2747) for the sins of his white siblings (R2752),[1] and finally "when [James] had done something . . . his adopted father called him a Nigger and struck him in the face." (R2748) (emphasis supplied)[2]

The causal effect of this tragic tale was totally discounted by the trial court when he sentenced Jim Savage to death. "Violence," said the trial court, "stems from a more complicated source" than an unhappy childhood with adoptive parents. (R3101) The court dismissed this highly significant evidence as unworthy of "any significant weight." (R3102)

In this respect, the lower court was clearly in error. First, as a matter of law, a mitigating circumstance does not have to be the sole cause of a violent act. Were this the case, there would be no such thing as a mitigating circumstance. Cf. Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986) (trial court's rejection of evidence of mental illness which did not rise to insanity defense clearly erroneous).

Second, the trial court cannot simply "disagree" with eleven members of the jury who find this unique saga so moving. There

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1. In addition to the expert testimony, lay witnesses such as Ms. Oglethorpe, who had watched Jim Savage grow up, corroborated that very strict discipline was used on James but not on his siblings. (R2380) She stated that he was punished unjustifiably.

2. When testifying as a witness for the State, Rev. Savage did not deny that this had occurred, but pled the pressure under which he had been at the time as an excuse for his lack of recollection. (R2920)

is, indeed, a good chance that Jim Savage's experiences were the direct cause of this crime. Had Jim Savage encountered this pitiable discrimination from the secure confines of his cultural home, he would have found support amongst others with similar experiences:

> Aboriginals could however, function within their own society. They were socialized into learning how to survive. And if they were called something insulting, like a boom or an Abo, that's a very insulting word. They could be told by an aboriginal mother, don't worry about those Gabas, white people. Don't worry about this. They don't need them.
>
> * * *
>
> [Those like Jim Savage] don't have the benefit of that enormous and rich aboriginal Australian culture.

(R2522-33) Thus, when he first got into trouble, the Aboriginal "family" network would have worked to help him back into society -- instead of committing him to the Florida State Prison for further discrimination, and a course in how to abuse drugs. (R2123)

Any childhood trauma should be considered a mitigating factor. Nibert v. State, 15 FLW 5415 (Fla. July 26, 1990); Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988); Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984), cert. denied, 469 U.S. 989 (1984); Scott v. State, 411 So.2d 866 (Fla. 1982); Eddings

v.Oklahoma, 455 U.S. 104 (1982).[3] The childhood experiences of James Savage would be enough for any judicial system that encompasses mercy to reduce society's harshest penalty one step to life imprisonment.

B. The mitigating effect of James Savage's incapacitation due to overwhelming abuse of mind-altering drugs.

The undisputed evidence demonstrated that Jim Savage had first begun to ingest alcohol heavily at the age of eleven. (R2795)[4] When he was first in prison for a non-violent offense, he was introduced to various other drugs. (R2123)[5] Prior to the offense for which he was convicted, Jim had been using alcohol, marijuana and crack cocaine solidly for two weeks (R2830), and had not slept for four days. (R2774)

A pharmacologist -- Dr. Marshell Johnson-Fannin of Florida A & M -- testified that Jim could have been totally addicted to crack cocaine within a week of starting to use it. (R2628) As a

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3. Similarly, this Court has ruled that family background and personal history may be considered in mitigation. Brown v. State, 526 So. 2d 903, 908 (Fla. 1988), cert. denied, 484 U.S. 912, 109 S. Ct. 371, 102 L. Ed. 2d 258 (1988). This would include the evidence of witnesses such as Ms. Nix, who testified that Jim Savage was shunned by other young people while living in Starke, Florida. (R2674)

4. Apparently the parents knew of this childhood effort to avoid the depression of the social outcast (R2799), and did nothing to stop it for reasons which remain totally unclear.

5. Some facts -- such as this one -- were known only to the trial court. The fact that eleven reasonable jurors voted for life without knowing further mitigation available to the trial court merely highlights the error of the trial court's override.

result of all this, "[t]he only premeditation . . . that any one who had been smoking rock cocaine for two weeks would have is [premeditation] to get more cocaine. Any other premeditation, I cannot see being within their framework at that point." (R2833-34; see also R2772) Certainly, Jim Savage's ability to understand the criminality of his conduct would have been substantially impaired as a result of these powerful and terrifying drugs. (R2857)

Alcohol and drug abuse is clearly a proper mitigating circumstance for a jury to consider. Pentecost v. State, 545 So.2d 861 (Fla. 1989); Amazon v. State, 487 So.2d 8 (Fla. 1986); Norris v. State, 429 So.2d 688 (Fla. 1983) (drug abuse problem and claim of intoxication at time of crime proper for jury to consider); Huddleston v. State, 475 So.2d 204 (Fla. 1985) (history of drug abuse).

The mere fact that the trial court decided to give this evidence no weight cannot justify the about-face between life and death. The trial court apparently merely disagreed with the jury's serious consideration of this matter, expressing his personal opinion that "[d]rugs [and] alcohol. . . are personal choices, not family excuses." (R3101)

In Cannady v. State, 427 So.2d 723 (Fla. 1983), the trial court likewise simply disagreed with the jury on the impact of intoxication. A doctor testified that Cannady's excessive drug use substantially impaired his ability to conform to the law. Id. at 727. The trial judge rejected this evidence, but this

Court held that the jury may have given the doctor's testimony more credence than did the judge, requiring ratification of the jury verdict of life imprisonment. Indeed, "[t]his court frequently has reversed jury overrides where the jury could have found alcohol or drug abuse as a mitigating circumstance." Huddleston v. State, 475 So.2d 204 (Fla. 1985) (emphasis supplied).[6]

On another level, in holding that intoxication is not an "excuse," the trial court applied the wrong legal standard. A mitigating circumstance does not have to rise to an "excuse" for crime. The correct standard is whether "continuous alcohol and drug use for at least forty-eight hours prior to the crime, together with significant sleep deprivation had some effect on the Defendant's judgment." (R3098) (emphasis supplied)

Clearly it had some effect in James' case. In response to prosecution questioning, Dr. Phillips put it this way:

> I would characterize someone who is on substantive quantities of alcohol and drug abuse, someone who suffers from debilitating psychiatric disease such as character pathology and personality disorder, who has four days of sleep deprivation and alcohol abuse and cocaine abuse, who thinks that he can somehow steal a car without any great, without any real plan of how that car is substantively then going to be translated into money, may be

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6. For example, in Burch v. State, 522 So. 2d 810 (Fla. 1988), the judge found that Burch's voluntary consumption of PCP should be considered in mitigation, but gave this little weight as the degree of impairment was "speculative and remote and could not be conclusively established." Id. at 813. This Court agreed with Burch that the jury could have found this to be mitigating, so that "the Tedder test is not met and the trial judged erred in overriding the advisory recommendation of the jury." Id. at 814.

goal directed but it doesn't sound like very well formulated planning to me.

(R2811-12) This alone is sufficient to sustain the eleven-to-one jury verdict in favor of life.

C. James Savage's mental incapacity as a mitigating circumstance.

James Savage suffers from brain damage. This is not surprising: When a child of eleven is allowed to continually abuse alcohol, the brain inevitably suffers. (R2795) Crack cocaine -- which constricts the blood vessels and thereby causes deterioration of the brain -- would have added to the decline. (R2832) On top of all this, as he grew up Jim suffered three serious blows to the head, in 1981, 1983 and 1985. (R2794,2766)

James Savage is also a schizoid personality. (R2771) This is hardly surprising, given the traumatic adolescence which this poor child went through. This child was regularly abused, called a "nigger," and cast out by family and churchgoers alike. Naturally, he would become withdrawn and never develop the ability to meaningfully interact in society. (R2725) This debilitating mental illness significantly diminished his mental capacity at the time of the crime. (R2771)[7]

Another manifestation of Jim's impossible childhood is that, while he was 25 years old at the time of the crime, his mental

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7. The trial court virtually ignored this evidence, merely mentioning in passing that "[t]he Defendant apparently has a schizoid personality. This personality trait results in social withdrawal and introvert tendencies." (R3098) The importance of a major mental disorder cannot be obscured behind two sentences.

age had arrested at approximately fourteen. (R2775) Jim Savage's mental age certainly qualified as a statutory mitigating circumstance that the jury may have considered. See Fla. Stat. Ann. § 921.141 (g) (West 1982).[8]

"While there is no per se rule which pinpoints age as an automatic mitigating or aggravating factor, we have held that the age of the Appellant, twenty-one, could be considered by the jury as a mitigating factor." Peek v. State, 395 So.2d 492 (Fla. 1980); Cannady v. State, 427 So.2d 723 (Fla. 1983). In Amazon v. State, 487 So.2d 8 (Fla. 1986), the accused was nineteen but had emotional maturity of a thirteen-year-old. This Court held that age could properly be found as a mitigating factor. Id. at 13. In this case, although chronogically twenty-five years old, Jim Savage had the functional age of a fourteen-year-old. Again this was sufficient for the jury to conclude that life should be the appropriate punishment.

D. The jury might reasonably have concluded that James Savage's expressions of remorse justified a life sentence.

According to the police, throughout the investigation of the case James Savage "was cooperating completely." (R1776; see also

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8. The trial court stated that there was no "link between the Defendant's . . . mental age as having a significant impact in causing this crime." (R3099) This misperceives the nature of this mitigating circumstance: By definition, someone with the mental age of a fourteen-year-old is not as culpable as a criminal who has maturely considered his or her crime. This has been recognized by the law since Roman times. Cf. Thompson v. Oklahoma, 487 U.S. ___, 108 S. Ct. ___, 101 L. Ed. 2d 702 (1988) (unconstitutional to execute those with chronological age of 15).

R1759) He agreed to go to the police station (R1254), agreed to hand over his clothes (R1319), showed the officers where he had destroyed his trousers (R1698), and admitted to his involvement in the crime. James was always polite to the officers as they investigated the case. (R1342) Indeed, at one point James spontaneously began to confess and the police had to stop him in order to read him his Miranda rights. (R1301) Officer Fernez described James Savage's demeanor when James confessed to the crime: "He did look down and, yes, sir, he did look remorseful." (R1308)[9]

It is clear that expressions of remorse by the accused should be considered in mitigation. See, e.g., Magill v. State, 386 So.2d 1188, 1190 (Fla. 1980); Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983); Campbell v. State, 15 FLW S342, 344 n.6 (Fla. June 14, 1990) Indeed, if the defendant gives a confession this may rightfully be considered the first step towards repentance by the jury. See Washington v. State, 362 So.2d 658, 667 (Fla. 1978). Again, this is sufficient under Tedder to require remand for entry of a life sentence.

E. Where mitigating circumstances of such quality are presented, it is a clear abuse of discretion to override a jury vote of 11-to-1 for life.

9. Additionally, the newspapers reported that James Savage had tried to make an apology to the victim's family through the media. (R1626)

The evidence in mitigation discussed above does not exhaust the sum of the reasons on which eleven jurors decided in favor of life. However, these are weighty reasons indeed, and certainly more than sufficient to meet the Tedder standard. In Ferry v. State, 507 So.2d 1373 (Fla. 1987), this Court stated:

> Tedder has been consistently interpreted by this Court to mean that when there is a reasonable basis in the record to support a jury's recommendation of life, an override is improper. When there are valid mitigating factors discernable from the record upon which the jury could have based its recommendation an override may not be warranted.

Id. at 1376 (emphasis supplied).

Even absent the Tedder standard the trial court's decision would have to be reversed. The court noted the existence of various mitigating circumstances (R3583-85), and then refused to "give significant weight to them." (R3585) This Court recently held that "a mitigating factor once found cannot be dismissed as having no weight." Campbell v. State, 15 FLW S342 (Fla. June 14, 1990); accord, Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986).

However, it is clear that the Tedder standard also requires reversal in this case. Justice England, concurring in Chambers v. State, 339 So.2d 204 (Fla. 1976), has explained that the Tedder standard incorporates an historical regard for the role of the jury in making the life-or-death decision in capital cases:

> Where a jury and a trial judge reach contrary conclusions because the facts derive from conflicting evidence, or where they have struck a different balance between aggravating and mitigating circumstances which both have been given an opportunity to evaluate, the jury recommendation should be followed because

> that body has been assigned by history and statute the responsibility to discern truth and mete out justice. Given that the imposition of a death penalty "is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgement" both our Anglo-American jurisprudence and Florida's death penalty statute favor the judgment of jurors over that of jurists.

Id. at 208-09 (quoting State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); accord Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988) ("under Florida's capital sentencing statute, it is the jury's function, in the first instance, to determine the validity and weight of the evidence presented in aggravation and mitigation"); Floyd v. State, 497 So.2d 1211 (Fla. 1986).

The "essential feature of a jury obviously lies in . . . community participation and shared responsibility that results from the group's determination. . . ." Williams v. Florida, 399 U.S. 78, 100 (1970). The jury's role as the conscience of the community in this case is reflected in the diverse make-up of the twelve men and women who decided that James Savage should live. Vernon Blanchette, a member of the National Rifle Association (R714), gave his input to the 11-to-1 decision for life.

Wendy Waters brought her individual experiences to bear, and she felt that intoxication can result in "totally different behavior" in a person. (R782) In Duane Franklin's opinion, intoxication may cause "a personality change." (R783) If the trial court disagreed, that is simply because he does not reflect this diversity of opinion.

Neither can the trial court boast greater experiences than the citizens with whom he differed on this most human of choices. whether James should live or die. Lydia Hougesen had been the foreperson on two prior criminal juries. (R850) Most pertinent to the case at hand, she was legally adopted as a child. (R881) Again, she brought this experience to bear on the jury's decision that James Savage should live.

This Court went on in Holsworth to hold that "a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." Id. at 354 (citing Tedder v. State, 322 So.2d at 910); see also Fead v. State, 512 So.2d 176, 178 (Fla. 1987) ("only when there are no 'valid mitigating factors discernable from the record upon which the jury could have based its recommendation' is an override warranted"); Ferry v. State, 507 So.2d 1373, 1376 (Fla. 1987); Gilvin v. State, 418 So.2d 996 (Fla. 1982); Mills v. State, 476 So.2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986); Shue v. State, 366 So.2d 387 (Fla. 1978).

Eleven jurors in this case did differ with the trial court, and it cannot be said that they were all unreasonable. Many decisions by this Court, where the jury's life verdict was ratified, are virtually indistinguishable from this case. For example, in Hansbrough v. State, 509 So.2d 1081 (Fla. 1987), the Appellant was convicted of first-degree murder and armed robbery.

In overriding a jury vote for life, the trial court found four aggravating circumstances. Id. at 1086. The mitigating circumstances offered by the defense included Hansbrough's extensive history of drug abuse, his difficult childhood and his mental and emotional problems. Id. at 1086.

In applying the Tedder standard and imposing a life sentence, this Court determined these factors could have persuaded the jury that life imprisonment was reasonable. See also Holsworth v. State, 522 So.2d 348 (Fla. 1988) (the jury could have found his alcohol and drug abuse, physical abuse as a child and his psychological disturbance sufficient for life); McCaskill v. State, 344 So.2d 1276 (Fla. 1977) (jury voted eleven to one for life imprisonment); Huddleston v. State, 475 So.2d 204 (Fla. 1985); Irizarry v. State, 496 So.2d 822 (Fla. 1986); Masterson v. State, 516 So.2d 256 (Fla. 1987); Norris v. State, 429 So.2d 688 (Fla. 1983); Perry v. State, 522 So.2d 817 (Fla. 1988).

Likewise, this Court must reaffirm Tedder and remand for imposition of a life sentence.

F. In elevating the sentence to death, the trial court considered factors which he should not legitimately have considered.

The trial court should not have discounted the overwhelming evidence in mitigation in this case. However, in doing so, at

the urging of the prosecution[10] the trial court erroneously took evidence into consideration which should not have been the basis for a sentence of death.[11]

For example, the trial court ignored the extensive and convincing testimony of Dr. Robert Phillips concerning James Savage's extensive mental health problems. The prosecution urged the court to pay no attention to this evidence (R3059) on the basis of the "contrary opinions by experts, Doctor Greenblum and Doctor Wooten. . . ." (R3061)[12]

Dr. Greenblum was called by the state, and the jury evaluated and apparently discounted his testimony. (R2859 et seq.) This was probably because he was subjected to cross-examination, which demonstrated that he had spent less than an hour with Mr. Savage, and had been concerned only with competency and M'Naghten sanity. (R2902)

The trial judge's consideration of Doctor Wooten's report raises totally different concerns. As the prosecution conceded, he was dead at the time his evidence was to be considered. (R3061) In Gardner v. Florida, 430 U.S. 349 (1977), the Supreme

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10. The trial court explicitly stated that he had taken the "argument of the attorneys [and] the pre-sentence investigation prepared by probation and parole services" into consideration in overriding the jury verdict. (R3093)

11. Mr. Savage also contends that certain aggravating circumstances were improperly included, see Section IV, as well as mitigating evidence improperly excluded. See Section II.

12. Dr. Wooten should not be confused with Judge Wooten, whose evidence for the defense was excluded at trial.

Court strongly condemned the use of hearsay evidence to support a death sentence, for the accused has no opportunity to confront it. Relying on Gardner, this Court has held:

> The requirements of due process of law apply to all three phases of a capital case in the trial court: 1) The trial in which the guilt or innocence of the defendant is determined; 2) the penalty phase before the jury; and 3) the final sentencing process by the judge.

Engle v. State, 438 So.2d 803, 813 (Fla. 1983) (emphasis supplied); accord Porter v. State, 400 So.2d 5, 7 (Fla. 1981) ("the sentencing process, as well as the trial itself, must satisfy the requirements of due process"); Spaziano v. State, 393 So.2d 1119, 1122 (Fla. 1981).

In Engle, the sentencing court considered evidence which had not been subjected to cross-examination. This Court ordered resentencing, holding:

> The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process clause of the fourteenth amendment to the United States Constitution. The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. This right of confrontation is a right that has been applied to the sentencing process.

Id. at 814 (citing Pointer v. Texas, 380 U.S. 400 (1965); see also Lanier v. State, 533 So.2d 473, 488 (Miss. 1988) (con-

sideration of hearsay psychological report at capital sentencing violated Confrontation Clause).[13]

In Skipper v. South Carolina, 476 U.S. 1 (1986), the accused's right to confrontation at the penalty phase was described as "elemental":

> it is also the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'

Id. at 5 n.1 (quoting Gardner v. Florida, 430 U.S. at 362); accord Id. at 10 (Powell & Rehnquist, JJ., and Burger, C.J., concurring).

In addition, during the sentencing proceeding, the trial court took a plea to what we now know was a non-existent charge of probation violation. (R2036-38)(See attached appendix) He then listened to the prosecution argue the need for elevating the sentences on these charges. (R3073) Then the court imposed a sentence of death.

Now that the state has admitted that these charges were a figment of their confabulation, it is also apparent that the trial court imposed "sentence[] on the basis of assumptions

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13. This has been held to be error in noncapital cases. See, e.g., United States v. Picard, 464 F.2d 215 (1st Cir. 1972) (unconstitutional reliance on unverified hearsay reports that accused had dealt drugs); United States v. Robin, 545 F.2d 775, 778 (2d Cir. 1976) (sentencing judge unconstitutionally relied on unverified hearsay statements concerning drug use); State v. Taylor, 514 So. 2d 755, 756 (La. App. 2, 1987). Indeed, it has even been held to be error in a civil case. See, e.g., Bobb v. Modern Products, Inc., 648 F.2d 1051, 1055-56 (5th Cir. 1981); Box v. Swindle, 306 F.2d 882 (5th Cir. 1962).

concerning [the accused's] criminal record which were materially untrue." Townsend v. Burke, 334 U.S. 736, 740 (1948). "Such a result, whether caused by carelessness of design, is inconsistent with due process of law, and such a conviction cannot stand." Id. at 741 (emphasis supplied). The Townsend rule has been routinely applied in this State,[14] and every federal court of appeal.[15]

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14. See, e.g., Epprecht v. State, 488 So. 2d 129, 130 (Fla. 3d DCA, 1986) (erroneous consideration of charges on which the accused had been acquitted); Berry v. State, 458 So. 2d 1155, 1156 (Fla. 1st DCA, 1984) (judge disagreed with jury which acquitted Berry of prior charges); Crosby v. State, 429 So. 2d 421, 423 (Fla. 1st DCA, 1983) (consideration of prior arrests as evidence of guilt); see also Hicks v. State, 336 So. 2d 1244, 1246 (Fla. 4th DCA, 1976) ("this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue"; quoting Townsend v. Burke, 334 U.S. at 740); Wolfe v. State, 323 So. 2d 680, 681-82 (Fla. 2d DCA, 1975); Howard v. State, 280 So. 2d 705, 706 (Fla. 4th DCA, 1973).

15. See, e.g., United States v. Picard, 464 F.2d 215 (1st Cir. 1972) (reliance on unverified hearsay reports that accused had dealt drugs); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970) (sentencing judge stated that he had considered five contemporaneous armed robberies, when three had been dismissed, and convictions entered only on two); United States v. Stein, 544 F.2d 96 (2d Cir. 1976) (inaccurate belief that accused had "feigned suicide" to avoid earlier sentence); Bibby v. Tard, 741 F.2d 26 (3d Cir. 1984) (judge erroneously believed long list of prior convictions included armed robberies); Moore v. United States, 571 F.2d 179 (3d Cir. 1978) (erroneous statements in presentence report); United States ex rel. Jackson v. Myers, 374 F.2d 707 (3d Cir. 1967) (misconception as to number of prior offenses); Baker v. United States, 388 F.2d 931 (4th Cir. 1968) (erroneous statements in pre-sentence report); United States v. Tobias, 662 F.2d 381 (5th Cir. 1981) (judge's reliance on inaccurate representations by prosecution plain error); Collins v. Buckhoe, 493 F.2d 343 (6th Cir. 1974); United States v. Hubbard, 618 F.2d 422 (7th Cir. 1980) (per curiam); United States ex rel. Welsh v. Lane, 738 F.2d 863 (7th Cir. 1984) (sentencing judge expressed erroneous belief that prior robbery conviction had been for armed robbery); United States v. Kerley, 838 F.2d 932, 941 (7th Cir. 1988) (erroneous belief that accused held particular position in anti-draft move-

(continued...)

In Barton v. Lockhart, 762 F.2d 712 (8th Cir. 1985), a burglary case, the sentencing judge relied in part upon the accused's alleged parole violations, which later turned out to be untrue. Id. at 712-13. Under the Townsend rule, resentencing was required. See also State v. Morgan, 712 P. 2d 741, 743 (Idaho App. 1985) (consideration of allegation that accused had violated pre-trial bond required resentencing); State v. Knapp, 570 P. 2d 1138 (Mont. 1977) (unconstitutional to base revocation of probation on false information).

As Chief Justice Rehnquist has explained, "a more careful application of [the Townsend rule] is appropriate in capital cases. Zant v. Stephens, 462 U.S. 862, 903 (1983) (Rehnquist, J., concurring) (emphasis supplied). However, under any rule James Savage's sentence would have to be vacated, since "even in a noncapital sentencing proceeding, the sentence must be set aside if the trial court relied at least in part upon 'misinformation of constitutional magnitude.'" Id., at 887 n.23.

The burden is on "the State . . . to convince us that these [materially false] items played no part in the sentence imposed in this case." Epprecht v. State, 488 So.2d 129, 131 (Fla. 3d

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15. (...continued)
ment); Taylor v. United States, 472 F.2d 1178 (8th Cir. 1973) (per curiam); United States v. Messer, 785 F.2d 832 (9th Cir. 1986); Leano v. United States, 494 F.2d 361 (9th Cir. 1974); Martinez v. United States, 464 F.2d 1289 (10th Cir. 1972); United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985); United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983).

DCA, 1986) (citing Townsend v. Burke, 334 U.S. at 740). This burden the State cannot carry. The sentence must be reversed.

II. THE TRIAL COURT ERRED IN EXCLUDING CRITICAL EVIDENCE IN MITIGATION.

A large part of Mr. Savage's case in mitigation was excluded as the result of two rulings by the trial court. This meant that neither the jury nor the judge took the evidence into account in reaching their verdicts.[16] Various rather fundamental principles of constitutional law inform the error of these decisions.

First, there was no basis in law to exclude the evidence. Second, the exclusion of the defense case violated fundamental rights preserved by the State and Federal constitutions. In any criminal case, the "constitution[] guarantees . . . the right of the accused to have witnesses testify in his favor . . . ." Dancy v. State, 259 So.2d 208, 209 (Fla. 3d DCA 1972) (citing Washington v. Texas, 388 U.S. 14, 18-19 (1967); accord, Ashley v. State, 435 So.2d 1263, 1269 (Fla. 1st DCA 1983); Green v. State, 377 So.2d 193, 202 (Fla. 3d DCA 1979); United States v. Armstrong, 621 F.2d 951 (9th Cir. 1980) (opinion of Kennedy, J).

In capital prosecutions this rule is reinforced by the principles of mercy found in the Eighth Amendment. If there is one message that has across come loud and clear over the past fifteen years, it is that the sentencer "may not refuse to consider . . .

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16. With respect to this issue, and various later ones, Mr. Savage contends that there is a level of prejudice even in the effect on the jury's 11-to-1 verdict for life. Had the trial court not had the solace of even one dissenting vote on the jury, he might have lent more weight to the decision.

'any relevant mitigating evidence." Hitchcock v. Dugger, 481 U.S. 393 (1987) (emphasis supplied).[17]

Viewed in light of these principles, it is apparent that the death sentence must be reversed.

A. Expert testimony should have been allowed on the effects on James Savage of the historical plight of the Australian Aboriginal -- characterized as "unique" by the trial court.

The Hon. John Wooten was a former Justice of the New South Wales (NSW) Supreme Court. He had been a Q.C. -- Queen's Counsel -- since 1966, and had worked continuously in Aboriginal affairs. (R2423-26, 2428) He was president of the original Aboriginal Legal Services (R2423) before becoming founding dean of the N.S.W. Law School, where most Aboriginal barristers receive their degrees under the affirmative action policy Judge Wooten inspired. (R2422) Since retiring from the NSW Supreme Court in 1983, Judge Wooten has been a Royal Commissioner looking into discrimination against Aboriginals. (R2436-38)

Throughout his legal career, Judge Wooten had studied the historical roots of Aboriginals, to set their contemporary problems in their cultural context. (R2430, 2440) Prior to coming to the United States on behalf of the Australian Government, to testify for James Savage, Judge Wooten reviewed the literature on

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17. See also McKoy v. North Carolina, 494 U.S. ___, 110 S. Ct. ___, 108 L. Ed. 2d 369 (1990); Mills v. Maryland, 486 U.S. ___, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988); Skipper v. South Carolina, 476 U.S. 1, (1986); Eddings v. Oklahoma, 455 U.S. 104, 1982); Lockett v. Ohio, 438 U.S. 586 (1978).

the cultural impact of discrimination on the Aboriginal. He also met with Phillip Philton, who was Superintendent of the Victoria Aboriginal Welfare Board at the time James Savage was forcibly adopted out to white parents. (R2441) He got James Savage's file from Philton and reviewed it with the Superintendent. (R2442; see, generally, Tr. 2419-92)

Defense counsel sought to qualify Judge Wooten as an expert. (R2435) However, the prosecution rejected this as impossible. Apparently an Australian justice should not be qualified because the prosecution thought that no Florida Supreme Court justice could ever be qualified as an expert in Florida or American law:

> MR. BAUSCH: Your Honor, qualifying him as an expert in Australian law concerns me just as if we were trying to qualify Justice Overton as an expert in United States law. I have some difficulty in that. First of all, not being a specific field and second of all being a field that's so broad.

(R2435)

While the ruling could have been clearer, the trial court seems to have rejected the State's invitation to preclude Justice Overton and other members of this Court from ever asserting legal expertise. Indeed, this Court has permitted the use of mere attorneys as experts in a range of litigation. See, e.g., Bertolotti v. State, 534 So.2d 386, 388 (Fla. 1988) (lawyer in capital case testified as "a legal expert for the defense"); Guy v. Knight, 431 So.2d 653 (Fla. 5th DCA, 1983) (lawyers as experts on contract law); Red Carpet Corp. v. Calvert Fire Insurance Co., 393 So.2d 1160 (Fla. 1st DCA, 1981); Warwick et al. v. Dot-

ter, 190 So.2d 596 (Fla. 4th DCA, 1966). To argue that neither Justice Overton nor Justice Wooten could be considered experts would be as offensive as it would be legally unsupportable.[18]

In order to justify the exclusion of this critical evidence, the trial court therefore ruled that Judge Wooten's testimony was irrelevant. (R2492) The trial court held that the testimony pertained only to James Savage's first six years of life, since at that age the Savage family came to the United States. The trial court considered this "too remote in time." (R2491)[19]

The decision was in error for various reasons. As a preliminary matter, it is important to understand the role of an expert witness under our law:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify about it in the form of an opinion . . . .

s.90.702, Florida Statutes (1987). An expert opinion is admissible, and often necessary, where "the disputed issue is

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18. In point of fact, Judge Wooten was offered as an expert in a very narrow legal field, in which he is one of the premier -- indeed, the few -- experts in the world: "as an expert in Australian law specifically relating to aboriginals and adoption and history and administration of laws relating to aboriginals and adoptions. . . ." (R2435)

19. It should be noted that the trial court also excluded the testimony of Dr. Michael Radelet in its entirety. (R2393-2418) Mr. Savage objects to this since he should have been given the opportunity to explain misinformation which apparently influenced the sentencing decision. See Skipper v. South Carolina, 476 U.S. at 5 n.1.

beyond the ordinary understanding of the trier of fact." In re Estate of Lenahan, 511 So.2d 365, 370 (Fla. 1st DCA, 1987) (quoting Johnson v. State, 393 So.2d 1069 (Fla. 1980).

The trial court correctly found that Judge Wooten's "experience comes primarily with the unique Australian experience with Aboriginals." (R2491) (emphasis supplied) The defense felt it important to introduce a map of Australia (R2352) to make sure that nobody thought it was a small country in the middle of Europe: Certainly, the unique experiences of the Aboriginal were beyond the ken of the average juror.

Judge Wooten detailed how Aboriginals were born into discrimination perhaps more pervasive even than the experience of our own country. The shocking history of the Aboriginal in White Australia has been detailed above. Even today, viewed by "mean whites" as "shiftless, unwilling to work, drunken [and] inferior" (R2457), the Aboriginal is subjected to "roped off areas to cinemas, exclusion from swimming pools, being served last in shops. . . ." (R2456)

Judge Wooten was able to provide an insight into that Australian experience which neither the jurors nor the trial court could hope to bring to the case. If the trial court had been correct in ruling that the evidence was only relevant to James Savage's first six years of life, there still would have been no basis for its exclusion.

Those six years were the most formative in James' life. Before he came to the United States,[20] James had suffered discrimination as the only "black fellow" in his Australian community. (R2378) Already, he was beginning to wonder how he came to be in a white family, the bitter fruit of a 1928 law in the hands of ardent advocates of forced assimilation. Already, he was beginning to feel the rejection experienced by others forcibly adopted under that same law. (R2468) Already, he was realizing that he had no identity, and none of the support system enjoyed by other Aboriginals. (R2469) Already, he was being harshly disciplined by his father for the transgressions of his white adoptive siblings. (R2377, 2380)

The rather obvious importance of early childhood in the development of personality is confirmed in the textbooks. Those who seek to understand the adult yet "minimize the importance of childhood experience . . . [do not] understand[] how the personality of the patient . . . has been shaped, and this shaping occurs through past experience with important people in that

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20. The trial court was also incorrect in suggesting that, as a matter of law, James' Aboriginal heritage had no influence on his experiences after he came to this country. Aboriginals are viewed as different by white people -- <u>especially</u> those who are not from Australia, and therefore would have had no idea who James was -- and evoke strong feelings of fear. (R2474) In the United States, James was without an identity: "He's not Negro. He's not Hispanic. He's not Indian. He's a complete oddity." (R2475) Thus, the feelings of being outcast which Judge Wooten described as the trademark of the Aboriginal child adopted into a white Australian family were reinforced -- rather than diminished -- by the fact that he was brought to the United States.

patient's earlier life."[21] The literature is replete with examples of adopted children who had developed severe emotional disturbances by the time they were the age at which James left Australia.[22]

The emotional impact of James' adoption into a white family was reinforced, as in so many cases, by Graeme Savage's harsh treatment of James for the transgressions of the two white siblings. (R2377, 2380, 2390) This is not just relevant, but presents a textbook example of the psychological trauma derived from a parent who is "inconsistent but harsh in matters of discipline. . . ."[23] The authors might be referring to James himself when they state that in a large proportion of children, these problems will be reflected in "recurrent problems with the police, and a tendency towards drug and alcohol abuse" in later life. Kaplan & Sadok, at 1689. Obviously, this was the case in James' case.

As the basis of Judge Wooten's expert opinion, defense counsel asked a hypothetical question regarding the effects of the Aboriginal background on James Savage's propensity to commit

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21. Kaplan & Sadok, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, at 451 (5th ed. 1989) (hereinafter cited as "Kaplan & Sadok").

22. For example, one seven-year-old had a history of "functional enuresis, functional encopresis, learning difficulties . . . temper tantrums, and acting like a stranger in her own home," all largely attributable to her inability to understand why she had been given up for adoption. Kaplan & Sadok, at 1959 (enuresis is the technical term for continual bedwetting; encopresis, involuntary defecation).

23. Sadok & Kaplan, at 1689.

crime. (R2448-49) Judge Wooten explained that, while Aboriginals can prosper within the supportive community of their peers, there is a very high risk that an Aboriginal adopted into a white family -- particularly one which is not supportive -- will turn to substance abuse and to crime. (R2470)

This Court has long since held that "[t]he only limitation on introducing mitigating evidence is that it be relevant to the case at hand . . . ." King v. State, 514 So. d2 354, 358 (Fla. 1987) (emphasis supplied); see also O'Callaghan v. State, 542 So.2d 1324, 1326 (Fla. 1989); Barvard v. State, 486 So.2d 537, 538-39 (Fla. 1986). Because the law recognizes the obvious impact of the childhood experience on the character of the adult, early abuse and emotional trauma are always relevant to sentencing. See, e.g., Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988); Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984), cert. denied, 469 U.S. 989 (1984); Scott v. State, 411 So.2d 866 (Fla. 1982); Eddings v. Oklahoma, 455 U.S. 104 (1982).

"'The conviction of our time [is] that the truth is more likely to be arrived as by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court. . . .'" Washington v. Texas, 388 U.S. at 22 (quoting, Rosen v. United States, 245 U.S. 467 (1918). The trial court was simply wrong in suggesting that this rule should not apply to James Savage's case. See, e.g., Green v. State, 377 So.2d 193, 202-03 (Fla. 3d

DCA, 1979); Johnson v. State, 408 So.2d 813, 815 (Fla. 3d DCA, 1982). The trial court excluded the evidence from the jury's consideration, and refused to consider it himself. The sentence must therefore be reversed.

B. The trial court's erroneous ruling that a psychologist could properly be impeached by the fact that James Savage had recently been paroled precluded the introduction of other important mitigating evidence.

The trial court made another ruling which caused great prejudice to Mr. Savage's case in mitigation. It should be borne in mind that the defense never sought to prove that James Savage was a calm and placid person, skating smoothly through a level life. To the contrary, the case in mitigation made it very clear that the incomparable traumas of James' early life left him depressed, emotionally immature, and prone to seek attention in fits of angry resentment. The defense sought solely to explain James, not deny him.

Our death penalty statute carefully enumerates the matters which can be placed before the jury in aggravation. For reasons which are fundamental to a fair sentencing hearing, the law does not allow extraneous evidence of "bad acts" to be tossed at random into the delicate balance between life and death.

The prosecution proposed to cross-examine various defense witnesses concerning all of James Savage's non-violent criminal history, as well as all the incidents which he had got into when in prison. The reason given for this was that such cross-exami-

nation would apparently have "impeached" the defense case. To the contrary, these acts were totally consistent with statements by the defense witnesses that James was socially immature, and unable to conform his actions to socially-accepted norms.

For example, the defense proposed to submit the evidence of Dr. Burnard Healey, a highly qualified Australian clinical psychologist who had specialized in the emotional alienation of Aboriginal children adopted into white families. (R2550-68) Dr. Healey had met with James Savage on three occasions, and there was no dispute that Dr. Healey should be permitted to testify. Dr. Healey would have offered an extensive discussion of the bewilderment experienced by James Savage as he discovered that he was not "like" his parents. (R2559) He would have discussed the sadness and loss of morale that young James would have experienced as he proved unable to find an identity. (R2560) This gradually turned to resentment, alternating with depression -- angry attention-seeking, followed by withdrawal into a shell of social immaturity. (R2561-64)

Dr. Healey's evaluation was based on his face-to-face meeting with Mr. Savage, as well as his extensive knowledge of the cultural crisis which meets the Aboriginal in the white world. His conclusions were entirely consistent with James acting out, sometimes violently, when forced to live in white society.

Dr. Peter Read had also flown over from Australia to share his twenty years' experience with displaced Aboriginal children. (R2506-35) His study of 1,000 Aboriginal children placed with

white families indicated that they all suffered the same identity crisis as James. (R2517) By forcing -- with all the assimilationist's good intentions -- the Aboriginal child to wear suits and use a knife and fork, the white family simply assured that the child would never fit in with the Aboriginal culture either. (R2518) Ninety percent of those coming to one state's Legal Aid Society for assistance in criminal cases had been adopted into white families as children. (R2524) Again, there was no dispute that Dr. Read's testimony was competent. (R2537)[24]

The trial court correctly ruled that prior convictions and bad acts in prison would not be admissible.[25] Inexplicably, however, the court ruled that the prosecution should be able to make as much hay as they liked of the "fact" that James Savage had only been released on parole 23 days before this crime occurred. (R2589)

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24. The prosecution did object -- as they had with Judge Wooten -- to Dr. Read testifying to the history of abuse of the Aboriginal people, and the effect of this on current cultural psychology. (R2537)

25. The prosecution had offered Muehleman v. State, 503 So. 2d 310 (Fla. 1987), to support the use of James Savage's other "bad acts." There is a rather crucial distinction between the cases. In Muehleman, as the prosecution pointed out, the defense witness had testified that the defendant was a "passive non-aggressive individual." (R2583) Surely, then, evidence that the defendant had a proclivity for committing acts of violence was totally acceptable cross-examination. In this case, the defense witnesses explicitly testified that they would expect the accused to commit acts of violence, precipitated by drug abuse, "when he's under [a] high level of frustration and tension. . . ." (R2575) All the prosecution offered to "impeach" this was evidence that, yes, when under the influence of drugs and when frustrated, James Savage was prone to lose control. The trial court was therefore clearly correct in this ruling.

This ruling raised the potential for great prejudice for the defense. The jury did not "know"[26] at that time that James Savage had been in prison and had been released on parole just days before the crime occurred.[27] Rather than allow this highly prejudicial "fact" to come out, the defense did not offer the testimony of Dr. Read and Dr. Healey to the jury.[28]

The issue of when a person is paroled from prison is, itself, generally not a matter for the sentencer to consider. See Paramore v. State, 229 So.2d 855, 860 (Fla. 1969), vacated on other grounds, 408 U.S. 935 (1972).[29] What possible relevance the "fact" that James Savage had been paroled 23 days before the

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26. This word is placed in inverted commas because, as discussed below, the State had actually misled the court into thinking that James Savage had been released on probation. He had served all his time, so the "fact" offered by the prosecution was not true. (See attached appendix)

27. The jury knew at the time that James Savage had been involved in an altercation with two officers. (R2287,2299) However, this evidence was not of great significance in the life-or-death balance, since on the jury's request (R2309), Officer Doler had stood beside James Savage. This showed that the bevy of officers who had barely sustained a bruise had been large enough to take care of James without trouble. (R2592) Further, since this incident took place at the Brevard County jail, the jury would not have necessarily inferred that James Savage had been convicted of any other crimes.

28. Although a proffer had been made before the judge, the trial court did not consider the evidence given by Dr. Read and Dr. Healey in his sentencing order. The trial court's ruling also resulted in the exclusion of other witnesses, namely Dr. Read, Mr. Healey, Mrs. Harding, Alick Jackomas, Mr. Randall, and Mr. Hewitt. (R2625-6)

29. This is the rule in almost all the states. See Paduano & Smith, Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty, 18 Colum. Hum. Rts. L. Rev. 211, 216-17 (1987).

could have to any aggravating circumstance in this case is very difficult to divine.

The question becomes all the more perplexing in light of the false testimony of the officers on the motion to suppress. At the time of sentencing, the trial court was under the impression that James Savage had been on probation at the time of the crime, released by a Parole Board which apparently failed to protect society. In truth, this was not the case. As the state made very clear in defending a civil action filed by the victim's family, James Savage had served his full time. (See attached appendix)

The evidence which the prosecution proposed to place before the jury was therefore not just prejudicial, but also false. In this respect, Caldwell v. Mississippi, 472 U.S. 320 (1985), provides some guidance. As Justice O'Connor explained in her concurring opinion, "there can be no 'valid state penological interest' in imparting inaccurate or misleading information . . . in a capital sentencing case." Id. at 342 (O'Connor, J., concurring). As the Caldwell court noted, id. at 334 n.5, this Court recognized the same principle many years ago. See Blackwell v. State, 79 So. 731, 735-36 (Fla. 1918); Pait v. State, 112 So.2d 380, 383-84 (Fla. 1959); see also Dugger v. Adams, 489 U.S. ___, 109 S. Ct. 1211, 103 L.Ed.2d 435, 443 (1989).

Neither would the evidence have been admissible had the prosecution "impeached" the witnesses merely with the fact that James Savage had been in jail until 23 days prior to this crime,

without mentioning the "fact" that he had been paroled. In assessing James Savage, both Dr. Healey and Dr. Read testified that James' criminal history was not relevant. (R2537) Obviously, they said, one would expect that James would be unable to fit into his adoptive society.

Seeking to "impeach" the witnesses was just a subterfuge designed to get highly prejudicial information before the jury. It is clear that the prosecution cannot set up a straw man to knock down in this way. In Maggard v. State, 399 So.2d 973 (Fla. 1981), cert. denied, 454 U.S. 1059 (1981), this Court held that "[m]itigating factors are for the defendant's benefit, and the State should not be allowed to present damaging evidence against a defendant to rebut a mitigating circumstance that the defendant expressly concedes does not exist." Id. at 978; see also Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986) (reversal for "erroneous permitting of anticipatory rebuttal by the state directed at a statutory mitigating factor . . . waived by the defense").

Because this order resulted in the defense not presenting evidence, "the trial court's express orders . . . effectively precluded [defense] counsel from . . . presenting possible non-statutory mitigating circumstances." Hall v. State, 541 So.2d 1125, 1126 (Fla. 1989). Therefore, the death sentence imposed on James Savage cannot stand.

III. SINCE COUNSEL WITHDREW FROM PARTICIPATION IN THE DEFENSE BECAUSE THE PROSECUTION MADE UNFOUNDED THREATS AGAINST HIM REGARDING POTENTIAL PROSECUTION, THE STATE INTERFERED WITH MR. SAVAGE'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL TO AN INTOLERABLE DEGREE.

John Delgado, the attorney for Mr. Savage who was primarily responsible for the presentation of the penalty phase to both judge and jury, felt forced to exclude himself from the entire process. A brief review of the facts is important to an understanding of how the State interfered with Mr. Savage's right to counsel in this incident.

As the trial court noted (R2664), this was all rather a tempest in a teapot. The State alleged that Mr. Delgado, upon hearing that Rev. Graeme Savage was to be called as a witness for the prosecution, and upon encountering Rev. Savage in the hall, told him that he would be helping the State to put his own son into the electric chair. (R3015)

This was hardly a threatening statement. It could be construed as encouraging Rev. Savage to help his own adoptive son -- a reasonable course of action for the attorney trying to save James' life. To the extent that the statement upset Rev. Savage, one can only attribute his emotional discomfort to the fact that it was true. Rev. Savage may well have been upset about many aspects of the case in mitigation -- for example, when confronted with the fact that he had struck his adoptive son, and called him a "nigger." His discomforture would hardly indicate that he was being illegitimately coerced.

However, it was not even Rev. Savage who brought the matter to the attention of the prosecution. (R3019) It later appeared that when the State asked him about the incident, Rev. Savage said that an apology would more than suffice for him to drop any complaint. (R3019) The trial court noted that the first thing Mr. Delgado did when confronted with the issue was to "offer[] apology to counsel on the other side." (R3019)

These more benign descriptions of the incident did not come out until after the horse had left the stable. At the time when the damage was done to the defense, the prosecution did not seek to minimize the matter. Early in the penalty phase, one of the prosecutors told Mr. Delgado that he was being investigated for witness tampering, a third degree felony. (R2651)

Mr. Delgado told the trial court that he could not possibly continue. While slated to examine all the defense witnesses, Mr. Delgado reasonably perceived that anything he might say which would be offensive to Rev. Savage would add fuel to the fire. (R2655) Witnesses would be recounting the incidents of abuse by the father on his adoptive son, and a centerpiece of the defense would be this physical and emotional suffering.

When the defense motion for a mistrial was denied (R2663-6), and Mr. Delgado received no assurances that he would not be subject to prosecution, he therefore took no further action in the case. The other counsel, Mr. Turner, was therefore forced to do the entire defense presentation at the penalty phase. Mr.

Turner had not talked to any of the witnesses, including the experts:

> MR. TURNER: My concern right now is that my client is being deprived of effective representation because Mr. Delgado has now decided that he is in conflict and cannot support or assist because he says he has apprehensions that he is going to be possibly prosecuted or going to be turned into the . . . bar. Therefore, I have not had sufficient time to talk with this lady who is involved in pharmacology.

(R2818-19) This strange eventful history must result in the reversal of Mr. Savage's death sentence.[30]

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that "[a]n accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair." Id. at 685. Nothing must "inhibit[] the zealous representation required of attorneys." Morales v. State, 513 So.2d 695, 695 (Fla. 3d DCA, 1987) (citing Von Moltke v. Gillies, 332 U.S. 708 (1948). Nothing must preclude "counsel [from] acting in the role of an advocate. . . ." Smith v. State, 496 So.2d 971, 973 (Fla. 1st DCA, 1986) (emphasis in original). "The right to counsel . . . encompasses the right to assistance of counsel whose loyalty is not divided.

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30. John Delgado had no further involvement in the case, even during the sentencing proceedings before the trial court.

. . ." Davis v. State, 461 So.2d 291, 294 (Fla. 1st DCA, 1985).[31]

In our adversarial system, interference with counsel's function by the State generally creates a presumption of prejudice:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

Strickland v. Washington, 466 U.S. at 692 (emphasis supplied) (citing United States v. Cronic, 446 U.S. 648, 659 & n.25 (1984).[32]

In this case, John Delgado took no further part in the case[33] as a direct result of the State's threat that he would be

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31. In capital and non-capital cases, this requirement obviously extends to the sentencing phase as well as the determination of guilt. Brown v. State, 479 So. 2d 152 (Fla. 5th DCA, 1985).

32. The Supreme Court has identified various contexts where actual or constructive denial of counsel results in a presumption of prejudice. See, e.g., Herring v. New York, 422 U.S. 853 (1975) (bar on defense counsel giving closing argument); Brooks v. Tennessee, 406 U.S. 605 (1972) (requirement that defendant be first witness); Ferguson v. Georgia, 365 U.S. 570, 593-96 (1961) (bar on counsel performing direct examination of defendant).

33. It does not matter that Mr. Savage had access to another attorney -- Mr. Turner. John Delgado was appearing pro bono publico as Mr. Savage retained attorney. The state cannot interfere with counsel who is already representing the accused, even if another competent counsel takes that lawyer's place. See also United States v. Panzardi Alvarez, 816 F.2d 813 (1st Cir. (continued...)

prosecuted and referred to the bar association for the actions described above. Even had there been merit to the State's cause against Mr. Delgado, when Mr. Delgado spontaneously offered to apologize the State could have "cured" the entire problem simply by conceding that this apology was quite enough to satisfy Rev. Savage. The State apparently decided against this simple solution to the evisceration of James Savage's right to counsel. Now the State must unfortunately bear the burden of a resentencing trial.

IV. THE ERRONEOUS SUBMISSION AND CONSIDERATION OF AGGRAVATING CIRCUMSTANCES REQUIRES THAT THE DEATH SENTENCE IMPOSED UPON JAMES SAVAGE BE REVERSED.

A. The Trial Court Should Not Have Instructed the Jury or Found that the Murder was Cold, Calculated, and Premeditated Without any Pretense of Moral or Legal Justifiation.

Over vehement defense objection, the trial court insisted on instructing the jury on the aggravating circumstance in Section 921.141(5)(i), Florida Statutes (1987). (R2198-2219) Defense counsel filed a motion in limine in this regard. (R3540) The trial court eventually instructed the jury on this circumstance. (R2994) The trial court also erroneously concluded that the state established this aggravating circumstance beyond a

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33. (...continued)
1987) (reversal where court refused to let Florida counsel appear pro hac vice in Puerto Rico despite appearance of other competent counsel); Harling v. United States, 387 A. 2d 1101 (D.C. 1978).

reasonable doubt. (R3581-82) Close scrutiny of the evidence reveals that the evidence did not establish this circumstance and, in fact, even failed to justify an instruction thereon.

The only evidence of the circumstances surrounding the murder came from Savage's own statements to the police. Those statements revealed that Savage, intoxicated and high on crack cocaine, originally intended only to steal the car parked in the alley. When the victim first came out of the shop, Savage hid in the alley until she went back inside. The episode degenerated into a murder, only when the victim came back outside and surprised Savage in his attempt to steal her car. Savage's original intent was merely theft. There was absolutely no evidence to support any planning of the victim's death. The heightened premeditation required to sustain this circumstance is completely absent in this case. Savage's crime is the classic example of "a robbery gone bad." See Hansbrough v. State, 509 So.2d 1081 (Fla. 1987)[a robbery that got out of hand resulting in the frenzied stabbing of the victim does not demonstrate the cold calculated premeditation necessary for this factor].

The facts in this case are remarkably similar to those in Hamblen v. State, 527 So.2d 800 (Fla. 1988). Hamblen had no intention of killing the victim (female owner of a boutique). Hamblen became angered when Ms. Edwards pressed the alarm button. Hamblen then decided to kill her. This Court pointed out that Hamblen's conduct was "more akin to a spontaneous act taken without reflection." Hamblen, 527 So.2d at 805. A distinguishing

factor in Hamblen (like Savage's case) was the absence of any transportation of the victim to another location where the murder occurred, e.g., Parker v. State, 476 So.2d 134 (Fla. 1985).

In Smith v. State, 515 So.2d 182 (Fla. 1987), this Court found the evidence insufficient to support this circumstance, even where the rock used to bludgeon the victim was not of a type found in the immediate vicinity. The trial court concluded that obtaining such a weapon demonstrated heightened premeditation. This Court disagreed. In this case the electrical cord used to strangle Ms. Barber was handily obtained from her car at the scene.

Rogers v. State, 511 So.2d 526 (Fla. 1987) is also enlightening. As Rogers fled from an attempted robbery, he wounded a witness attempting to follow him to the getaway car. As the victim lay wounded, Rogers shot him twice more, execution style. This Court pointed out that there was an utter absence of any evidence that Rogers had a careful plan or prearranged design to kill anyone during the robbery. Receding from Herring v. State, 446 So.2d 1049 (Fla. 1984), this Court held that there must be an indicia of "calculation." 511 So.2d at 533. As in Rogers, there may be sufficient evidence of simple premeditation, there is insufficient evidence of the heightened premeditation necessary in this case.

B. The Jury Instructions on Heightened Premeditation and cruelty failed to Adequately Channel the Jury's Discretion.

Defense counsel challenged the standard jury instructions defining the aggravating circumstances of cold, calculated, and premeditated [s.921.141(5)(i)] and heinous, atrocious or cruel [s.921.141(5)(h)]. Citing Maynard v. Cartwright, 486 U.S. 356 (1988) defense counsel pointed out that these instructions failed to adequately inform juries of what they must find to impose the death penalty. (R2219-33) The trial court overruled Appellant's objections and read the standard jury instructions. (R2994) Ultimately, the trial court found both of these aggravating factors present. (R3581-83)

Maynard v. Cartwright, supra, calls into question the constitutionality of Florida's standard jury instructions on these two aggravating circumstances. Because these aggravating circumstances can characterize every first-degree murder (especially to a jury) they are unconstitutionally vague. The instructions fail to adequately "inform juries what they must find to impose the death penalty and, as a result, leaves them and appellate courts with a kind of open-end discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972)." Maynard v. Cartwright, 486 U.S. at 362

In Smalley v. State, 546 So.2d 720 (Fla. 1989), this Court discussed the problem presented by Maynard v. Cartwright, concluding that substantial differences between Florida's capital sentencing scheme and Oklahoma's rendered the holding inapplicable to Florida. This Court pointed out that, in Oklahoma, the jury is the sentencer. In Florida, a trial judge,

after an advisory jury opinion, makes findings that support the determination of all aggravating and mitigating circumstances. This Court concluded that it is possible to discern what facts the sentencer relied on in deciding that a certain killing was heinous, atrocious, or cruel. This analysis fails to address what effect the vague instruction may have had on the jury recommendation which, is relied on (and supposedly relied on heavily) by the sentencer. See e.g., Riley v. Wainwright, 517 So.2d 656 (Fla. 1987). The jury instructions and the statutory language setting forth the aggravating circumstances do not adequately limit the jury's or the trial court's discretion in any significant way.

SECTION 2: SINCE DOUBLE JEOPARDY BARS THE REIMPOSITION OF THE DEATH PENALTY IN THIS CASE, THIS COURT SHOULD REVERSE JAMES SAVAGE'S CONVICTION AND REMAND FOR RETRIAL ON THE QUESTION OF GUILT ONLY.

We now turn to the violations of Mr. Savage's rights which require that the conviction be reversed, and this case be sent back for a retrial. Mr. Savage emphasizes, however, that he does not wish to run the gauntlet once more on the death penalty. He therefore respectfully asks that this Court first decide his double jeopardy challenge to any reimposition of the death penalty.

V. SINCE THE FIRST TRIAL CONCLUSIVELY SETTLED THE IMPROPRIETY OF SENTENCING JAMES SAVAGE TO DEATH, THE DOUBLE JEOPARDY CLAUSE PRECLUDES HIS EXPOSURE TO THE DEATH PENALTY AT A RETRIAL.

Ten years ago the United States Supreme Court made it clear that the protections of the Double Jeopardy Clause apply with equal force to the sentencing phase of a capital trial. See Bullington v. Missouri, 451 U.S. 430 (1980). The rule of Bullington has created no great controversy in most states, where juries impose a final sentence. See, e.g., Young v. Kemp, 760 F.2d 1097 (11th Cir. 1985); Godfrey v. Kemp, 836 F.2d 1557 (11th Cir. 1988); Fitzpatrick v. McCormick, 869 F.2d 1247 (9th Cir. 1989); see also State v. Silhan, 275 S.E. 2d 450 (N.C. 1981).

There seems little reason not to apply the rationale of Bullington to the facts of this case. The Supreme Court reasoned that a capital sentencing proceeding is the equivalent of a trial

in length, and more than its equivalent when the stakes are considered:

> The "embarrassment, expense and ordeal" and the "anxiety and insecurity" faced by a defendant at the penalty phase of a . . . capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The "unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant," . . . thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince the jury to impose the ultimate punishment.

Id., 451 U.S. at 445.

The same considerations apply to this case. As set forth above, see Section 1(I), the trial court incorrectly overrode the jury's decision that life imprisonment was the appropriate punishment in this case. The jury found -- by an 11-to-1 vote -- that James Savage should live. If this Court agrees that this decision was the correct one James Savage has, in effect, been "acquitted" of the death penalty.[34]

Certainly, the decision of this Court should carry no less weight than a correct decision by the trial court that the jury was correct. Indeed, the Supreme Court has explicitly held that the Double Jeopardy bar applies "whenever a jury agrees or an

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34. Appellant makes no argument that the trial court cannot disagree with the jury without violating the Double Jeopardy Clause. See Lusk v. State, 446 So. 2d 90 (Fla. 1984); Spaziano v. Florida, 462 U.S. 447 (1984). However, where this Court holds that the jury's verdict was proper, then the cumulative effect of both the jury's finding and the finding made by this Court is that the accused has been "acquitted" of the death sentence.

appellate court decides that the prosecution has not proved its case." Poland v. Arizona, 476 U.S. 82 (1986) (quoting Bullington v. Missouri, 451 U.S. at 443).[35]

In Brown v. State, 521 So.2d 110 (Fla. 1988), cert. denied, 484 U.S. 912 (1988), this Court unanimously held that the improper imposition of a life sentence by the trial judge insulated the defendant from being retried for the death penalty. Id. at 112 (citing Arizona v. Rumsey, 467 U.S. 203 (1984); see also State v. Bassett, 557 So.2d 76, 77 (Fla. 5th DCA, 1990). How logical could it be to rule that a proper decision by the trial jury, ratified by this Court, should not provide the same protection?

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35. There have been many cases in the past where this Court has considered an override of the jury's life recommendation. See Radelet, Rejecting the Jury: The imposition of the Death Penalty in Florida, 18 U.C. Davis L. Rev. 1409 (1985) (84 jury overrides in 326 capital cases between 1972 and 1984). In many of these cases, the conviction has been affirmed, but the case remanded for imposition of a life sentence. There is apparently no case where an individual has successfully challenged his conviction in collateral proceedings, and then been subjected to the death penalty on retrial -- the Bullington rule would surely preclude it. To deny application of the rule to James Savage's case would therefore create independent constitutional problems. He would be penalized for asserting his constitutional right to challenge defects in his conviction under a rule which might be stated as follows: If you waive your right to appeal your conviction, we guarantee you life; if you assert it, you may get death once more. This is precisely the scenario condemned by the Supreme Court in United States v. Jackson, 390 U.S. 570 (1968), where the death penalty could only be applied to those asserting their right to a jury trial. Those who entered a guilty plea faced a maximum punishment of life imprisonment, chilling the assertion of rights in a manner which was "patently unconstitutional." Id. at 581; see also Simmons v. United States, 390 U.S. 377 (1968) (cannot use testimony given in suppression hearing against the accused at trial).

Support may be found in some of decisions applying Bullington which arise from statutory schemes similar to our own. For example, in Mississippi the statute is identical in all respects save for our judge-override provision, and Bullington has been applied with full force. See Dycus v. State, 440 So.2d 246 (Miss. 1983). This is true even in cases where the jury did not vote unanimously for life, but when "the jury did not impose the death penalty . . . he was sentenced to life" by operation of law. Odom v. State, 483 So.2d 343, 344 (Miss. 1986).

In Alabama, the judge imposes sentence, with a discretion that is not even bounded by the deference to jury recommendations required by our own Tedder rule. The Alabama Supreme Court nevertheless has applied Bullington, holding that once a determination has been made that the accused should be sentenced to life imprisonment, the accused "is protected against the later imposition of the death penalty in the event that he obtains a reversal of the conviction and is retried and reconvicted for the same offense." Ex parte Godbolt, 546 So.2d 991, 994 (Ala. 1987) (emphasis in original); accord Ex Parte Bell, 511 So.2d 519, 522 (Ala. Crim. App. 1987).

This Court should therefore rule that the death penalty is no longer an issue in the case, and proceed to the merits of Mr. Savage's challenge to his conviction.

VI. SINCE THE STATE WITNESSES MISLED THE TRIAL COURT WITH TESTIMONY WHICH HAS NOW PROVEN TO BE UNTRUE, THIS COURT CANNOT RATIFY THE LOWER COURT'S FINDING THAT EVIDENCE WAS PROPERLY SEIZED UPON MR. SAVAGE'S ILLEGAL DETENTION AND ARREST.

The zeal with which cases are occasionally brought to court sadly leads to the occasional excess. This case is a good example. James Savage's detention and arrest was the subject of an evidentiary hearing below, and the result was a close one. The trial court noted that the issue could well be the subject of reversal in an appellate court. (R1917) However, James Savage was arrested for violation of his probation. (R1699; see also 1687,1697,1758) The trial court therefore upheld the procedures.

The probation story was necessary to avoid suppression at the criminal trial. However, the victim's family subsequently sued the Department of Corrections for letting Mr. Savage free too early. Now, a different story would prove more expedient, and the truth came out.

Mr. Savage was not on probation at all, since he had completed his time. (See attached Appendix). The requirement of the Fourth Amendment that no warrant shall issue, but upon probable cause, supported by oath or affirmation particularly describing the person or things to be seized, applies to arrest as well as search warrants. Diordenello v. United States, 357 U.S. 480 (1958). In light of the latest revelation regarding Savage's probationary status, Appellant submits that the state

has failed to meet its burden of proof in establishing that his arrest was made pursuant to a valid warrant.

A void or nonexistent warrant may not be the basis for a legal arrest and search. Martin v. State, 424 So.2d 994, 995 (Fla. 2d DCA 1983); Pesci v. State, 420 So.2d 380, 382 (Fla. 3d DCA 1983). In State v. Gifford, 558 So.2d 444 (Fla. 4th DCA 1990), Gifford became a suspect in a sexual offense case. A records check revealed an outstanding probation violation warrant in Gifford's name. After his arrest on the warrant, Gifford ultimately confessed following advisement of his Miranda rights. The officers subsequently discovered that the warrant was invalid and should have been withdrawn ten days before Gifford's arrest.

The Fourth District Court of Appeal agreed that the arrest was unlawful. The court also pointed out that the "good faith exception" to the exclusionary rule does not apply. See United States v. Leon, 468 U.S. 897 (1984). However, Gifford's continued detention and subsequent arrest on the sexual battery charge was supported by independent probable cause. Prior to interviewing Gifford, the detective had interviewed the victims and witnesses and recovered physical evidence. The District Court found that the lapse of time between the illegal arrest and Gifford's statement, coupled with the gathering of evidence establishing probable cause, dissipated any "causal connection" between the illegal arrest and the subsequent statement. The analysis by the Gifford court supports the conclusion that James Savage's statements were the product of an illegal arrest.

Unlike Gifford, the police in Savage's case admitted that they had nothing even approximating probable cause to support an arrest. (R1696) Another helpful case is Albo v. State, 477 So.2d 1071 (Fla. 3d DCA 1985). Police stopped Albo for a traffic infraction. When a routine computer check indicated that Albo's license was under suspension for the failure to pay a traffic fine, the police arrested him for driving with a suspended licence. Incident to that arrest, police seized a concealed weapon in Albo's car. Albo sought to suppress the weapon based upon the contention that the information provided by the computer was incorrect. Albo had, in fact, paid the fine and his license had been reinstated at the time of his arrest. The hearing revealed that police computers were not updated to reflect these facts.

The District Court of Appeal, Third District, held that the trial court erred in denying Albo's motion to suppress. The trial court based its ruling on the fact that the arresting officer had acted in "good faith." Albo, 477 So.2d at 1072. The District Court held that suppression of the gun was required on the ground that the arrest was illegal and the "good faith" exception did not apply to the instant facts. The Court concluded that the law enforcement authorities, considered collectively, had no objective cause to believe that Albo's license was suspended in order to justify his arrest. The police may not rely upon any incorrect or incomplete information when

they are at fault in permitting the records to remain uncorrected. Id.

It is now beyond dispute that James Savage was not on probation. His arrest for violation of probation was therefore illegal. All that flowed from that arrest was unlawfully gained and any evidence developed as a result of that arrest should have been inadmissible. Wong Sun v. United States, 371 U.S. 471 (1963) and Walker v. State, 433 So.2d 644 (Fla. 2d DCA 1983).

A. At the very least, this Court should order a remand to determine the nature and scope of the State's subornation of perjury in this case.

In Giglio v. United States, 405 U.S. 150 (1972), the United States Supreme Court made it clear that the prosecution may not suborn perjury at any criminal trial -- let alone one where the State is seeking to have the accused executed. Nobody should be convicted or sentenced to die on the basis of false testimony:

> To be sure, where is may be established that a conviction has been obtained through the use or false evidence or perjured testimony, the accused's rights secured by the due process clause of the Fourteenth Amendment of the Constitution of the United States are implicated. And this is so without regard to whether the prosecution has wilfully procured the perjured testimony. Where such false evidence has in fact contributed to the conviction, the accused is entitled to relief therefrom.

Pearson v. State, 428 So.2d 1361, 1363 (Miss. 1983) (emphasis in original) (citing Mooney v. Holohan, 294 U.S. 103 (1935); Napue v. Illinois, 360 U.S. 264 (1959); see also United States v. Agurs, 427 U.S. 97 (1976); Miller v. Pate, 396 U.S. 1 (1967).

We now know that James Savage's arrest was based on a falsehood and was illegal. At the very least, this Court should remand for a hearing to determine the nature and scope of the state's subornation of perjury in this case.

B. In the alternative, this Court may find from the facts already presented that the lower court erred in failing to suppress the seized evidence.

Officer Plymale and Officer Baker asked to speak with James Savage and two other people. (R1642) At this point, the only link between Jim Savage and the crime was that the police had decided to look for a "transient-type person." (R1716) The officers ran a warrants check on the three (R1645) at which time Detective Sarver told them to hold James Savage for questioning. (R1660) James Savage was never told he could leave. (R1665)

It was ten minutes before the other officers arrived. (R1648) At that time, four officers were standing around James. (R1666) While there was some dispute as to the visibility of their guns and bullet-proof vests (R1640), Officer Plymale displayed his badge. (R1645)

It was as a direct result of a F.I. card (based on an officer spotting James downtown one night) that Detective Sarver decided to hold James for questioning. (R1746) Officer Plymale clearly stopped James on the pretext that he was investigating a rash of burglaries. (R1251)

Detective Nichols candidly admitted that while James Savage's name had come up in discussions of who might possibly

have committed the crime, he had no reasonable suspicion that James had either committed a crime or was in the process of committing one. (R1797) The initial detention of James Savage was a stop, despite the officers' testimony to the contrary.

Many investigatory stops are accomplished by display of force rather than actual application. The number and position of the officers is a typical example. See e.g. United States v. Richards, 500 F.2d 1025 (9th Cir. 1974). The actual display of force is not a necessary ingredient in every investigative detention situation. "Any restraint of movement will do. . . . " United States v. Elmore, 595 F.2d 1036, 1041 (5th Cir. 1979). In Adams v. Williams, 407 U.S. 143 (1972), a police officer approached the suspect seated in an automobile, tapped on the car window, and asked the occupant to open the door. The Court found that a "forcible stop" had occurred (emphasis added) and suggested strongly that it occurred at the time the officer tapped on the window.

Despite the testimony of the officers at Savage's suppression hearing, the totality of the evidence reveals that James Savage was not free to do so. This would have become readily apparent had he attempted to leave. The Third District Court of Appeal adopted the test set forth in United States v. Wylie, 569 F.2d 62 (D.C. Cir. 1977) for the determination of whether a "stop" has been effected, or whether mere "contact" has occurred:

> [T]he crucial consideration is . . . whether the person was 'under a reasonable impression

> that he [was] not free to leave the officer's presence.' We would only add that in determining whether such a reasonable impression existed, the test must be 'what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes.' (citations omitted).

State v. Frost, 374 So.2d 593,597 (Fla. 3d DCA 1979). After Officers Plymale and Baker continued to detain Savage at Detective Sarver's request, Sarver transported James to the police station. Sarver then obtained evidence from Savage, including Savage's shoes and shirt. This evidence was seized prior to any Miranda warnings. Due to the illegal stop and continued illegal detention of James Savage, the evidence seized as a result should have been suppressed. Wong Sun v. United States, 371 U.S. 471 (1963).

VII. THE FRUITS OF A STATEMENT TAKEN WITHOUT MIRANDA WARNINGS SHOULD HAVE BEEN SUPPRESSED.

Before any Miranda rights had been read, Detective Sarver apparently asked about the scratches on James Savage's hands. (R1680) James told a story about fighting a man called Whiggy (R1681), which turned out to be false. (R1688) His story that he had borrowed $40 from William "Speedy" Gartland (R1684) also turned out to be untrue. (R1687)

The police testified that they would have had to let James go if he had asked to leave. (R1696) James Savage reasonably testified that he did not think he would be allowed to leave.

(R1813) He had just got out of prison, and there you do what you are told by the officers or you get beaten up. (R1814)

The officers apparently believed that James was not "in custody" for the purposes of Miranda because of their subjective statement that he could have left. Indeed, the police stated that they only felt he was a suspect after they refuted his story and did a presumptive test for blood on his shirt. (R1720) Mr. Savage said that when he was in the police station he thought he was under arrest. (R1824) Indeed, one officer did concede that Mr. Savage was unlikely to know his way to and from the conference room in the police station. (R1736)

Not until a considerable time after he had been taken to the police station did a law enforcement agent read Jim his rights. (R1697, 1755) Jim was confronted by the police investigation showing that his previous tale had not been true, and with the fact that he was in violation of his parole. He then gave a statement implicating himself. (R1697)

In denying Mr. Savage's motion to suppress the statements, the trial court stated that the Miranda warnings "could have and should have been given earlier." (R1917) The trial court made a factual finding that the first Miranda warning was given between 8:00 p.m. and 8:15 p.m. (R3435) The trial court further found that:

> The seizure of the defendant's clothing was either a voluntary relinquishment by the defendant at a time when he was either cooperatively present at the police station or lawfully detained for the purpose of further investigation.

(R3435) It is abundantly clear that the police obtained Mr. Savage's shirt without any explanation of his constitutional rights. The issue that this Court must resolve is whether or not Mr. Savage voluntarily consented to the police demand for his shirt and shoes, from which the police obtained the victim's blood.

The United States Supreme Court has held that mere acquiescence to the authority of the police is not consent, and conduct that indicates only acquiescence to perceived police authority will not support a search based on the alleged consent, regardless of the lack of overt coercion. Bumper v. North Carolina, 391 U.S. 543 (1968). See also United States v. Ruiz - Estrella, 481 F.2d 723 (2d Cir. 1973). Since Mr. Savage handed over his clothing in the face of police authority, the question remains whether the setting in which the consent was obtained was coercive.

This Court must determine whether Mr. Savage's consent was "freely and voluntarily" made under the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The court had discussed a number of factors that are used in determining whether a suspect's consent is voluntary. These factors include:

> (1) the time, place, and purpose of the encounter; (2) the words used by the police officer; (3) the officer's tone of voice and demeanor in requesting the defendant to accompany him to the police station; (4) the

> manner in which the defendant is transported to the police station; (5) the defendant's previous exposure to the criminal justice system; (6) the maturity, sophistication, mental or emotional state of the suspect; (7) Miranda warnings; (8) prior illegal police action; (9) deception by the police as to their purpose; and (10) the defendant's awareness of his Fourth Amendment rights.

W. Lafave, Search and Seizure, s.8.2 (2d.ed. 1987).

Mr. Savage's limited educational background, low intelligence, and "prison mentality" are probably the most important considerations in the determination that his consent was involuntary under the totality of the circumstances. Courts will consider factors that indicate the consenting party was particularly susceptible to coercive tactics. Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973). See also United States v. Mayes, 552 F.2d 729 (6th Cir. 1977) (eighteen-year-old with seventh-grade education; consent involuntary); and, LaDuke v. Nelson, 762 F.2d 1318 (9th Cir. 1985) (vulnerable nature of migrant workers made them particularly susceptible to strong show of force by INS agents; consent involuntary).

The state did not refute the evidence that James Savage functions at the level of a fourteen-year-old. (R2775) The fact that James Savage is an Aboriginal is also an important consideration. Aboriginals are indoctrinated to be polite. In this type of situation, Aboriginals will answer questions in a manner that they believe the questioner desires. Regina v. Anunga, 11 A.L.R. 412, 414 (1975).

Additionally, James Savage had very recently been released from prison. He was use to doing what authorities told him to do. If a prisoner failed to cooperate, he got a beating. (R1814) James Savage reasonably testified that he did not think he would be allowed to leave. (R1813)

Under the totality of the circumstances, he did not feel free to refuse the detectives' requests for his clothing. James Savage thought he was under arrest. (R1824) He had not yet been advised of his Miranda rights, nor had he been told that he was free to leave. (R1665) Considering the totality of the circumstances and lack of Miranda warnings, one must conclude that Mr. Savage's consent was involuntary. The trial court should have suppressed the physical evidence seized by the police and Mr. Savage's subsequent statements.

VIII. THE PERVASIVE PRE-TRIAL PUBLICITY CREATED AN REQUIREMENT THAT VOIR DIRE BE INDIVIDUAL AND SEQUESTERED IN THIS CASE.

At one point, the court noted that he was "trying to alert [the lawyers] to the fact that we do have some who are extraordinary, and those who are not quite extraordinary as far as their knowledge [of the case]." (R439) (emphasis supplied) Indeed, all the jurors in this case had either extraordinary or almost-extraordinary knowledge of the "facts," as recounted in the media. All this led Venireperson Conner to naturally assume that the trial court be held in another town. (R51) Short of this, it was absolutely critical that voir dire be adequate to expose bias

without further tainting the other jurors who would sit on the case.[36]

A. The right to individual, sequestered voir dire in the extraordinary case.

When James Savage asked that jurors in his highly-publicized trial be carefully screened, separate from their peers, he was not casting any aspersions on the local community, but merely asserting his constitutional right to a fair trial, by "a panel of impartial 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722, (1961).[37] It must be said that there is no case which holds that -- under federal law, in every capital case, without discrimination -- "individualized segregated voir dire is constitutionally required." Berryhill v. Zant, 858 F.2d 633, 643 (11th Cir. 1988) (Clark, J., concurring).[38]

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36. The defense requested that they "conduct voir dire on each individual, separate and distinct from the group." (R3400) Instead, the trial court held voir dire in panels of roughly a dozen, with each other member of the panel hearing the prejudicial statements made by his or her peers.

37. The question is similar to a request for a change of venue. As the Mississippi Supreme Court has held: "[W]hen it is doubtful that a fair and impartial jury can be obtained in the county where a homicide has been committed, an accused on trial for his life 'is but asking for his rights when he requests a change of venue.'" Fisher v. State, 481 So. 2d 203, 216 (Miss. 1985) [quoting Johnson v. State, 476 So. 2d 1195, 1210 (Miss. 1985)].

38. Of course, the fact that the federal courts have only recognized that individual, sequestered voir dire is vital to a fair trial in limited circumstances should not preclude this Court from recognizing the right under our own constitution. See, e.g., State v. Glosson, 462 So. 2d 1082 (Fla. 1985) (rejecting Hampton v. United States as unworkable under our justice system); Aldana v. Holub, 381 So. 2d 231 (Fla. 1973). Our own constitution explicitly guarantees the right to a "trial by impartial jury in (continued...)

However, "[g]iven the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).[39]

Where pervasive publicity has blanketed the jury pool, it is clear that "[a] searching voir dire is a necessary incident to the right to an impartial jury." United States v. Bear Runner, 502 F.2d 908, 911 (8th Cir. 1974) (citing Dennis v. United States, 339 U.S. 162 (1950).[40] In such a case, "[t]he defendant

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38. (...continued)
the county where the crime was committed." Art. 1, § 16(a), Fla. Const. Where the saturation publicity makes the selection of an impartial jury difficult, and the accused asserts his right to be tried in the county, our constitution should be read to require that a probing, individual voir dire be conducted.

39. Normally, much of the potential prejudice in a high-profile case may be eviscerated by a change of venue. In this case, Mr. Savage chose to be tried in the county where the crime occurred. The Bill of Rights, Amend. VI, U.S. Const., as well as the Constitution of this State, Art. 1, § 16, Fla. Const., secure him both the right to be tried in Brevard County and the right to a fair trial. Our own constitution explicitly preserves the right to "trial by impartial jury in the county where the crime was committed." Id. (emphasis supplied). "On occasion, however, [these rights] have not been entirely harmonious neighbors." Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163, 1165 (Miss. 1987). When this is the case, suitable precautions must be taken to assure jurors' impartiality, for "[n]o right ranks higher than the accused to a fair trial." Id. at 1166. The closing remark of the Mississippi Supreme Court in that case is also appropriate: "[C]ases as sensational as this one are fortunately rare, and extreme remedies are sometimes necessary for extreme problems." Id. at 1167.

40. See also Morford v. United States, 339 U.S. 258 (1950); Swain v. Alabama, 380 U.S. 202, 218-19 (1965) ("[t]he voir dire in American trials tends to be extensive and probing"); Jordan v. Lippman, 763 F.2d 1265, 1277 (11th Cir. 1985) ("voir dire is key element in the trial court's constitutionally-mandated search for (continued...)

. . . has the right to 'probe for the hidden prejudices of the jurors. . . .'" Silverthorne v. United States, 400 F.2d 627, 640 (9th Cir. 1968) (quoting Lurding v. United States, 179 F.2d 419, 421 (6th Cir. 1950); accord Jordan v. Lippman, 763 F.2d 1265, 1278 (11th Cir. 1985) (voir dire must be adequate "to unearth such potential prejudice in the jury pool"). Thus, the defense must be able to bring out what prejudicial information or misinformation lurks within.

However, as Judge Clark pointed out in Berryhill, requiring counsel to voir dire jurors in the presence of each other results in defense counsel being faced with an unacceptable Hobson's choice:

> To ensure a fair jury, he [will have] to question each prospective juror individually about what the juror [knows] about the case from the media or other exposure. By being forced to ask such pointed questions in front of the entire jury venire, however, counsel risk[s] contaminating those prospective jurors who [have] not read or heard about the case with the responses of those who [have].

Berryhill v. Zant, 858 F.2d at 642 (Clark, J. concurring) (emphasis omitted).

This is not the only problem. When faced by saturation publicity, jurors' well-intentioned assurances that they can be fair are simply not sufficient to assure an impartial panel. How

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40. (...continued)
juror impartiality"); United States v. Davis, 583 F.2d 190, 196 (5th Cir. 1978) ("court should have determined what in particular each juror had heard or read and how it affected his attitude towards the trial").

many people like to admit that they will be "unfair" before a gathering of neighbors, the press watching eagerly on? See Williams v. Griswald, 743 F.2d 1533, 1540 n. 14 (11th Cir. 1984) ("the juror may be reluctant to admit any bias in front of his peers"). Indeed, "'going through the form of obtaining the jurors' assurances of impartiality is insufficient . . . .'" Silverthorne v. United States, 400 F.2d 627, 638 (9th Cir. 1968); see also, Irvin v. Dowd, 366 U.S. 717, 728 (1961) (jurors' statements of their own impartiality to be given "little weight").[41]

Again, Mr. Savage does not assert a right to individual, sequestered voir dire in any but the most extraordinary case. Ordinarily, the trial court enjoys the discretion to decide whether this will be permitted. See Fla.R.Crim.P. 3.300 (b); Branch v. State, 212 So.2d 29, 30 (Fla. 2d DCA, 1968).[42] Howev-

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41. See also Jordan v. Lippman, 763 F.2d 1265, 1274 (11th Cir. 1985) (quoting United States v. Davis, 583 F.2d 190, 197 (5th Cir. 1978)) ("The juror is poorly placed to make a determination of his own impartiality"; "juror's conclusory statement of impartiality is insufficient"); Coleman v. Kemp, 778 F.2d 1487, 1543 (11th Cir. 1985), cert. denied, 476 U.S. 1164 (1986) ("conclusory protestations of impartiality in the voir dire" not sufficient to rebut the prejudice due to pre-trial publicity); United States v. Gerald, 624 F.2d 1291, 1297 (5th Cir. 1980) (under certain circumstances "a trial court commits reversible error by permitting the jurors to decide whether their ability to render an impartial verdict is impaired").

42. None of the cases where this Court has upheld the denial of individual, sequestered voir dire have approached the circumstances of this case. Generally, for example, while there "had been news coverage, . . . there is no indication that any of the coverage was prejudicial." Stone v. State, 378 So. 2d 765, 768 (Fla. 1980). As set forth below, this case was different in degree from these cases.

er, a "very wide latitude of examination . . . is allowable and indeed often necessary to bring to light the mental attitude of the proposed juror to one of the parties that it may be determined if such attitude renders the proposed juror unqualified." Cross v. State, 103 So. 636, 637 (Fla. 1925). Even in a civil case, where there is a high probability that a probing voir dire in the presence of all the jurors exposed prejudicial matters, this Court has reversed. See, e.g., Blanton v. Butler, 81 So.2d 745, 746 (Fla. 1955) (discussion of insurance companies in motor vehicle collision case).

For the reasons which follow, this is one of the rare instances where individual, sequestered voir dire was required. Indeed, why it was denied in this highly publicized case is something of a mystery. "A small amount of time would be involved, when compared to the possibility of a new trial." United States v. Starks, 515 F.2d 112, 125 (3d Cir. 1975).

B. The overwhelming publicity in this case required that voir dire be conducted individually.

In light of the extraordinary publicity in this case, James Savage asked for nothing more than his constitutional rights when he requested individual voir dire. Virtually all the jurors had

heard or read about the case,[43] reading up to 25 articles reflecting the media's interpretation of the facts. (R416)

In United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981), no member of the collective panel admitted to having formed an opinion on the guilt of the accused. Yet because 48 of the 56 prospective jurors stated that they had read or heard about the case, the court reversed, holding that the trial court's inquiry was insufficient to reveal possible prejudice. See also State v. Claybrook, 736 S.W. 2d 95, 100 (Tenn. 1987) (where 80 percent of the first group of jurors had heard about the case, individual voir dire required) (citing Sommerville v. State, 521 S.W. 2d 792 (Tenn. 1975); Jordan v. Lippman, 763 F.2d at 1269 (sequestered voir dire required in case where 89 percent of pool had heard about the case).

In this case, 50 of the first 54 jurors (or over 92 percent) questioned on this matter knew about the case. Neither was the media coverage they had seen precisely impartial. The articles explicitly said that James Savage had committed the crime. (R39) The police had apparently "caught the man that did it." (R165) Indeed, the media coverage mentioned that James Savage had confessed. (R48,50,74,118,247,359) Since it was common knowledge

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43. See (R32, 45-46, 54, 67, 73, 85, 99, 104, 113, 116-17, 128, 148, 158, 164, 171, 178, 185, 188-89, 198, 202, 208, 216, 222, 226, 230, 245, 250, 258, 265, 270, 282, 293, 300, 305, 315, 316, 322, 326, 343, 351, 356, 364, 375, 381, 386, 393, 402, 408, 420, 426. Only four potential jurors (R93, 96, 112, 434) purported not to have heard about the case. Even they had not necessarily not read about the case, but just did not remember. (R434)

that James had confessed, this gave cause for concern that he might not be innocent. (R359) See Rideau v. Louisiana, 373 U.S. 723 (1963); Seals v. State, 44 So. 61, 65 (Miss. 1950) (error to go forward with trial where jurors already know of confession).

Other jurors apparently knew that James Savage had a criminal record. (See, e.g., Tr. 158) In State v. Claybrook, 736 S.W. 2d 95 (Tenn. 1987), the court reversed when a juror noted that the accused had "been in prison before." Id. at 100; see also United States v. Davis, 583 F.2d at 196 n.6.

The unfortunate coincidence of James' surname had caused almost universal discussion: "the name Savage . . . sounds like an Indian type." (R321) Cf. United States v. Starks, 515 F.2d 112, 124-25 (3d Cir. 1975) (error not to conduct sequestered voir dire on sensitive racial implications of case); United States v. Bear Runner, 502 F.2d 908, 910 (8th Cir. 1974) (questioning regarding "American Indian gentlemen" should have been sequestered).

For some, this was not merely a nominal coincidence. Various jurors had heard that James Savage was a "vagrant" or a "transient" from out of town. (R68,80,232) Because of this case, "the business people in the town were upset at the time. They wanted to have some sort of law or ordinance passed relating to transients." (R232) The general fear of "vagrants" in the community is similar to the fear of the accused expressed in the media in Coppedge v. United States, 272 F.2d 504, 505 (D.C. Cir. 1959). In that case, the Court held that individual questioning

would have been a prerequisite to exploring the issue, else when jurors expressed their views, "the damage to the defendant would have been spread to the listening . . . jurors." Id. at 508.[44]

Many jurors had discussed the case with family, friends, and co-workers. (R34,47,54,114,120,151,159,198,223,267,280,286,328, 373,376) One juror had had as many as ten to twenty conversations. (R377) Some of them had discussed the case since they received their jury summonses (R280,322), or had read about the case since they became potential jurors. (R341,387) Others had "debated" the case with fellow jurors while awaiting their turn on voir dire. (R134,315,318) In the course of these "debates":

> [E]verybody would say, you know, kind of lower their breath a little, and Savage trial.

(R320)

Overall, before the trial began, many jurors had decided that the crime was "very vicious" (R125), or "brutal." (R129) Cf. Berryhill v. Zant, 858 F.2d 633, 642 (11th Cir. 1988) (Clark, J., concurring) (quoting Coppedge v. United States, 272 F.2d 504, 507-08 (D.C. Cir. 1959) (highly prejudicial for potential jurors to express view that "defendant was a vicious criminal").

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44. Because the case was tried locally, various potential jurors knew the victim. (R86, 377-80; see also R344) It was the victim's status in the local community that "brought [the case] to attention." (R251) They had "had posters all over Melbourne" (R216) when the victim went missing. Because it was tried locally, various jurors also knew the scene of the crime well. (See, e.g., R777) (four jurors at a time say they know the scene).

Thus, the overwhelming attitude in the community was "negative." (R286) The local people with whom jurors had talked opined that James Savage -- as soon as he was inevitably found guilty -- should be executed. (R151,268) For example, "one guy was saying when they caught him, they ought to hang him." (R268)

In Coleman v. Kemp, Thelma Harrington gave "[u]ndoubtedly the most colorful description," id. at 1533, of the community sentiment concerning the case:

> Q. And did people indicate what they thought ought to be done about it?
>
> A. Mighty right they did.
>
> Q. What did they say?
>
> A. Fry'em, electrocute 'em.
>
> Q. What else?
>
> A. That's about all I heard, and that's what should be done for 'em.

Id. at 1534. This was one of the most significant factors recounted by the court in granting relief.

While these preconceptions are important to assessing the sentiment in the community, the ultimate question, however, is not whether the jurors thought the case brutal. Rather, it is whether they bore even a suspicion that James Savage was the one who did it, and whether the repetitive statements by other jurors injected an element of partiality even into the minds of those who came to the case without preconceptions:

> [A] trial is conducted not only to determine that an atrocious crime has occurred, but to determine whether the accused committed the

> crime. Too often the former obscures the latter.

Johnson v. State, 476 So.2d at 1209 (emphasis supplied). Was this truly "a panel of impartial 'indifferent' jurors"? Irvin v. Dowd, 366 U.S. at 722. It cannot be said that people who lived and breathed the publicity in this case could possible meet this high standard.

In the collective setting of panel voir dire, some jurors admitted that they were probably partial (R126,341), but were "not sure" that James Savage was guilty. (R135) They had "not really" expressed an opinion about the case (R152), or they had formed "preliminary opinions" about the case, which might result in a "subconscious bias." (R361,363) According to these venirepersons, James Savage was apparently guilty, and the most that might be conceded was that the newspapers have sometimes been wrong before. (R167)

Even with these jurors, there was an obvious need for further probing of the extent of their prejudices, and the facts underlying their preconceptions. This questioning as to the strength of opinions had to be done individually because of the possibility of contaminating the other venirepersons. Silverthorne, 400 F.2d at 639.

However, some potential jurors (R91,115,137,169,237,248, 354,380) had already decided that James Savage was without doubt guilty. Indeed, prior to being excluded, these jurors made such

comments as "I feel that he's guilty" (R248) in front of their fellow jurors. (See also R394)

This is probably the most important area where the prejudice from the failure to provide individual, sequestered voir dire really became apparent. Those who did express their view that James Savage was probably or certainly guilty -- in front of their peers -- merely supplemented the subconscious taint in the minds of the other jurors.

James Savage does not assert a broad right to individual, sequestered voir dire. While a trial judge might be well-advised to allow such questioning in many instances where there has been considerable publicity, few cases will be reversed where it is denied. This is one of those truly extraordinary cases, however, where the trial judge was required to allow exhaustive probing of the saturation publicity in an individual, sequestered setting. The conviction must be reversed.

IX. THE LOWER COURT SHOULD NOT HAVE ALLOWED THE JURY TO HEAR A HIGHLY PREJUDICIAL YET TOTALLY IRRELEVANT ADMISSION MADE BY JAMES SAVAGE.

Life was at stake in this case. "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special '"need for reliability in the determination that death is the appropriate punishment"' in any capital case." Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (emphasis supplied) (quoting, Gardner v. Florida, 430 U.S. 349 (1977) (quoting, Woodson v.

North Carolina, 428 U.S. 280, 305 (1976) (White, J., concurring).[45]

This rule was clearly contravened when the trial court admitted a totally irrelevant, yet highly prejudicial, statement at the first phase of the trial. When stopped by the police, James Savage made a comment to an officer questioning why he was being detained:

> He stated I've been standing around before when people have been murdered, and I haven't been arrested.

(R1272)

When the defense learned that this was to be presented to the jury, counsel vociferously objected. (R1262) the trial court agreed that the "risk existed" that the jury would "misconstrue" the statement (R1266), but could think of no reason why the statement should be excluded. (R1265)

The better analysis would have been to start by wondering why the statement should be included. See Rainer v. State, 473 So.2d 172, 173 (Miss. 1985) ("the learned trial judge . . . misses the point. The question is . . . whether [the evidence] had a tendency to confuse and mislead the jury. We think it manifestly did"). This discussion would begin with our rules of evidence:

> Relevant evidence is evidence tending to prove or disprove a material fact.

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45. In Beck v. Alabama, 447 U.S. 625 (1980), the Supreme Court held that "[t]he same reasoning must apply to rules that diminish the reliability of the guilt determination." Id. at 638 (disapproving the failure to give a lesser-included offense).

s.90.401, Fla. Stat. (1989).

The question becomes, how would a reasonable juror have "construed" this statement? If the juror believed that Mr. Savage meant that he had been an innocent bystander near murders in the past, then the statement was obviously not relevant in any way to his guilt in this case. It should have been excluded under Section 90.401.

If Mr. Savage meant that he had been a guilty party around prior murders but the police had not been able to come up with enough evidence to arrest him, then the rules of evidence[46] prohibit admission of the statement, whether it was relevant or not:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice.

s.90.403, Fla. Stat. (1989) (emphasis supplied).[47]

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46. While the admission of the evidence clearly violated our law, it also contravened the Due Process Clause of the United States Constitution. The appropriate standard in this case was stated in Norris v. Risley, 878 F.2d 1178 (9th Cir. 1989):

> [W]e must determine, based on "reason, principle, and common human experience," whether the circumstances . . . created an "unacceptable risk of impermissible factors coming into play" and . . . "pose[d] an unacceptable threat to the defendant's right to a fair trial."

Id. at 1182. The answer must be that it did. See also United States v. Schuler, 799 F.2d 1300, 1302 (9th Cir. 1986).

47. One commentator notes the strength of this provision: "This code states bluntly that evidence falling within the classes is 'inadmissible.' This is in rather startling contrast to the [previous] patterns of case law . . . which speak in terms of trial court permissiveness or discretion . . . [and it] may reasonably (continued...)

The probative value of the ambiguous statement allegedly made by James Savage is minimal in the first place. What little value the statement has is overwhelmed by its prejudicial impact. The familiar rule which governs a cautious approach to the admission of other-crimes evidence mandates that a collateral crime, even if established to a far greater certainty than it was in this case, is "not admissible if offered solely to prove [the accused's] propensity to [commit crime]." Brown v. State, 397 So.2d 320, 323 (Fla. 2d DCA, 1981) (citing, Williams v. State, 110 So.2d 654, 660 (Fla. 1959), cert. denied, 361 U.S. 847 (1959).

Under this rule, evidence of other crimes has often been excluded because "the similarities and uniqueness of the compared factual situations were insufficient to allow admissibility . . . [and] 'the similar facts evidence . . . tend[ed] to prove only two things -- propensity and bad character.'" Peek v. State, 488 So.2d 52, 55 (Fla. 1986) (quoting Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981); see also State v. Lee, 531 So.2d 133, 135 (Fla. 1988); Wilson v. State, 490 So.2d 1062, 1063 (Fla. 5th DCA, 1986); Flowers v. State, 386 So.2d 854, 855 (Fla. 1st DCA, 1980); Davis v. State, 376 So.2d 1198, 1199 (Fla. 2d DCA, 1979). It is hard to say what the statement in this case proves. Cer-

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47. (...continued)
be anticipated that more reversals will be forthcoming. . . ." Gard, FLORIDA EVIDENCE, at 151 (1980).

tainly, it is not admissible under the Williams rule. The conviction must therefore be reversed.

X. THE FAILURE TO GIVE AN INSRUCTION ON INTOXICATION DEPRIVED JAMES SAVAGE OF THE ENTIRE DEFENSE THEORY.

The defense asked for an intoxication instruction. (R1417 The state objected. In deciding whether to allow the instruction, the trial court said:

> We either need to make an error on it or not with it rather than ignore it.

(R1423) Ultimately, the trial court ruled that "over the strenuous objection of the defense attorney, I won't read [this instruction]." (R1471) However, the court noted that "if the appellate court is looking for some reason . . . this is going to be a wonderful reason to reverse this." (R1471) The trial court was quite correct.

Rule 3.390(a), Florida Rules of Criminal Procedure, states:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel . . .

A defendant is entitled to a jury instruction on the theory of his defense, if there is evidence in the record to support it, regardless of how weak or improbable it may be. Bryant v. State, 412 So.2d 347 (Fla. 1982); Solomon v. State, 436 So.2d 1041 (Fla. 1st DCA 1983). Failure to so instruct shall result in reversal and remand for new trial.

The prosecutor admitted that, in a capital case, the intoxication instruction should be given if there is any indication whatsoever. (R1418) The trial court stated:

> You could hardly say that the evidence was woefully insufficient. You could say it was very thin . . .

(R1467) Given this recognition by both the state and the court, it is difficult to fathom why both insisted on denying the instruction.

It is well established that voluntary intoxication is a defense to any crime requiring specific intent. Gardner v. State, 480 So.2d 91 (Fla. 1985); Linehan v. State, 476 So.2d 1262 (Fla. 1985); Garner v. State, 28 Fla. 113, 9 So. 835 (1891). This Court specifically held that voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery. Linehan v. State, supra.

In Gardner v. State, 480 So.2d 91 (Fla. 1985), this Court stated that a defendant has a right to a jury instruction on the law that is applicable to his defense where any trial evidence supports the theory.Before an instruction is warranted, a defendant must come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged. Linehan, supra. The evidence may be elicited during cross-examination of prosecution witnesses, as well as during the presentation of defense witnesses. Gardner, supra. Finally, it is important to note that the evidence need not be convincing to the trial court

before an intoxication instruction can be submitted to the jury. It is sufficient if the defense is merely suggested by the testimony, since it is the jury's duty to weight the evidence, not the trial court's. Pope v. State, 458 So.2d 327 (Fla. 1st DCA 1985); Gardner, 480 So.2d at 93.

The state cannot deny that intoxication was an issue at trial. During jury selection, the prosecutor told the venire that the law required a high degree of intoxication before one's criminal responsibility is negated. (R698) In closing argument, the defense stressed that James Savage had never had specific intent to kill because of his addiction to cocaine. (R1475) James had no premeditation. (R1478) In response, the prosecution thought it important to argue that the jury should note what they had not been told in instructions:

> There will not be anything that legally justifies or legally excuses what took place on Thanksgiving eve of 1988. Nothing. . . .
>
> This wasn't some kind of an alcoholic black-out or a drug-induced frenzy when you loose all sense of what's going on.

(R1488,1492)

The jury was obviously concerned about the issue as evidenced by their question concerning "Mr. Savage's drug use and the police description of the addi[c]tive nature of the drug. . . . " (R1577) After pertinent portions of the testimony were read to the jury pursuant to their request, the foreman asked if there was any "concrete" evidence that James Savage actually used cocaine. (R1581) Without consulting with counsel, the trial

court told the jury that they would have to rely upon their own memories.

In fact, there was concrete evidence that James Savage used cocaine that night. James told Officer Plymale that he had been smoking rock cocaine that evening. After exhausting his supply of drugs, James Savage began looking for something to steal so that he could obtain more crack cocaine. (R1278-9) Officer Plymale was familiar with the drug, its effects, and the behavior of addicts. Plymale explained that crack cocaine was extremely addictive. After an intense high, the user had an immense craving for more. (R1309)

In convincing the judge not to instruct on this critical element of James Savage's defense, the state relied heavily on Bertolotti v. State, 534 So.2d 386 (Fla. 1988). Bertolotti is clearly distinguishable, in that Bertolotti's "self-serving declaration" was unsupported by independent testimony or evidence and was specifically contradicted at trial." Bertolotti, 534 So.2d at 387. (emphasis added) James Savage's evidence on this score is unrefuted, therefore must be accepted. At the penalty phase, it became clear that James Savage used cocaine and alcohol continuously for two weeks immediately prior to the crime. During that fortnight, James never went more than two hours without smoking crack. (R2774,2830,2835)

In a capital case, it is particularly important that a jury receive "clear instruction which guides and focuses the jury's consideration . . . ." Bell v. Watkins, 692 F.2d 999, 1012 (5th

Cir. 1982). Complete jury instructions are twice as important in a capital trial, because failure to give a full charge raises an intolerable likelihood that "the jury [will] convict for an impermissible reason -- its belief that the defendant is guilty of some serious crime and should be punished." Beck v. Alabama, 447 U.S. 625, 642 (1980). The trial court should have allowed the jury to settle the issue of James Savage's intoxication.

XI. TO INSTRUCT THE JURY THAT A CONVICTION FOR SECOND-DEGREE MURDER MAY RESULT IN PROBATION SERVED ONLY TO ENCOURAGE THE JURY TO REJECT JAMES SAVAGE'S SOLE DEFENSE TO FIRST-DEGREE MURDER.

The defense objected to an instruction which informed the jury that, should they vote for conviction on second rather than first-degree murder, the trial judge might "sentence the defendant to probation." (R1446) The objection was overruled. (R1447) Ultimately, the trial court instructed the jury:

> The punishment for this crime is either death or life imprisonment without possibility of parole for twenty-five years.
>
> If you find the Defendant guilty of a lesser included crime, I have discretion to sentence the Defendant or to place him on probation.

(R1523)

Rule 3.390(a), Florida Rules of Criminal Procedure provides:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial.

The above rule (prior to a 1984 amendment) specified that "upon request of either the State or the defendant the judge shall include in said charge the maximum and minimum sentences which may be imposed."

In Craig v. State, 510 So.2d 857 (Fla. 1987), this Court held that the trial court erred in instructing the jury on the minimum and maximum penalties for all lesser included offenses of the crimes charged. This Court pointed out that the plain language of the rule authorized such an instruction only for the crime charged, not the lesser included offenses. Craig, 510 So.2d at 865. The error was not preserved in Craig, in that, defense counsel failed to make a specific objection, state grounds, or argue prejudice. James Savage's defense counsel made a specific objection and argued below:

> The Defense would ask that the court place him on probation be deleted, because it refers to the Court having discretion to sentence.
>
> It sounds like if he's found guilty of murder two, you're going to put him on probation. You could put him just on probation, and that would be it.
>
> I think it's a bad inference if it stops at -- says I have discretion to sentence the Defendant.
>
> I believe that would suffice, and the Court would then have discretion. There would be no minimum or maximum penalty involved.

(R1446-7) The trial court overruled the objection and read the offensive instruction to the jury.

The trial court instructed the jury that, if they returned a guilty verdict on a lesser included offense, James Savage could

be placed on probation. No minimum mandatory sentence of twenty-five years was available for any of the lesser included offenses. The jury undoubtedly got the message that a lesser verdict could result in freedom for James Savage. Even in light of such a verdict, the likelihood of Savage receiving probation was remote indeed. The prejudice in the instant situation is manifest. Accordingly, James Savage's convictions and sentences must be reversed and this cause be remanded for a new trial.

XII. THE DENIAL OF FUNDS CRITICAL TO THE DEFENSE, AND THE FAILURE TO ALLOW JAMES SAVAGE, AN INDIGENT ACCUSED, TO SEEK FUNDS FOR EXPERT ASSISTANCE ON AN EX PARTE BASIS DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHTS.

The defense requested that any request for funds for expert assistance be conducted on an ex parte basis. (R1941) The prosecution objected (R1958), conceding that the defense had the

right to confidential evaluations (R1963) but disputing the right to proceed ex parte.[48]

The court refused to accept motions not served on the prosecution. (R1964) The court noted the defense objection to this procedure, but ruled:

> I think it is probably the way we ought to frame it for appellate reasons, instruct you if you wish to argue the motion you must give a copy of the motion to the state attorney's office and we can argue that appropriately as it relates to the appropriate expensitures of funds that you think are fair.

(R2080) Because of this, the defense had to withdraw all the exhibits to the motions for funds. (R2116)

However, in order to meet the burden required before funds will be granted, the defense was forced to make extensive disclosures of the evidence and strategy which supported the requests for funds. For example, requesting an addictionologist, the defense proffered evidence of James' drug abuse in prison:

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48. The State engaged in various ex parte procedures in this case. For example, neither Mr. Savage nor his counsel was summoned to the grand jury when the prosecution was presenting its case for indictment. Nor was Mr. Savage or his counsel asked to help the prosecution determine which investigators to use or what experts to employ in the prosecution of the case against him. Mr. Savage was not consulted by the State Attorney to assist in the decision as to which Assistant State Attorneys should be involved in this case. Perhaps most critical of all, the application for warrants in this case were presented to a judicial officer ex parte without notification to the accused or his counsel. It now turns out that perjured testimony concerning Mr. Savage's purported probationary status was presented in this ex parte proceeding. The State is therefore in tenuous territory when it suggests that Mr. Savage should not have been permitted to preserve the integrity of the defense by ex parte applications. Indeed, certain interests of the criminal justice system are served by these ex parte proceedings involving both parties.

> The last time I had a chance to see and talk to James was at Union Correctional Institution in Raiford, Florida. We both were in confinement at the Southeast Unit. He always managed to get drunk on homemade wine and he's take enormous amounts of actifed, senequin, dilantin, melaril, etc. We'd go to recreation together and he'd be so screwed up he wouldn't even recognize me. Any kind of pill he would pop in large quantity if he could get ahold of them. After I left and went to Florida State Prison I heard he overdosed and almost died. I have always liked James despite his drug and alcohol problem. But drugs and especially alcohol affect him like no other, like no one I've ever known before. He becomes another person. During his blackouts, he recognizes no one and loses control.

(R2123) Despite this showing, the request for this assistance was denied. (R2133)

Indeed, various expert assistance was denied because counsel had allegedly made an insufficient showing of need, constrained by the necessity of maintaining some level of confidentiality in the defense camp. Mr. Savage appeals both the denial of his right to make the required showing without the other side present, and the denial of the requisite funds for his defense.

A. An indigent accused should be permitted to make ex parte applications for funds for the preparation and presentation of the defense.

To require the indigent accused -- but not the accused of means -- to make revelations or forego the constitutional right to the funds necessary to put on an effective defense is offensive to various constitutional rights of the accused.

In Ake, the United States Supreme Court held that where the assistance of an expert is needed to prepare to present a defense, an indigent defendant has a constitutional right to the services of an independent expert at state expense.

> [When a] question . . . [is] likely to be a significant factor in his defense . . . [the defendant is] entitled to the assistance of a[n expert] on this issue and the denial of that assistance deprive[s] him of due process.

Ake v. Oklahoma, 470 U.S. 68, 86-87 (1985).

Ake involved the denial of an independent psychiatrist in a capital case which presented issues of insanity and future dangerousness. In analyzing under what circumstances expert assistance is constitutionally required, the Court explicitly held that a showing of need was to be made ex parte:

> When the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent. . . .

Id. at 82-83.

Every court which has considered the issue has determined that such hearings should be held on an ex parte basis. See, e.g., McGregor v. State, 733 P. 2d 416, 416-17 (Okl. Cr. 1987), conviction rev'd after remand, 754 P. 2d 1216, 1217 (Okla. Cr. 1988) (intention of Ake majority that hearings be held ex parte is "manifest"); Brooks v. State, 385 S.E. 2d 81, 82-84 (Ga. 1989); Gipson v. State, ___ S.W.2d ___, WESTLAW 1989-WL-98069

(Tenn. Cr. App. 1989); People v. Loyer, 169 Mich. App. 105, 425 N.W. 2d 714, 721-22 (1989).[49]

Various reasons support the unanimous decision of our sister courts. Ake provides that an indigent defendant is entitled to defense services at state expense only upon a threshold showing that such assistance is required to deal with a significant factor in the defense of the case. Ake, 470 U.S. at 86-87. Thus, in order to demonstrate his entitlement to an expert or investigative assistance, the defendant must reveal to the court the theory of the defense, the results of any investigation and witness consultation that has already taken place and other work product, and the information that is anticipated from the services sought. Moore v. Kemp, 809 F.2d 702, 710-12 (11th Cir. 1987) (en banc); Messer v. Kemp, 831 F.2d 946 (11th Cir. 1987) (en banc). Obviously, of necessity, this showing must require disclosure of information obtained in attorney-client interviews.

The first concern this raises is one of Equal Protection. It is clear that "[t]here can be no equal justice where the kind of

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49. See also State v. Hickey, 346 S.E. 2d 646, 654 (N.C. 1986) (dicta); State v. Poulsen, 45 Wash. App. 706, 726 P. 2d 10361038 (1986) (dicta); Wall v. State, 289 Ark. 570, 715 S.W. 2d 208, 209 (1986) (dicta); People v. Thornton, 80 Mich. App. 746, 265 N.W. 2d 35, 38-39 (1978) (dicta). Other jurisdictions have preserved the constitutional rights of the accused through a statute which expressly allows ex parte applications to the trial judge. See, e.g. Minn. Stat. § 611.21 (1982); Nev. Rev. Stat. § 7.135 (1983); N.Y. County Law § 722-C (McKinney Supp. 1984-85); Kan. Stat. Ann. § 22-4508 (Supp. 1981); Tenn. Code Ann. § 40-14-207 (1988); Cal. Pen. Code § 987.9 (1983) (allowing an ex parte hearing before a different judge than the trial judge to preserve the accused's right).

trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U.S. 12, 19 (1956). To the contrary, "all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" Id. at 17.

Were Mr. Savage financially independent he would obtain investigative and other services without informing the prosecution of whose assistance he was seeking or why. Penalizing the impoverished defendants by requiring them to announce privileged information and their trial strategy as a prerequisite to investigating and presenting a defense would obviously constitute invidious discrimination. See United States v. Tate, 419 F.2d 131, 132 (6th Cir. 1969); United States v. Theriault, 440 F.2d 713, 716 (5th Cir. 1973) (Wisdom, J., concurring); State v. Hamilton, 448 So.2d 1007, 1008-09 (Fla. 1984).

In Blazo v. Superior Court, 315 N.E. 2d 857 (Mass. 1974), the court held that "[t]he reason ex parte application is allowed is that, just as a defendant able to foot the costs need not explain to anyone his reasons for summoning a given witness, so an impecunious defendant should be able to summon his witnesses without explanation that will reach the adversary." Id. at 860 n.8. This, as the court held in People v. Loyer, 169 Mich. App. 105, 425 N.W. 2d 714 (1989):

> potentially expos[es] defendant's defense to prosecutorial review when a monied defendant's defense would remain inviolate. * * * When such an advantage is to be reaped by the prosecution only when the defendant is poor and therefore cannot afford to pay the . . . fees

> of his witnesses, it seems undeniable to us that such a defendant is not the recipient of equal justice under law.

Id. at 722.[50]

Next, the premature disclosure of the defense case implicates the right to counsel. The right to funds identified in Ake is to funds for "the assistance of a competent [expert] in preparing the defense." Lindsey v. State, 330 S.E. 2d 563, 566 (Ga. 1985) (emphasis supplied); United States v. Bass, 477 F.2d 723, 725-26 (9th Cir. 1973) (expert's "services embrace pretrial and trial assistance to the defense, as well as potential testimony").[51] In order to show why such assistance in preparation will

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50. Although buttressed by an explicit statute allowing ex parte applications, federal decisions have noted the same equal protection concerns. See, e.g., United States v. Meriwether, 486 F.2d 498 (5th Cir. 1973), cert. denied, 417 U.S. 948 (1974) ("When an indigent defendant's case is subjected to pre-trial scrutiny by the prosecutor, while the monied defendant is able to proceed without such scrutiny, serious equal protection questions are raised"); accord United States v. Holden, 393 F.2d 276 (1st Cir. 1968); Marshall v. United States, 423 F.2d 1315, 1318 (10th Cir. 1970); Williams v. United States, 310 A.2d 244 (D.C. App. 1973); Gaither v. United States, 391 A.2d 1364, 1367 n.4 (D.C. App. 1978); United States v. Sutton, 464 F.2d 552, 553 (5th Cir. 1972).

51. Again, the federal courts have recognized that:

> [The defense] expert fills a different role. He supplies expert services "necessary to an adequate defense," which embraces pretrial and trial assistance to the defense as well as availability to testify. His conclusions need not be reported to either the court or the prosecution.

United States v. Theriault, 440 F.2d 713, 715 (5th Cir. 1971), cert. denied, 411 U.S. 984, 93 S. Ct. 2278, 36 L. Ed. 2d 960 (1973); accord United States v. Marshall, 423 F.2d 1315, 1319 (10th Cir. 1970).

be necessary, the defense will be asked to disclose more than the results of whatever expert testing is done: The defense must show how such testing fits into the plan of defense.

The disclosures required when applications for funds are made in the presence of the prosecution also violate the Due Process Clause. As the Ake court held, due process and fundamental fairness thus forbid the State from "legitimately assert[ing] an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." Ake, 470 U.S. at 79.[52]

While this Court has never ruled on the precise point in this case, the Court has noted in dicta that the defendant is required to make "an ex parte showing to the trial court. . . ." Clark v. State, 467 So.2d 699, 701 (Fla. 1985) (quoting Ake v. Oklahoma, 105 S. Ct. at 1096-97). Decisions from this Court indicate the breadth of the disclosures to be made: The accused is required to show that the expert's assistance will relate to "a significant factor at trial. . . ." Id. at 701 (emphasis in

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52. Again, this conclusion is buttressed by federal cases which hold that the proceeding must be held ex parte because "[d]issemination of information critical to the defense permits the government to enjoy unauthorized discovery which is forbidden under our concept of criminal procedure . . . ." United States v. Edwards, 488 F.2d 1154, 1162 (5th Cir. 1974); accord United States v. Greschner, 802 F.2d 373, 379-80 (10th Cir. 1986), cert. denied, 480 U.S. 908, 107 S. Ct. 1353, 94 L. Ed. 2d 523 (1987); United States v. Meriwether, 486 F.2d 498, 506 (5th Cir. 1973); United States v. Chavis, 476 F.2d 1137, 1141-45 (D.C. Cir.), aff'd on rehearing, 486 F.2d 1290 (D.C. Cir. 1973); Gaither v. United States, 391 A.2d 1364, 1367-68 (D.C. App. 1978); United States v. Hamlet, 456 F.2d 1285 (5th Cir. 1972).

original). Rather than the prosecution, it is then "the court [which] properly has the responsibility to determine the reasonableness" of the request. Oats v. State, 472 So.2d 1143, 1144 (Fla. 1985) (emphasis supplied).

This Court discussed the equal protection implications of this showing, as well as the impact on the right to counsel, in State v. Hamilton, 448 So.2d 1007 (Fla. 1984):

> [T]he expert "shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege." * * * The rule is designed to give an indigent defendant the same protection as afforded to a solvent defendant. Further, and as important, in many instances the basis for the request is founded on communications between the appointed lawyer and his client. Any inquiry into those communications would clearly violate the basic attorney-client privilege. Any inquiry into counsel's basis [for the motion] . . . impermissibly subjects the indigent defendant to an adversary proceeding concerning issues which may be litigated in the trial of the cause. No solvent defendant would be subjected to this type of inquiry or proceeding.

Id. at 1008-09 (emphasis supplied).

Turning to the Due Process concerns, while Florida has extensive pre-trial discovery, there are certain matters which are specifically exempted from discovery:

> Work Product. Disclosure shall not be required of . . . the opinions, theories, or conclusions of the prosecuting or defense attorney, or members of his legal staff.

Fla.R.Crim.P. 3.220 (c)(1). In order to show how an expert will assist towards a "significant factor in the defense" the defense will necessarily have to disclose what the theory of defense is

to be. Such disclosures would be unfair, for "the Due Process Clause . . . forbids enforcement of [discovery] rules unless reciprocal rights are given to criminal defendants." Wardius v. Oregon, 412 U.S. 470, 472 (1973). This list is by no means exhaustive of the constitutional provisions which are offended by the prosecution's presence at strategic discussions of the proposed defense investigation.[53] On the other hand, it is not easy to perceive the interest which the State has in being present, unless the trial court is perceived to be incapable of following the mandate of Ake without the State's assistance.

B. The trial court erred in denying the defense funds essential to a proper adversarial presentation of the facts.

The trial court denied funds for expert assistance on James Savage's drug and alcohol abuse. (R2133)[54]

He also ruled that the defense would receive no funds for assistance on the impact of James' Aboriginal heritage. (R2133)

The defense made it clear that the assistance of a drug abuse expert was critical to the case, as discussed above, at

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53. Other constitutional rights implicated by forced disclosures in applications for funds include the Fifth Amendment, see Marshall v. United States, 423 F.2d 1315, 1318-19 (10th Cir. 1970), and, to the extent that a balanced adversary system fosters accurate fact-finding in a capital trial, the Eighth Amendment.

54. The error was not cured by the defense subsequently spending their own funds to secure this vital expert, for the expenditure was made after the guilt phase. This was because it had become clear how seriously the jury had taken the issue of intoxication -- coming back with two questions about it (R1577, 1581) -- even without the necessary expert testimony.

page 90. Indeed, to borrow from the Georgia Supreme Court, at the guilt phase of the trial James Savage's alcohol and drug abuse:

> was not merely a "significant" issue, it was virtually the only issue. . . .

Holloway v. State, 257 Ga. 620, 361 S.E. 2d 794, 796 (1987) (emphasis in original).

Intoxication was the sole focus of closing argument. The defense sought to stress James Savage's addiction to cocaine. (R1475) Counsel argued that this negated specific intent, and contradicted the prosecution's argument of premeditation. (R1475, 1478) In reply, the prosecution argued that there was no legal excuse (R1487), and that this was not some "alcoholic blackout or a drug-induced blackout or some kind of frenzy where you lose all sense of what's going on." (R1492)

Over strenuous defense objection, the trial court refused to instruct on intoxication. (R1471) The trial court conceded that this would be a central focus of any appeal, and would be "a head note" in any appellate decision. (R1471)

Despite the evisceration of the defense, the jury still came back with a question during their deliberations:

> Concerning testimony relating to Mr. Savage's drug use and the police description of the addi[c]tive nature of the drug, and possibly even . . . what someone addicted to this drug is liable to do if that's the correct term.

(R1577)

The Ake decision applies to all services and expenses reasonably necessary for an effective defense.[55] Where a proper showing has been made, the courts have ruled that the constitution may require the provision of funds for the assistance of a narcotics analyst. Patterson v. State, 232 S.E. 2d 233 (Ga. 1977). In State v. Lippencott, 124 N.J. Super. 498, 307 A. 2d 657 (1973), the court explicitly held that the defense should be provided with an expert on the effects of alcohol. Accord People v. Mencher, 248 N.Y.S. 2d 805 (App. Div. 1964) (narcotics expert on effects of withdrawal on voluntariness of confession). This Court should similarly reaffirm the indigent defendant's constitutional right to funds critical to his defense.

XIII. THE JURY SHOULD NOT HAVE BEEN INSRUCTED ON THE MEANING OF REASONABLE DOUBT, NOR THAT THEY MUST CONVICT ABSENT SUCH A DOUBT.

The jurors were instructed as to what was meant by the term "reasonable doubt":

> Whenever the words "reasonable doubt" are used, you must consider the following: a reasonable doubt is not a possible doubt, a speculative, imaginary, or forced doubt. Such

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55. See, e.g., Thornton v. State, 255 Ga. 434, 339 S.E. 2d 241 (1986) (dental expert); State v. Carmouche, 553 So. 2d 467 (La. 1989) (eyewitness identification expert); State v. Bridges, 385 S.E.2d 337, 338 (N.C. 1989) (fingerprint expert); United States v. Patterson, 724 F.2d 1128 (5th Cir. 1984) (same); United States v. Durant, 545 F.2d 823 (2d Cir. 1976) (same); State v. Carmouche, 527 So. 2d 307 (La. 1988) (neurologist); Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975) (firearms expert); Tatum v. State, 380 S.E. 2d 253 (Ga. 1989) (same); Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980) (pathologist); United States v. Fogarty, 558 F.Supp. 856 (E.D. Tenn. 1982) (handwriting analyst); Bowen v. Eyman, 324 F.Supp. 339 (D.Ariz. 1970) (serologist); State v. Carmouche, 527 So. 2d 307 (La. 1988) (same).

> a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt. Or if having a conviction, it is one which is not stable, but one which wavers or vacillates, then the charge is not proved beyond every reasonable doubt, and you must find the defendant not guilty because the doubt is reasonable.

(R1541)[56]

Condemnation of any attempt to define "reasonable doubt" is almost universal, "because often the definition engenders more confusion than does the term itself." United States v. Martin-Trigona, 684 F.2d 485 493 (7th Cir. 1982); see also Smith v. Commonweath, 156 S.E. 577 (Va. 1931); McCoy v. Commonwealth, 112 S.E. 704 (Va. 1922); Dunn v. Perrin, 570 F.2d 21, 23 (1st Cir. 1978), cert. denied, 437 U.S. 910 (1978); United States v. Gatzonis, 805 F.2d 72, 73 (2d Cir. 1986); United States v. Link, 202 F.2d 592, 594 (3d Cir. 1953); Smith v. Bordenkircher, 718 F.2d 1273, 1276 (4th Cir. 1983) (en banc), cert. denied, 466 U.S. 976 (1983); United States v. Rodriquez, 585 F.2d 1234, 1240-42 (5th Cir. 1978), cert. denied, 449 U.S. 835 (1980); Boatright v.

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56. The jury was also instructed that "[i]f you have no reasonable doubt, you should find the defendant guilty." (R 1542) "[N]o one of us has the right to violate the rules we all share." (R1551) It is also error to tell the jury that they have a "duty to convict" since such an instruction infringes upon the independence of the jury in much the same manner as the definition of reasonable doubt. See, e.g., United States v. Spock, 416 F.2d 165, 180 (1st Cir. 1969) ("In a criminal case a court may not order the jury to return a verdict of guilty, no matter how overwhelming the evidence of guilt"); United States v. Johnson, 718 F.2d 1317, 1325 (5th Cir. 1983).

United States, 105 F.2d 737 (8th Cir. 1939); United States v. Pinkney, 551 F.2d 1241 (D.C.Cir. 1976); State v. Starr, 216 S.E. 2d 242, 246 (W.Va. 1975).

Any effort to detract from the importance of reasonable doubt has been held to be per se reversible error, insofar as it "tends to denigrate the 'graver, more important transactions of life'" governed by the standard. United States v. Pinkney, 551 F.2d 1241, 1244 (D.C. Cir. 1976). This Court should similarly hold the reasonable doubt instruction to be plain error, and bar its further abuse.

XIV. THE INRODUCTION OF A PLETHORA OF GRUESOME PHOTOGRAPHS DENIED JAMES SAVAGE HIS RIGHT TO A FAIR TRIAL.

The defense objected to a large number of gruesome and inflammatory color photographs which the prosecution proposed to use in this case. (See, e.g., R986, 1024, 1071, 1102, 1115, 1118, 1119, 1121, 1126, 1132)[57] The objectionable evidence included one color photograph showing the skin peeled from the victim's neck where the cord had strangled her. (State's exhibit 32) Several showed minute details of the victim's bruised and bloody face with chunks of flesh missing. (State's exhibits 32, 37 and 40) One of these portrayed the victim's haunting "death stare." (State's exhibit 37) In response, the State took the position "that the defendant . . . should expect to be confronted with

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57. The defense also objected to the use of a videotape of the scene as cumulative and highly prejudicial. (R2099)

evidence and photographs of his handiwork." (R2097) Of course, this is something of a reversal on the fundamental presumption of innocence:

> [A] trial is conducted not only to determine that an atrocious crime has occurred, but to determine whether the accused committed the crime. Too often the former obscures the latter.

Johnson v. State, 476 So.2d at 1209 (emphasis supplied).

The issue of gruesome photographs is one of the most troubling in capital cases today. Too often, appellate courts are asked to rubber stamp the admission of truly revolting pictures, even though "[i]t is unrealistic to believe, even after a limited view, that the horror engendered by these slides could ever be erased from the minds of the jurors. . . ." Commonwealth v. Garrison, 331 A. 2d 186, 188 (Pa. 1975); Young v. State, 234 So.2d 341 (Fla. 1970); Walker v. City of Miami, 337 So.2d 1002 (Fla. 3d DCA, 1976).

If the purpose of each photograph admitted in this case was to "illustrate the testimony of the pathologist . . . it is quite apparent that it sheds little light . . . ." Garrison, 331 A. 2d at 188. In State v. Beers, 8 Ariz. App. 534, 448 P. 2d 104 (1969), the court reversed, finding the gruesome photographs to be irrelevant:

> No reference except in identification was made to the photographs by any witness which made the photographs relevant to any of the issues in the case. [Only the] prosecutor made reference to the pictures and bruises in his closing argument. . . .

Id. at 108; accord Bunting v. Commonwealth, 208 Va. 309, 157 S.E. 2d 204, 208 (1967) (photograph "which has no tendency to prove [relevant facts], but only serves to prejudice an accused . . . excluded on the ground of lack of relevancy"); cf. Commonwealth v. Chacko, 391 A. 2d 999, 1001 (Pa. 1978) (invoking "essential evidentiary value" test for inflammatory photographs); Commonwealth v. Liddick, 370 A. 2d 729, 731 (Pa. 1977). This Court should similarly hold the pictures irrelevant in this case.

Even if relevant to some degree, the horrible pictures were not necessary. See, e.g., Commonwealth v. Rogers, 401 A. 2d 329, 330 (Pa. 1979) ("But the officer did not need the photograph to . . . testify"); Garrison, 331 A.2d at 188 ("it is quite apparent that it sheds little light" on testimony). Had there been any significant probative value, the prosecution might easily have had "the photograph . . . reproduced in black and white in order to reduce its potential for prejudice." State v. Polk, 164 N.J. Super. 457, 397 A. 2d 330, 334 (1977).

Overall, this Court should remind the trial courts that great care should be taken prior to waving ghastly pictures in front of lay jurors who will never have seen anything similar before in their lives. The idea of a trial is not that jurors should regurgitate at the evidence, but that they should make a reasoned, informed decision as to guilt. In this case, it is clear that Mr. Savage was:

> denied a fair trial when the court allowed a gruesome, color photograph of the deceased's massive head wound to go to the jury. * * * In this case, the photograph which was admit-

> ted could serve no purpose other than to inflame and prejudice the jury in the grossest manner.

People v. Garlick, 46 Ill. App. 3d 216, 4 Ill. Dec. 746, 360 N.E. 2d 1121, 1126-27 (1977); accord Commonwealth v. Scaramuzzino, 317 A. 2d 225, 226 (Pa. 1974).

XV. THE TRIAL COURT ERRONEOUSLY RULED THAT DNA "FINGERPRINT" EVIDENCE PURPORTING TO LINK JAMES SAVAGE TO THE CRIME SHOULD BE ADMITTED.

A hearing was held on the defense motion to exclude the DNA testimony. (R1981 et seq.) The only witness was the state's proposed expert, and the trial court ruled that the evidence should be admitted. (R2053) The defense ultimately stipulated to the results of the test, but reserved for appeal the issues raised pre-trial. (R1191, 1197)

DNA testing is currently almost exclusively in the hands of two private companies, which expect to make a large profit out of their rush to get the procedures into the forensic market. As those responding to advertisers -- as opposed to scientists -- are wont to do, the two corporations carefully named the procedure "DNA Fingerprinting," in order to benefit from the aura of precision which surrounds the long-validated fingerprint procedures.

Of late, the cracks have been appearing in this new, apparently impregnable prosecution armor. Courts have looked beyond the self-serving comments of "experts" whose livelihood depends on

the unblinking acceptance of the evidence involved in this testing.[58]

Perhaps most apparent in the abuse of this latter-day voodoo has been the abuse of statistics to prove that the accused is the guilty party to the exclusion of every other human being on the planet. The lower courts in this state have unquestioningly accepted the prosecution's extrapolation of a study of fourteen English caucasians[59] to produce a figure that there is "one-in-billions" chance that the accused is not guilty. See, e.g., Martinez v. State, 549 So.2d 694, 695 (Fla. 5th DCA, 1989) (one-in-234 billion chance that the accused is not the one who did it, with only 5 billion inhabitants of the Earth); Andrews v. State, 533 So.2d 841, 843 (Fla. 5th DCA, 1988) (one-in-839,914,540).[60]

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58. For example, in People v. Castro, 545 N.Y.S. 2d 985 (Sup. 1989), the court excluded evidence from Lifecodes Corporation, the for-profit company which did the testing in Mr. Savage's case, as being totally unreliable. See also Hoeffel, The Dark Side of DNA Profiling: Unreliable Scientific Evidence meets the Criminal Defendant, 42 Stan. L. Rev. 465 (1990) (hereinafter "The Dark Side of DNA").

59. The Dark Side of DNA, at 488-89 (citing Jeffreys, Wilson & Thein, Hypervariable "Minisatellite" Regions in Human DNA, 314 Nature 67, 68 (1985)).

60. As Benjamin Disraeli once said, "[t]here are three kinds of lies: lies, damned lies and statistics." Huff, HOW TO LIE WITH STATISTICS (Gollancz, 6th Ed. 1954). The Courts have frequently agreed with the British Prime Minister and been careful that the accused "should not have had his guilt determined by the odds and . . . he is entitled to a new trial." People v. Collins, 68 Cal. 2d 319, 66 Cal. Rptr. 497, 438 P. 2d 33, 33 (1968); see also United States v. Massey, 594 F.2d 676 (8th Cir. 1979); State v. Carlson, 267 N.W. 2d 170, 176 (Minn. 1978); State v. Boyd, 331 N.W. 2d 480 (Minn. 1983); People v. Harbold, 124 Ill. App. 3d 363, 79 Ill. Dec. 830, 464 N.E. 2d 734, 749 (1984); People v. Risley, 214 N.Y. 75, 108 N.E. 200 (1915); Dorsey v. State, 276 Md. 638, 350 A.

(continued...)

Properly analyzing the figures proposed by the prosecution, the probability may be as low as one-in-24. The Dark Side of DNA, at 492. Juries and trial judges are therefore being blinded by pseudo-science.

Concededly, this is not the best case with which to test the admissibility of such critical evidence for our state, since the indigent accused had no expert to contest the state witness' efforts to "confuse matters a bit more here." (R2010) If this evidence is to be admitted in courts in our State, at least a full evidentiary hearing should be held to air the conflicting reports on the reliability of the DNA method.

XVI. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

This Court has the responsibility in this case to determine whether "there is substantial, competent evidence to support the verdict and judgment." Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31 (1982). Reviewing the evidence in this case, it is apparent that there is not.

First, the defense correctly argued that there was no corroboration of James Savage's purported statement that he had committed robbery. (R1360) The State countered by saying that there did not have to be any evidence of specific intent to rob.

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60. (...continued)
2d 665, 669 (1976); Campbell v. Board of Education, 310 F. Supp. 94, 105 (E.D.N.Y. 1970).

(R1361) This is not the law. See Young v. Kemp, 760 F.2d 1097 (11th Cir. 1985).

Secondly, the only evidence which directly bore on the accused's state of mind at the time of the crime were the alleged statements. In these, James Savage stated that he committed the crime from the impulse to secure his next "fix" of crack cocaine. In light of this unrebutted evidence, the charge should have been reduced to second-degree murder.

Finally, in light of the eleven-to-one vote for life, the evidence should be ruled insufficient to support a death sentence.

CONCLUSION

For the reasons set forth above, as well as those which appear to this Court from an independent review of the record in this case, James Savage respectfully suggests that his case should be reversed and remanded for a new trial, limited solely to the issue of whether he may again be convicted and sentenced to some sentence less than death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to James Savage, #083475, P.O. Box 747, Starke, Fla. 32091 on this 8th day of October, 1990.

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