IN THE SUPREME COURT OF FLORIDA

EMANUEL JOHNSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 78,336

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEPHEN KROSSCHELL
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 351199

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

	PAGE NO.
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	11
ARGUMENT	12
ISSUE I	
THE CONFESSIONS SHOULD HAVE BEEN SUPPRESSED.	12
ISSUE II	
THE POLICE SEIZED CLOTHING WITHOUT PROVIDING PROBABLE CAUSE THAT EVIDENCE WOULD BE FOUND AND WITHOUT DESCRIBING WITH PARTICULARITY THE ITEMS TO BE SEIZED.	88
ISSUE III	
THE TRIAL COURT SHOULD HAVE EXCUSED FOR CAUSE A JUROR WHO WOULD VOTE FOR DEATH AS THE PROPER PUNISHMENT FOR ALL FIRST DEGREE MURDERS AND WOULD NOT CONSIDER MITIGATING FACTORS.	95
CONCLUSION	100
CERTIFICATE OF SERVICE	

TABLE OF CITATIONS

CASES	PAGE NO.
Arizona v. Roberson, 486 U.S. 675 (1988)	35
Bain v. State, 440 So. 2d 454 (Fla. 4th DCA 1983)	43
Blackburn v. Alabama, 361 U.S. 199 (1960)	45
Bonilla v. State, 579 So. 2d 802 (Fla. 5th DCA 1991)	95
Brady v. United States, 397 U.S. 742 (1970)	62
Bram v. United States, 168 U.S. 532 (1897)	63
Breedlove v. State, 364 So. 2d 495 (Fla. 4th DCA 1978)	67
Brewer v. State, 386 So. 2d 232 (Fla. 1980)	45, 51, 52, 63
Brewer v. Williams, 430 U.S. 387 (1977)	62, 77
Brooks v. State, 117 So. 2d 482 (Fla. 1960)	52
California v. Prysock, 453 U.S. 355, 101 S. Ct. 2896, 69 L. Ed. 2d 696 (1981)	25
Campbell v. State, 571 So. 2d 415 (Fla. 1990)	99
Carlton v. State, 449 So. 2d 250 (Fla. 1984)	93
Coleman v. Alabama, 399 U.S. 1 (1970)	74
Colorado v. Connelly, 479 U.S. 157 (1987)	45
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	91

TABLE OF CITATIONS (continued)

Cribbs v. State,
378 So. 2d 316 (Fla. 1st DCA 1980) 26, 40, 41

Croney v. State,
495 So. 2d 926 (Fla. 4th DCA 1986) 29

Cruz v. State,
465 So. 2d 516 (Fla. 1985) 61

DeConingh v. State,
433 So. 2d 501 (Fla. 1983) 67

Drake v. State,
441 So. 2d 1079 (Fla. 1983) 47

Eddings v. Oklahoma,
455 U.S. 104 (1982) 99

Fillinger v. State,
349 So. 2d 714 (Fla. 2d DCA 1977) 57

Foreman v. State,
400 So. 2d 1047 (Fla. 1st DCA 1981) 57

Foster v. State,
374 S.E.2d 188 (Ga. 1988) 26

Foxworth v. Wainwright,
167 So. 2d 868 (Fla. 1964) 1

Frazier v. State,
107 So. 2d 16 (Fla. 1958) 51

Getreu v. State,
578 So. 2d 412 (Fla. 2d DCA 1991) 94

Green v. State,
437 So. 2d 784 (Fla. 2d DCA 1983) 22

Haliburton v. State,
476 So. 2d 192 (Fla. 1985) 82, 83

Haliburton v. State,
514 So. 2d 1088 (Fla. 1987) 83, 84

Henry v. Dees,
658 F.2d 406 (5th Cir. Unit A Oct. 1981) 47, 51, 53

TABLE OF CITATIONS (continued)

Hill v. State,
477 So. 2d 553 (Fla. 1985) 98, 99

Holiday v. State,
369 S.E.2d 241 (Ga. 1988) 44

Jones v. State,
528 So. 2d 1171 (Fla. 1988) 83

Jordan v. State,
334 So. 2d 589 (Fla. 1976) 86

Kirby v. Illinois,
406 U.S. 682 (1972) 70

Leyra v. Denno,
347 U.S. 556 (1954) 66, 67

Marron v. United States,
275 U.S. 192 (1927) 92

Martin v. Wainwright,
770 F.2d 918 (11th Cir. 1985) 34, 44

Martinez v. State,
543 So. 2d 466 (Fla. 4th DCA 1989) 46

Martinez v. State,
545 So. 2d 466 (Fla. 4th DCA 1989) 55

McNeil v. Wisconsin,
115 L. Ed. 2d 158 (1991) 76, 86-88

Michigan v. Mosley,
423 U.S. 96 (1975) 32, 36, 40, 41

Miller v. Fenton,
474 U.S. 104 (1985) 61

Miranda v. Arizona,
384 U.S. 436 (1966) 24-29, 32-35, 43, 44, 47-51, 54, 58, 76-78, 80, 82, 83

Moran v. Burbine,
475 U.S. 412 (1986) 45, 82

Morgan v. Illinois,
119 L. Ed. 2d 492 (1992) 100

TABLE OF CITATIONS (continued)

Myers v. State,
499 So. 2d 894 (Fla. 5th DCA 1986) 61

Ormond v. State,
599 So. 2d 951 (Miss. 1992) 74

Otey v. Grammer,
859 F.2d 575 (8th Cir. 1988) 35, 36

Owen v. State,
560 So. 2d 207 (Fla. 1990) 34, 36

Patterson v. Illinois,
487 U.S. 285 (1988) 77, 78, 82, 83

People v. Coleman,
534 N.E.2d 583 (Ill. App. 1989) 73

People v. Hogan,
647 P.2d 93 (Cal. 1982) 64, 65, 67

People v. Leonard,
337 N.W.2d 291 (Mich. App. 1983) 25

People v. Leonard,
364 N.W.2d 625 (Mich. 1984) 25, 26

People v. Leonard,
397 N.Y.S.2d 386 (N.Y. App. Div. 1977) 48, 53, 55, 66

People v. Ray,
430 N.W.2d 626 (Mich. 1988) 25

People v. Samuels,
400 N.E.2d 1344 (N.Y. 1980) 72

People v. Sickley,
448 N.E.2d 612 (Ill. App. 1983) 56

People v. Smith,
526 N.W.S.2d 682 (N.Y. App. 1988) 90

People v. Williams,
155 Cal. Rptr. 414 (Cal. App. 1979) 44

Peoples v. State,
612 So. 2d 555 (Fla. 1992) 70, 72

Perez v. State,
521 So. 2d 262 (Fla. 2d DCA 1988) 93

Perez v. State,
18 Fla. L. Weekly S361 (Fla. June 24, 1993) 95

Phillips v. State,
701 S.W.2d 875 (Tex. Cr. App. 1985) 44

Polakoff v. State,
586 So. 2d 385 (Fla. 5th DCA 1991) 93

Ponticelli v. State,
593 So. 2d 483 (Fla. 1991) 50

Renckley v. State,
538 So. 2d 1340 (Fla. 1st DCA 1989) 94

Rickard v. State,
508 So. 2d 736 (Fla. 2d DCA 1987) 67

Roberts v. United States,
656 F. Supp. 929 (S.D.N.Y. 1987) 92

Rochin v. California,
342 U.S. 165 (1952) 61

Roman v. State,
475 So. 2d 1228 (Fla. 1985) 61

Simon v. State,
5 Fla. 285 (1853) 62

Sims v. Georgia,
389 U.S. 404 (1967) 47, 49

Sims v. State,
483 So. 2d 81 (Fla. 1st DCA 1986) 93, 94

Smith v. Illinois,
469 U.S. 91 (1984) 33, 43

Smith v. Lockhart,
923 F.2d 1314 (8th Cir. 1991) 74

Sobczak v. State,
462 So. 2d 1172 (Fla. 4th DCA 1984) 72

Spano v. New York,
360 U.S. 315 (1959) 59, 60, 67

Spencer v. State,
263 So. 2d 282 (Fla. 1st DCA 1972) 61

Spradley v. State,
442 So. 2d 1039 (Fla. 2d DCA 1983) 50

Stark v. Frayer,
67 So. 2d 237 (Fla. 1953) 1

State v. Burbine,
451 A.2d 22 (R.I. 1982) 83, 84

State v. Chavis,
546 So. 2d 1094 (Fla. 5th DCA 1989) 43

State v. Davis,
485 So. 2d 24 (Fla. 2d DCA 1986) 54

State v. Faller,
227 N.W.2d 433 (S.D. 1975) 53

State v. Fann,
571 A.2d 1023 (N.J. Super. L. 1990) 74

State v. Griffin,
754 P.2d 965 (Utah App. 1988) 63

State v. Haynes,
602 P.2d 272 (Ore. 1979) 83

State v. Hegelman,
717 P.2d 1348 (Utah 1986) 63

State v. Hume,
512 So. 2d 185 (Fla. 1987) 95

State v. LeCroy,
461 So. 2d 88 (Fla. 1984) 24, 27

State v. Rowell,
476 So. 2d 149 (Fla. 1985) 33

State v. Sawyer,
561 So. 2d 278 (Fla. 2d DCA 1990) 19, 41, 42, 50, 53, 54, 57

State v. Tamer,
475 So. 2d 918 (Fla. 3d DCA 1985) 90, 91

State v. Williams,
18 Fla. L. Weekly S371 (Fla. July 1, 1993) 61

State v. Wininger,
427 So. 2d 1114 (Fla. 3d DCA 1983) 42, 43

State v. Wyer,
320 S.E.2d 92 (W. Va. 1984) 86

State v. Zimmerman,
802 P.2d 1024 (Ariz. App. 1990) 44

Stokes v. State,
541 So. 2d 642 (Fla. 1st DCA 1989) 43

Thomas v. State,
456 So. 2d 454 (Fla. 1984) 45, 51

Thomas v. State,
403 So. 2d 371 (Fla. 1981) 100

Thompson v. Wainwright,
601 F.2d 768 (5th Cir. 1979) 34

Thompson v. State,
548 So. 2d 198 (Fla. 1989) 47

Traylor v. State,
596 So. 2d 957 (Fla. 1992) 32, 62, 69, 75-77, 85-87

United States ex rel. Robinson v. Zelker,
468 F.2d 159 (2d Cir. 1972) 73

United States v. Beale,
921 F.2d 1412 (11th Cir. 1991) 25

United States v. Clements,
713 F.2d 1030 (4th Cir. 1983) 79

United States v. Gillyard,
726 F.2d 1426 (9th Cir. 1984) 27-29

United States v. Holzman,
871 F.2d 1496 (9th Cir. 1989) 90, 91

United States v. Leon,
468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) 94, 95

United States v. Lopez-Diaz,
630 F.2d 661 (9th Cir. 1980) 35

United States v. Mohabir,
624 F.2d 1140 (2d Cir. 1980) 78, 80

United States v. One Parcel of Property at 18 Perkins Road,
774 F. Supp. 699 (D. Conn. 1991) 92

United States v. Payton,
615 F.2d 922 (1st Cir. 1980) 78

United States v. Roberts,
852 F.2d 671 (2d Cir. 1988) 92

United States v. Thompson,
612 F.2d 233 (6th Cir. 1979) 90

United States v. Viers,
637 F. Supp. 1343 (W.D. Ky. 1986) 93

United States v. Wade,
388 U.S. 218 (1967) 70

Wyrick v. Fields,
459 U.S. 42 (1982) 27, 28

OTHER AUTHORITIES

Fla. R. Crim. P. 3.111 75, 76, 79-81, 85, 86
Fla. R. Crim. P. 3.130 81
Fla. R. Crim. P. 3.133 71
§ 775.021(1), Fla. Stat. (1987) 95
§ 933.05, Fla. Stat. (1987) 92, 94, 95

PRELIMINARY STATEMENT

Appellant, Emanuel Johnson, has four pending appeals, two in this Court and two in the Second District Court of Appeal:

Appeal number 78,336 (victim White)
Appeal number 78,337 (victim McCahon)
Appeal number 91-2368 (victim Cornell)
Appeal number 91-2373 (victim Giddens)

References to the records in these cases use the letter "W," "M," "C," and "G," respectively. Rather than tediously make certain that everything in one record is also in the other records, Appellant relies on all records. Courts may take judicial notice of their own records. Foxworth v. Wainwright, 167 So. 2d 868 (Fla. 1964); Stark v. Frayer, 67 So. 2d 237 (Fla. 1953). The few references to the records in the Second District are for informational purposes only. Appellant also relies on his brief in case number 78,337.

STATEMENT OF THE CASE AND FACTS

Emanuel Johnson lived in Sarasota about a mile from the house of Iris White, 73. (W5336) He had some years earlier done regular lawn maintenance for her. (W5249, 5339)

At 1 p.m. on October 4, 1988, the police found White's body on her back on her bed, naked from the waist down. (W4734, 4752-55) She had twenty-four stab wounds and one incised wound. Some of the wounds had irregular margins, suggesting that she was moving at the time they occurred. Nine fatal wounds penetrated the lungs and three penetrated the heart. A blunt trauma wound was on the back of her head from hitting something. (W5436-49)

The doctor thought a cut on a finger was a defensive wound,

but it could have occurred after she was dead. An abrasion near the vagina and another near the anus might have occurred during her death but could already have existed. A forceful opening by hand or fingernails most likely caused these abrasions. White could have been conscious for several minutes or within a minute. She had probably been dead twelve to eighteen hours. (W5434-46)

Steak knives were on the bed. (W4734) A screen in the living room was cut, and the lower window raised. (W4801-02, 4815) The lower window had Johnson's fingerprints on it, behind the upper outer window. (W4806-07, 5235-36) Dirt outside the window was similar to dirt on an afghan underneath the window and to dirt that outlined shoeprints on the porch linoleum. (W4810-19, 4879) The front door was slightly open. (W4733)

The police found ten Negroid hairs which were not Johnson's, including several pubic Negroid hairs from the bedspread, carpet sweepings, and White's left arm, as well as non-matching Negroid head hairs from White's left thigh and the bedcover between her legs. (W5154-69) Two pubic hairs from the carpet sweeping and one hair from White's pubic hair combing had the same microscopic characteristics as Johnson's hair. (W5068-74) Hair exams, however, are subjective, and the expert could not say that these hairs were Johnson's hairs. (W5102, 5117)

On October 12, a week after White's death, the police found a red T-shirt and a black T-shirt in the hall closet of Johnson's apartment, in laundry that included a red striped shirt. (W4925, 4948-52, 4969-71, 4985, 5043-44, 5546) The black shirt was not Johnson's. (W5204) A state expert said that a red fiber on White's

dress, a fiber on the bedspread, and two fibers from her pubic hair combings had similar characteristics to the fibers from the red T-shirt. (W5085-87) The expert could not say these fibers came from the shirt. (W5131) Other red cotton fibers from the bedspread, sweepings, pillowcase and White's hands did not match the T-shirt fibers. (W5170-74) A yellow fiber on the black T-shirt was similar to fibers from a yellow rug in White's apartment. (W5090) Hairs can linger for years, and a yard worker could leave hair and fibers that someone else could track into the house. (W5154, 5189)

A defense expert said the state expert used inadequate procedures and should not have reached any conclusions about the fibers. (W5467, 5497) Especially significant were the red fibers on White's hands that did not come from the shirt. (W5484) Fibers stay on smooth objects like hands only a short time, and consequently, these fibers on her hands were probably deposited there shortly before her death. (W5487-88)

After a lengthy interrogation during the pre-dawn hours of October 12, Johnson confessed on tape. He knocked on White's door and told her he wanted to talk about lawn maintenance. When she opened the door, he grabbed her around the neck and forced her into the house. When he asked, she said her purse or wallet was in the bedroom. He led her into the bedroom and choked her until she was unconscious. He went to the kitchen, took some knives, stabbed her several times, and left by a side door, which locked behind him. (W5261, 5349-50) Twenty minutes later, he returned because he forgot her wallet. He cut a rear window screen with a key, entered the house, took the purse, and left through the side door. He took

twenty or thirty dollars from the wallet and threw the wallet over a fence near the Green Fountain Nursery. (W5261, 5350) On October 11, a road surveyor found White's wallet near this nursery. (W5321)

The state indicted Johnson for first degree murder on November 4, 1988. (W6277) The state charged him by amended information on April 19, 1991, for armed burglary. (W8328) On May 24, 1991, a jury found him guilty as charged. (W8430-31)

Penalty phase

At the penalty phase, Kate Cornell testified that, on January 17, 1988, about 12:30 a.m., Johnson appeared at the bathroom door, grabbed her arm, held a knife to her face, and told her to give him her money. (W5810-11, 5814) She screamed and said her money was in the bedroom. (W5811) They went to the bedroom, and she took the money from her wallet and gave it to him. (W5812) He pushed her to the bed and punched her between her eyes. (W5812) They struggled, and she was stabbed in the hand, arm, and heart. (W5813) He ran away when she asked what he had done to her roommate. (W5810-14)

Lawanda Giddens testified that on May 28, 1988, about 11 p.m., she opened her door after someone knocked. Johnson pushed it open, grabbed her by the throat, and took her to the kitchen. He asked for her money and told her to shut up or he would kill her. She gave him the money from her purse. He held her by the throat and took her out the sliding glass door. She struggled, and he pushed her to the ground. He ran away when she yelled. (W5804-06)

Emanuel Johnson was born in Hallandale, Mississippi, a poor rural town with no industry except cotton farming and fish factories. A few whites had money and lived in a nice area of town,

while the large majority of blacks lived in the run-down impoverished areas. The only opportunity for advancement in Hallandale was to leave. The Johnson house was small with only three rooms, and the children slept on rollaways in the hall or kitchen wherever there was space. (W5820, 5824-26, 5937-38, 5974, 5977)

Emanuel had two older full brothers -- Henry, Jr. and Kenneth -- born to his father Henry, Sr., and mother Charlene. (W5819-20, 5824, 5930, 5975) The father left when Emanuel was seven months old, and they never heard from him again. (W5821, 5975-76) Kenneth testified that the absence of the father had a devastating effect on Emanuel. (W5821) Henry, Jr., said that Emanuel constantly wanted to talk about his father. (W5934) Emanuel's grandmother said he was very concerned about his natural father and often asked questions about him. (W5962)

Charlene remarried to Subord Aimes and they had several children -- Marvin, Lee, George, and Angela. Aimes was a good father, active with his step-children, and Emanuel loved him and was closely attached to him. Aimes died in a car accident, however, when Emanuel was approximately ten years old, and Emanuel took the death very hard. Kenneth believed that Emanuel lost his sense of identity and place in society when he twice lost his fathers. (W5821-24, 5937, 5976)

With her second husband's death, Charlene struggled to make ends meet, because she lived only on Social Security income. (W5826) Her relatives often helped her with food and clothes for the children. (W5993) For a time, she went to Texas, and Emanuel's grandmother took care of him. (W5964)

The children suffered abuse and teasing at school, because their clothes were not good and they lived in a poor house. This harassment affected Emanuel greatly and, like his other brothers, he dropped out of school to work to support the family. When he was thirteen, Emanuel had to go to the hospital to have his stomach pumped out because he had taken an overdose of his mother's pills and had almost passed out. (W5826-27, 5931, 5938, 5943, 5993-95)

Emanuel's aunt, Claire Lewis, testified that Emanuel often played with her children because they lived next door in Hollandale. He was respectful and thoughtful and often helped her more than her own children did. After he moved to Florida, he continued to call or send greetings to her. Emanuel's grandmother, Mary Johnson, who worked in the public school system, had contact with him on occasion at school and knew him as a gentle and kind person who needed love and affection. (W5960-66)

Johnson enrolled in and completed a welding training program in the Job Corps for those who do not finish school. He did well and received his G.E.D. and awards and trophies from this program. While he was in the program or elsewhere, he often visited his family and relatives, and continually remained in contact by phone or letter. (W5827-31, 5906, 5937, 5943, 5961, 5995-97)

Emanuel was the first of the children to leave Hallandale. After completing the Job Corps program approximately in 1982, he came to Sarasota where his uncle lived and wanted to start a welding career there. He started a lawn service and had a large clientele. He also worked in construction and, before he had a car, sometimes walked to work fifteen miles or more. (W5830-31,

5904, 5933, 5906)

Emanuel took care of Wendy Fiati's yard and packed antiques carefully for her shop in Sarasota for seven years. Emanuel was honest, dependable, conscientious, hard-working, and always looked out for her best interests. He came by her house to ask if she needed anything, even when he was not scheduled to work. He was sensitive, believed in God, and cared about her personally. He wrote poetry, read frequently, and always wanted to know and learn more. She wore bathing suits around the swimming pool when he was there and never felt concerned. He often talked proudly of his family. (W6014-20)

Emanuel took care of Evelyn Syprett's yard for six years. He was dependable and polite. Once, she paid him too much, and he returned the money that night when he looked at the check. Often, she drove them to the bank, and he cashed checks for her and brought the money back if she was not properly dressed to go inside. In 1988 when he went home to his mother, Evelyn gave him an extra twenty dollars, but he paid it back afterward when he did not use it on his trip. Evelyn's son Jim, an attorney, saw Emanuel six or ten times at Evelyn's house. He always acted appropriately and politely and seemed very hard-working. (W5948-54)

Emanuel began dating Bridget Chapman in 1985, and they became engaged and lived together. (W5832, 5902-03) He always treated her well, and they never had serious problems. (W5833, 5939) Over the years, they did have one fight in which he hit her with an open hand and she hit him back, but it was not serious or violent. He wrote poetry to her. (W5918-19, 5923-25)

Emanuel was the only father Bridget's child Crystal (six years old at the time of trial (W5906)) had known. He treated her as his own child and had a great relationship with her even while he was in jail, and Crystal loved him very much. (W5832, 5902, 5905) He taught her many things, spent much time with her, read books to her, and sent her problems to solve. He was a religious man who took Crystal to church and read the Bible to her. He was a good person who loved his family and worked hard to make sure they had what they needed. They had many good times together celebrating holidays, going to the beach, fishing, barbecuing, riding, talking, and laughing. Emanuel supported the family economically and loved Bridget and Crystal. (W5903-20)

In 1986, Bridget became pregnant. Emanuel took her to the hospital one day when she did not feel well, but the doctor said nothing was wrong. The next night, Bridget thought she might need to go to the hospital again, but Emanuel said that the doctor had said she was fine. Bridget had a miscarriage that night while she was using the toilet. Emanuel went into the bathroom and saw the baby hanging out. This had a devastating effect on him, to the point that he sent photographs of the dead baby, whom he called Emmanuelle, to his mother and other family members. The back of the photo to his mother said, "My first kid, I thank God for her." He kept Emmanuelle's picture in his wallet, always talked about her, and visited her grave often. While in jail, he sent a Mother's Day card to Bridget from the entire family including Emmanuelle. (W5833, 5913-14, 5997-58)

After the miscarriage, Bridget thought that Emanuel became

distant and may have blamed himself for not taking her to the hospital. (W5914-15) Emanuel also had a car accident at that time, and Kenneth noticed that he seemed changed after the accident and miscarriage. (W5833)

Angela Johnson, 18, was very close to Emanuel, and he was her favorite brother. He took her places and brought things for her. After he left Hollandale, he wrote letters to her, and she visited him in 1985. She saw that he was a loving boyfriend to Bridget and a good father to Crystal. After Angela had a child, Emanuel wrote her not to get any more trouble, to go to school, and to get an education. When he came home, he always helped out his grandparents with chores around the house. (W5968-72)

Emanuel wrote to his brother Henry to come to Sarasota and better himself. Emanuel picked Henry up every morning, and if he did not have work, Emanuel had work in his lawn service for him. (W5931-32) Emanuel also told his half-brother Lee that he could make a better living for himself in Sarasota. Lee worked for Emanuel for a time, and Emanuel paid his rent until Lee found a good job. Emanuel encouraged him to finish school and get his G.E.D. (W5938-39) Marvin came in 1984, after Emanuel encouraged him to come and better himself. Emanuel rented a car, brought Marvin to Sarasota, paid his apartment rent, and was a loving and caring brother to him. (W5942-44)

Emanuel often brought Crystal to his brother Henry's house, at times nearly every day, and the two families went to the beach for barbecues or stayed home and talked. Henry's children loved Emanuel. (W5933-34) In July 1988, Emanuel returned to Hallandale

with Crystal and his brother Marvin for a family get-together with his mother. They went to the national park and to the swimming pool, had a barbecue, and generally had a good time. (W5945)

Kenneth came to Sarasota in 1985 and stayed with Emanuel for a few months. Kenneth became the only member of his family to attend college, and he obtained a degree in electrical engineering from the University of Central Florida in Orlando. (W5819, 5831, 5839) Emanuel and Bridget later moved to Orlando and stayed in the same apartment complex where Kenneth lived. (W5834, 5909) Emanuel left his truck and lawn tools with his brother Henry. (W5932, 5940) Kenneth had difficulty working full time and simultaneously going to school, but Emanuel always encouraged him to continue and finish his schooling. (W5834)

Shortly before his arrest in the present case, Emanuel and Bridget had a son, Emanuel, Jr. While he was in jail between 1988 and 1991 awaiting trial, Emanuel often talked to his son on the phone, although he was not old enough to talk back. (W5902-08) He also continued to have extensive phone and letter communication with Kenneth and be supportive while Kenneth was in school. (W5834-35) He wrote letters, sent holiday cards and poems to Bridget, and told the kids to be good. She loved him very much. (W5910-11, 5915, 5920) Emanuel often talked to his mother, to Henry, and to Wendy Fiati on the phone, and wrote to Angela, to Wendy, to Aunt Claire, and to his maternal grandparents, the Hollidays. (W5934, 5940, 5970-71, 6021) He wrote to his mother and always said he loved her. (W5999) He read in jail and studied the law. (W6022)

Kenneth characterized Emanuel as a loving and nurturing person

to his family and friends. He was unselfish and always gave whatever his family needed. Each one of his brothers had lived with Emanuel at one time or another. He had brought all of them from Hallandale, given them their start, and been an inspiration to all of them, even while he was incarcerated. (W5835-37) Henry testified that Emanuel was a kind and loving brother. Whatever Henry needed, Emanuel would get it for him. Henry loved Emanuel. (W5930-34) Lee said that Emanuel was hard-working and always looked after his brothers, gave them money, and encouraged them to better themselves. (W5940) Charlene said she loved Emanuel and always would. (W5999) Wendy Fiati said that Emanuel was considerate of everyone and kind and thoughtful. (W6026-27)

On May 30, 1991, the jury recommended death by an 8-4 vote. (W8727) On June 28, 1991, Judge Owens sentenced Johnson to death, finding the aggravating circumstances of (1) prior violent felony, (2) commission of murder during burglary for financial gain, and (3) heinous, atrocious, or cruel killing. The judge found fifteen nonstatutory mitigating circumstances. (W8812) For the burglary charge, Judge Owens sentenced Johnson to life in prison, listing the unscored capital felony and a pattern of escalating criminal activity as reasons for departure from the sentencing guidelines. (W8810, 8817) Johnson now appeals. (W8824)

SUMMARY OF THE ARGUMENT

I. The confessions should have been suppressed because the officers did not properly advise Johnson of the cause of the arrest. They also did not take him immediately to the jail for booking. They diluted the Miranda warnings. They ignored his

"objection to proceeding on." The confessions were involuntary. The confessions occurred after the right to counsel had attached, and the police did not obtain an adequate waiver of this right.

II. The clothes were improperly seized because the affidavit did not provide probable cause to seize the clothes. The warrant was an illegal general warrant which improperly allowed the officers to rummage through the apartment in a general exploratory search for evidence. The affidavit omitted important facts which would have changed the probable cause determination.

III. The judge forced the defense to use a peremptory challenge on a juror who favored death and could not consider mitigating circumstances.

ARGUMENT

ISSUE I

THE CONFESSIONS SHOULD HAVE BEEN SUPPRESSED.

In his taped statement to the police, the defendant said, "I hope I just don't get locked up in some cell without help." (W6816) In light of Mr. Johnson's current situation, these were prophetic words.

A. Factual background

After the Sarasota police learned that Johnson's fingerprints matched the fingerprints on the window, they held several meetings on October 11. (W47, 125, 168, 1018) They decided to get an arrest warrant, because he was the primary and only suspect. (W110, 1020) The arrest warrant affidavit was typed by 8:30 p.m. (W55) A prosecutor assisted detective Sutton in preparing it and with other matters that afternoon, evening and early morning hours. (W511,

572-74) The judge signed the warrant at approximately 9:15 p.m. and wrote on it, "No bond. To be set by Court." (W57, 512, 1006, 6450)

After the arrest, detectives Sutton and Sullivan had the arrest warrant in their pocket and started interrogating Johnson at 10 p.m. in a small, eight feet by five feet room. (W472, 476, 718) Sullivan was expert at obtaining confessions from defendants and had attended many training sessions on interrogations. (W880) He wanted to get a "hook" into Johnson to get him to confess. (W913) The officers knew he had been arrested once or twice before. (W477)

The officers read Johnson the Miranda warnings and he agreed to talk. (W474, 717) The atmosphere was casual, and they did not raise their voices. (W476, 717) They denied making threats or promising him an insanity plea. (W478, 487) Throughout, he seemed calm, alert, responsive, and intelligent, and he did not yawn or act tired. (W475, 503, 508) He said he often "prowled" at night and was a night person. (W509) Whenever the officers were getting "close" to him, pressing him, and accusing him explicitly or implicitly of committing the crime, however, he would say he was tired. (W508)

They told him they had an arrest warrant for homicide, but they did not go into details, hoping he might talk about McCahon as well as White. (W478-79, 715-16, 726) Detective Sapp was outside and put in his report that Johnson originally did not want to talk about White. Sapp explained at the hearing that this meant that Johnson hesitated when asked about White and seemed to prefer to talk about McCahon first. He did not actually say that he did not

want to talk about White. (W1235-37, 1255)

Johnson said he had been living in one of McCahon's apartments for a few weeks. (W480) He had seen her body on the ground when she died but did not know who it was until a co-worker told him. (W480) He also had done yardwork for White five years earlier, and his uncle lived across the street from her. (W480) She had put her house up as bond to get him out of jail, and he loved her like a mother. (W480-81, 727) By 11:15 p.m., the officers were not progressing and therefore told him that his fingerprint had been found at one or both of the crime scenes. (W483, 732, 901) Johnson said it had to be a mistake. (W483-84) He said he was tired. (W508)

When the officers realized that the interrogation was going nowhere, they persuaded Johnson to take a polygraph, and Sapp went to get Sergeant Stanton, the polygraph examiner, around 11:30 p.m. (W485-86, 1237) Johnson had three glasses of water at 11:50 p.m., and Stanton arrived at midnight. (W486, 580) The officers walked Johnson to the polygraph room, another small, eight feet by six feet room. (W488, 620) Sutton and Sullivan occasionally stood outside during the examination, watching through a one-way mirror and listening through headphones. (W488-89, 557)

The polygraph started at 12:30 a.m. (W524, 581) The atmosphere was casual, and Stanton did not raise his voice, threaten Johnson, or make promises. (W490, 587) Johnson seemed alert. (W586) He had last slept the previous night, had last eaten at 5 p.m., and had had six beers between 4 and 10 p.m., but did not seem to be under the influence of alcohol. (W598, 631, 636)

He signed consent forms to be polygraphed for both White and

McCahon and notification of rights forms, which included statements that he understood that anything he said could be used against him in court. (W582, 593, 599) These forms did not include statements that he waived his right to remain silent or to an attorney. (W630) Stanton did not read the forms to him. (W641) Stanton said that the polygraph test results would not be admissible in court. (W589, 624) Stanton did not explain to Johnson that a polygraph exam had three parts, the pre-test interview, the machine hookup, and the post-test interview. (W627-28)

Stanton gave him six polygraph exams, three for each case. (W489, 604-05) Before taking the three polygraphs for White, Johnson said he had been told that his fingerprints were inside the house. (W653) When the White tests were over at 1:40 a.m., Johnson said he was a little tired but wanted to go on. (W615) He had not at that point or later shown any signs of fatigue. (W615) He used the restroom. (W622) The McCahon tests ended at 2:30 a.m. (W644)

Stanton reviewed the charts and then started the third phase of the polygraph examination, the post-test interview, by telling Johnson at 2:47 a.m. that he had flunked the tests. Stanton accused him of being involved in White's and McCahon's deaths. The tests were conclusive, and it was no longer a question of whether he did it but why he did it. Johnson denied these accusations. When Stanton asked him to explain the fingerprints inside White's house, he said he could not explain them and had feelings for White like his own mother. (W607-09, 644, 654, 659, 908-09)

As Stanton bore down on him and accused him of committing the crime, he became agitated. He said, "Well, you know, I'm getting

a little tired." Stanton did not ask any questions to clarify this statement and instead said, "I'm getting tired too but this is more important I think to proceed on." Johnson never seemed fatigued during the interview; at that point, he was very conscious and aware of the conversation. The interrogation continued, and he did not make any "further objections to proceeding on." (W616, 656)

Stanton suggested various scenarios. Perhaps Johnson had planned only to take something from White's house, but she awakened and struggled, and he killed her out of fear. Sometimes, people commit acts they do not understand and later cannot believe that they did. No matter how hard they try to forget, they cannot help but remember it. Johnson needed to understand why he committed these acts. He had a problem, was scared of his actions, was out of control, and was screaming for help to stop his behavior. (W610, 659-60)

Sullivan, standing outside, heard Johnson talk about being tired two, three, or four times. Stanton never clarified these statements of fatigue or asked if Johnson wanted to stop. Johnson would say he was tired whenever Stanton pressed him hard. Sullivan discounted these statements because he did not believe that a person accused of murder could suddenly get sleepy. "They would be the most alert they've been in their life." (W775, 911-15)

At some point, detective Redden told Sullivan that she had heard that Johnson had beaten some prostitutes. (W745, 1030) Around 3:30 a.m. when Johnson again said he was tired, Sullivan and Sutton entered the room because Stanton was not making progress. (W488, 558-59, 911-12) Sullivan said, "Why don't you listen to

this man, he's trying to help you. We're all trying to help you, but you just don't want any help. I know you've got a problem with women, and you know you've got a problem with women. Why don't you talk about this." (W491, 663, 916) He said that Johnson needed to talk about it, because it had probably been going on a long time. (W746)

Johnson paused for thirty or forty-five seconds. He then said he did have problems, felt a great pressure in his head, and had tried to talk to his brother and mother about it, without success. When Sutton asked if this pressure was responsible for White's death, Johnson said it was. He then confessed, first about White, then about McCahon, and also mentioning Cornell, ending at 4:05 a.m. After Sullivan left to get a tape recorder, Johnson told Sutton he had also committed Cornell and Giddens, and he mentioned three hundred burglaries he had done. (W491, 496, 611, 746-47, 765)

When Sullivan returned at 4:11 a.m., Johnson's first declaration on the tape was, "When can I get some sleep, man?" Sullivan responded, "Well, this hopefully won't take very long. I want to simply get a summary about all this." (W6803) Sutton characterized this exchange as Johnson saying he was tired. (W506) Sullivan did not believe he was asking for sleep, because he was wide awake; he was only saying it because he was being pressed. (W927)

Johnson repeated his statements on tape, ending at 4:35 a.m. (W500) He became emotional and started crying at times during the tape. (W751) He talked articulately and did not act tired on the tape. (W506-07) When Sutton asked if the pressure had "just escalated," Johnson said it "just kept building, man," it "never

stopped." (W6805, 6807) He was "glad" that the officers "done got me man," "because I might be able to get some help now." (W6811, 6814) The officers were "the right people, man." Sutton replied, "you just had to be convinced we were the right people." (W6814) At the end, Johnson said, "I hope I just don't get locked up in some cell without help." (W6816) When he left the room, Johnson saw Stanton and shook his hand, thanking him for his help. (W500)

Dr. Walter Afield saw Johnson on October 27, 1988, and again on October 17, 1989. Johnson was vague, tangential, loose in his thinking. Based on tests, Dr. Afield believed he was somewhat autistic and suffering from psychosis. His IQ was 82, and he did not have the ability to understand the Miranda warnings. Although Johnson might later have said he was malingering at the time, Afield still believed that Johnson was psychotic on the day that the doctor saw him. (W788-95, 826)

Dr. DeClue testified that Dr. Afield's tests could be interpreted either that Johnson was malingering or that he was really disturbed when the tests were given in 1988 shortly after Johnson's arrest. Dr. DeClue leaned toward the view that Johnson really was disturbed in 1988, based on (1) the evidence of cocaine, marijuana, and alcohol use at that time, (2) his low-average intelligence, which would make it harder for him to fake the test results, and (3) the anti-psychotic medication that the jail psychiatrist prescribed for him then. (W1348-55, 1362)

Dr. Merin and Dr. Sprehe saw Johnson at various times, starting eighteen months after the arrest. Dr. Merin believed Johnson was not psychotic and could understand the Miranda warnings. Merin

read Dr. Afield's test results to mean that Johnson was malingering and trying to appear insane. Dr. Sprehe thought that Johnson could understand the Miranda warnings and that his statements to the police were not coerced. (W1275, 1289, 1296, 1299, 1305-10, 1325-27)

Dr. Richard Ofshe, a social psychologist and Berkeley professor, specialized in police influence and interrogation techniques. (W1038) The trial judge in State v. Sawyer, 561 So. 2d 278, 289 (Fla. 2d DCA 1990), characterized him as "the only true expert on thought control at the hearing." (W1053) He testified that Johnson was able to discuss details of his cases with Ofshe. (W1143) Johnson had read police reports and other paperwork and researched materials on the Fifth and Sixth Amendment. (W1147-49) Ofshe thought he could understand the Miranda warnings. (W1151)

Ofshe testified that, by overstating the evidence and using the polygraph to increase the certainty of guilt, the police made Johnson think he was in a hopeless situation. Telling defendants they have failed a polygraph is a powerful influence technique. The police also made Johnson think he would gain psychological benefits by confessing; they suggested that the crime was not too heinous and that his guilt could be unburdened on their sympathetic ears. (W1082-84, 1091)

According to Ofshe, Johnson said that detective Sutton discussed an earlier misadventure involving diamonds.[1] Johnson was

---

[1] Detective Sutton denied having any knowledge of the stolen diamonds case. (W539-40) The case, however, did exist, and Sutton listed the case number on one of his reports, although the State argued that he had merely gotten the case number from a computer screen and did not know the facts of the case. (W1472, 1483)

supposed to introduce an officer to the person from whom Johnson had bought the diamonds, but Johnson instead left town. Sutton said that Johnson could be charged with three hundred burglaries. If Johnson would plead insanity, Sutton would help with the judge, and he would be out of prison in a few years. Ofshe was aware that Sutton denied making these promises. (W1093-96)

Johnson told Ofshe he thought he would go home if he passed the polygraph. When Stanton told him he had failed it, this hope was gone. Stanton then developed the typical post-polygraph theme that the machine was all-powerful and Johnson was out of control. This reinforced Sutton's earlier suggestion that Johnson could plead insanity. He at that point decided he had no other choice but to accept the suggestion of insanity, admit he had a problem, and receive only a few years in prison. (W1090, 1106-12)

The tape showed that detective Sutton manipulated Johnson by using the pressure concept to get him to confess. Johnson thanked the officers for helping him, which indicated that he thought he had made a deal. He agreed to identify the places he had burglarized but wanted to stay out of sight, which suggested that he expected to be back in town soon. Sutton responded that no one would see him, since that would depend on whether anyone wanted to pursue charges. Sutton thus assured Johnson that he need not worry about that possibility, which was consistent with Johnson's report that Sutton had promised that the burglaries would not be prosecuted. (W1117-18)

Dr. Ofshe characterized the confession as coercively induced by a promise of an insanity plea and a threat of burglary prosecu-

tions if he did not cooperate. Although the police denied making these promises and threats, Ofshe thought that Johnson's account of what happened was internally consistent, was supported by specific facts that occurred, and explained the events better. The police account that Johnson suddenly confessed when accused of having a problem with women was not credible in Ofshe's opinion, given Johnson's steadfast denials for several hours that he had committed the crimes. (W1135, 1165, 1174)

Dr. Ofshe also thought that Johnson said he was tired and wanted to go to sleep because he wanted to stop the interrogation. Stanton's response that he was tired too but this was more important was a technique to overcome Johnson's request by ignoring it and moving on. (W1114-16)

Judge Silvertooth denied the motion to suppress, finding that Johnson waived his Miranda rights, voluntarily confessed, did not make an equivocal request to remain silent, and was not denied his right to counsel. The judge rejected Dr. Ofshe's opinion that the confession was coerced. (W6988) At trial, Judge Owens denied renewed motions to suppress. (W5242-43)

B. The dilution of the Miranda warnings

The purpose of the polygraph, of course, was not to persuade the police of Johnson's innocence but rather to persuade Johnson to confess his guilt. The police preyed on Johnson's hope that, if he passed the polygraph, they would let him go. They however had no intention of letting Johnson go, and, in fact, the judge's "no bond" order in their pocket meant that they could not let him go. Johnson's actual performance on the polygraph was irrelevant to any

issue of significance. The police instead used the polygraph solely as a trick to keep him talking, because the interrogation at that point had reached a dead end (in more ways than one) and would otherwise effectively be over.

As an integral part of the trick, the police diluted the general Miranda warnings. Sergeant Stanton told Johnson specifically that the polygraph examination was an "investigative aid" and that the test results would not be used against him in court. (W589, 624) This was contradictory and confusing advice which weakened the Miranda warnings and thereby deprived them of their positive ability to counteract the coercive interrogation environment. Stanton's plain purpose in giving this misleading advice was to make talking easier for Johnson. Under the totality of the circumstances, an uninformed suspect like Johnson might very well think that his discussions with Stanton were only an "aid" to the "investigation" and would not be incriminating evidence in a court of law. Indeed, the court in Green v. State, 437 So. 2d 784, 784 (Fla. 2d DCA 1983), found that "the post-polygraph conversation was a part of the whole examination and was covered by the stipulation."

Consequently, Johnson might reasonably have believed that the post-polygraph questioning about the results of the polygraph was part of the entire polygraph procedure. Although Stanton had perhaps in his own mind carefully and subtly maintained the theoretical distinction between numeric test results and verbal statements about the numeric test results, Stanton never communicated this technical distinction to Johnson. Stanton did not

explain that a polygraph exam had three parts, the pre-test interview, the machine hookup, and the post-test interview about the test results. (W627-28) Johnson could not reasonably be expected to understand these distinctions at 1 a.m. if Stanton did not explain them to him.

Furthermore, Johnson's agreement to revive the concluded interrogation by taking the polygraph did not necessarily extend to a separate post-polygraph interrogation that could be used against him in court. Rather than go to sleep, he agreed to the polygraph and nothing more. Not surprisingly, however, the police were only interested in persuading Johnson to continue the interrogation and thereby obtaining incriminating evidence. To that end, they were willing to use every trick in the book. Once they had his agreement to continue talking for the polygraph, their intent was patent. They never let up and never deviated from their inquisition against him even after the polygraph machine test phase was over.

Although Stanton initially gave Johnson a "Notification of Rights" form to read which said that his statements could be used against him, this form made no reference to the polygraph. (W6768) It was apparently a routine and general document which Stanton used for every interrogation and did not apply specifically to the polygraph examination. It did not ask Johnson to waive his rights, and it only repeated the general Miranda warnings which he had already once received. The general advice in the Miranda warnings presumably applied to other discussions and not to the "investigative" discussions about the polygraph and its results, because Stanton misled him into thinking that these discussions were

"investigative aids" that were part of the polygraph procedure and therefore not admissible evidence.

The net effect of this trickery and contradictory advice was to entice Johnson into continuing an interrogation that was otherwise finished and to create the misleading impression that he could now talk during and about the polygraph as "an investigative aid" to the police, without fear -- or at least with a lesser fear -- that his statements would become incriminating evidence. Tricky inducements of this sort which dilute the Miranda warnings are improper. As Miranda itself said, a defendant in custody must "be informed in clear and unequivocal terms that he has the right to remain silent. . . . [A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." Miranda v. Arizona, 384 U.S. 436, 467, 476 (1966) (emphasis added). Contrary to Miranda, Johnson received not "unequivocal" but confusing advice which tricked and cajoled him into talking.

This advice was similar to "refresher" advice that the police are taking a person's statement primarily to refresh the person's memory in the event of a court appearance. Like the advice in the present case, this "refresher" advice dilutes the Miranda warnings and is "roundly condemn[ed]" for that reason. State v. LeCroy, 461 So. 2d 88, 90 (Fla. 1984).

Several cases have suppressed confessions when, as in the present case, the police give contradictory advice which dilutes the Miranda warnings or lessens their effect during part of the interrogation. For example, the Michigan Supreme Court found that

"a potential for confusion exists in a situation where a defendant may not knowingly and intelligently waive certain rights **if the distinction between results of a polygraph examination and statements made before, during, or after a polygraph examination is not adequately explained to the defendant.**" People v. Ray, 430 N.W.2d 626, 629 (Mich. 1988) (emphasis added).

Similarly, in People v. Leonard, 337 N.W.2d 291, 293 (Mich. App. 1983), an intermediate appellate court suppressed a confession because the defendant and his lawyer had agreed that the "results of the polygraph examination and the polygraph examiner's opinion as to the defendant's veracity would not be used against defendant at trial." The court found that **the waiver of rights had not clearly "extended to the interrogation conducted after the examination had ended"** (emphasis added). On appeal, the Michigan Supreme Court agreed that "the defendant did not knowingly waive his right to remain silent in view of the stipulation . . . whereby the results of the polygraph examination and opinions drawn therefrom would not be admissible in evidence." People v. Leonard, 364 N.W.2d 625, 626 (Mich. 1984).

In United States v. Beale, 921 F.2d 1412 (11th Cir. 1991), the court suppressed a confession after the police told the suspect that his statements would not hurt him.

> Although the Supreme Court has held that the police do not have to recite the Miranda warnings in a talismanic fashion, the warnings must not be misleading. California v. Prysock, 453 U.S. 355, 101 S. Ct. 2896, 69 L. Ed. 2d 696 (1981). It appears that by telling [the suspect] that signing the waiver would not hurt him **the agents contradicted the Miranda warning** that a defendant's statements can be used against the defendant in court, thereby misleading [him] concerning the consequences of

> relinquishing his right to remain silent. Accordingly, the district court erred by admitting [the suspect's] statement.

Id. at 1434 (citations omitted, emphasis added); accord Cribbs v. State, 378 So. 2d 316, 318 (Fla. 1st DCA 1980) (telling defendant that he could not talk with a public defender until one had been appointed improperly "vitiated the Miranda warnings previously given"); Foster v. State, 374 S.E.2d 188, 194 (Ga. 1988) (confession suppressed despite Miranda warnings, after the police told the defendant that talking would not hurt "a thing").

The present case is not substantively different from these cases. The police did not in any way explain to Johnson the difference between his numerical performance on the polygraph test and his statements during the test and immediately afterward. Consequently, the State cannot now say that Johnson's mere reading and signing of the "Notification of Rights" form and his willingness to continue the otherwise concluded interrogation by talking for the polygraph constituted an express waiver of his rights which clearly extended to a separate post-polygraph interview. Just as in Leonard and Cribbs, in view of the stipulation that the results of the polygraph examination were only an "investigative aid" and were not admissible evidence, the police improperly "vitiated" the Miranda warnings and rendered the resulting statements inadmissible.

When the officers moved smoothly to the post-examination portion of the test, they should have told Johnson that the stipulation regarding the admissibility of the test was now over, and that his statements could now be used against him. In other

words, the police should have readministered the Miranda warnings, to combat the confusing effects of their earlier statements. This renewed necessity to rebut the earlier contradictory advice made this case different from Wyrick v. Fields, 459 U.S. 42 (1982), which held that renewed Miranda warnings after a polygraph are not always necessary. In Wyrick unlike the present case, the police had not promised that the test would not be used against the suspect, and they therefore had not given any contradictory advice which they had to negate.

This case is also not like LeCroy, in which this Court found the confession admissible under "the totality of the circumstances," despite the refresher advice that watered down the Miranda warnings. In LeCroy, the defendant repeatedly received Miranda warnings, and no additional facts suggested that he did not understand them or "was coerced or deceived into making the statement." 461 So. 2d at 90. By contrast in the present case, as this brief and the brief in case number 78,337 have shown and will show, the entire interrogation rested on psychological coercion and tricky deception. The police exploitation of this coercion and deception, including the dilution of the Miranda warnings, rendered the confession inadmissible.

This case is most like United States v. Gillyard, 726 F.2d 1426 (9th Cir. 1984). Gillyard suppressed a confession made during the post-examination interview phase of a polygraph test because, as in the present case, the police did not give renewed Miranda warnings. In Gillyard, the defendant agreed to talk when the police tempted him with a polygraph test; he would not have talked

to them otherwise. Similarly in this case, Johnson had said he was tired, the officers' tactics were not working, and the interrogation was effectively over, but he agreed to continue talking when the police tempted him with the polygraph. Consequently, neither Johnson's mere reading of the "Notification of Rights" form nor the Miranda waiver in Gillyard clearly meant that the defendant had also consented to a separate post-polygraph interrogation.

Significantly, Gillyard distinguished Wyrick on several grounds which are almost exactly applicable in the case at hand.

> 1. In Wyrick the defendant and his attorney requested the examination. Here the defendant consented after the agents suggested that he take one.
>
> 2. In Wyrick the defendant was represented by counsel. Here, he was not.
>
> 3. In Wyrick the statement read to the defendant included a clause much broader than the standard Miranda warning given in this case. There, and not here, the defendant was advised: "If you are now going to discuss the offense under investigation, which is rape, with or without a lawyer present, you have a right to stop answering questions at any time or speak to a lawyer before answering further, even if you sign a waiver certificate." 459 U.S. at 44. . . . The Wyrick warning made it clear to the defendant that he was not merely taking a polygraph examination but was going to be asked questions about a specific offense under investigation.
>
> 4. There the postexamination questioning was done by the same person who conducted the polygraph examination after he had merely switched off the machine. Here the questioning was not done by the polygraph operator but by two officers who questioned the defendant for a considerable period of time after the operator had left the room. As found by the district court, these officers came in the room, announced that the defendant was lying, and proceeded, in the district court's words, to "go to work" to get a confession. Here the questioning was not merely a continuation of the polygraph examination but a change to accusatory questioning by two officers who had nothing to do with the polygraph examination.

726 F.2d at 1429. These four distinctions between Wyrick and the Gillyard are strikingly germane to the case at hand and mandate the

conclusion that renewed Miranda warnings were necessary.

Finally, Croney v. State, 495 So. 2d 926 (Fla. 4th DCA 1986), distinguished Gillyard because the defendant in Croney was not in custody when he took the polygraph, was not extensively interrogated for several hours, and in fact volunteered his statements without any questioning. Clearly, these distinctions in Croney are wholly inapplicable in the present case.

The police below diluted the Miranda warnings by telling Johnson that the polygraph would not be used against him. They exploited this dilution of the warnings and thereby induced Johnson to talk about the polygraph and its results. Throughout the interrogation, the police used coercion and trickery to obtain the confession. They proceeded to "go to work" on Johnson without ever clearly explaining to him how his statements could or could not be used in court. Moreover, he never clearly agreed to continue the interrogation after the machine test. Consequently, under the totality of the circumstances, the Miranda warnings were diluted, and the resulting confession was presumptively involuntary.

C. The requests to end the interrogation

To end the interrogation, Johnson made several requests which were at least equivocal and ultimately became unequivocal. The officers, however, did not even attempt to clarify these requests, much less honor them. Accordingly, the police violated Johnson's Miranda right to cut off questioning at any time.

Initially, Johnson hesitated when asked about White and seemed to prefer to discuss McCahon first, although he did not expressly refuse to discuss White. (W1235-37, 1255) Later, at several points

during the interrogation, Johnson said he was tired, most often when the officers were pressing him hard and accusing him of committing the crime.

> Prosecutor: You stated that he had said it a couple times that he was tired. Do you recall any other time that he stated that he was tired?
>
> Detective Sutton: It was usually when we would get a little closer to talking about the case. . . . [F]or instance, and I don't recall the specific times but it may have been when we brought up the fingerprint hit. . . . [I]t seemed like when we were close to actually saying . . . you're the perpetrator of these offenses, that's when he would bring up that he was tired. . . .
>
> Q: Okay. And when he would say this, I'm tired, would he show any signs or anything that you would connect with being tired?
>
> A: I never saw any physical symptoms of him being tired in the entire interview.
>
> Q: So it was generally then when you were pressing him on an issue as far as accusing him, well, you did do these crimes. Would that seem to change the subject then when he would say he was tired?
>
> A: Yes.

(W508-09)

These expressions of fatigue occurred again after the first set of polygraphs was over, but Johnson said then that he wanted to go on. (W615) He reasserted his tiredness, however, after the second set of tests at 2:45 a.m., when Sergeant Stanton bore down on him and told him he had flunked the tests, the tests were conclusive, and the issue now was not whether he killed White and McCahon but why. Standing outside while Stanton interrogated Johnson, Sullivan heard Johnson say he was tired two, three, or four times. (W775, 911-12)

In what were the four most important words among the millions

of words in this case, Stanton characterized Johnson's expression of fatigue here as an "objection to proceeding on." Stanton adroitly sidestepped this "objection to proceeding on" by saying that, although Stanton was also tired, the interrogation was more important.

> Prosecutor: So you were pressing him on that he did it?
>
> Stanton: Yes, I was.
>
> Q: And what did he say then to that?
>
> A: He said, "Well, you know, I'm getting a little tired." And I said, "Well, I'm tired too but this is more important I think to proceed on."
>
> Q: And what did he respond to that?
>
> A: We proceeded on. He did not object. He did not indicate any further objection to proceeding on.
>
> Q: Did you see any . . . signs of being fatigued when he made that statement?
>
> A: No, sir. He was relatively agitated at this point because I was pressing him. As far as being fatigued I would say just the opposite, he appeared to be very conscious and very much aware of what was going on and what we were talking about. . . .
>
> Q: During the entire length of your interview with him did he show any . . . signs of being fatigued or being tired?
>
> A: No, sir.

(W615-16) (emphasis added) Stanton later admitted during cross-examination that he asked Johnson no questions to clarify these statements of being tired.

> Q: Now, at that point you didn't ask him to clarify, did you, what he meant by being tired, you just went ahead and told him that you were tired too, and it was more important than rest for you at that point; is that right?
>
> A: Yes, sir.

> Q: Okay. You understand the question? . . . [Y]ou didn't ask him any questions to clarify what he meant by that?
>
> A: Correct.

(W656)

Johnson's final expression of fatigue was his first declaration on the tape -- his explosive question, "When can I get some sleep, man?" Like Sergeant Stanton, detective Sullivan adroitly moved Johnson beyond this potential termination of the interview by responding, "Well, this hopefully won't take very long. I want to simply get a summary about all this." (W6803)

The police here did not scrupulously honor or clarify what was at first an equivocal and later an unequivocal "objection to proceeding on." Johnson did repeatedly indicate (at least equivocally) in one manner or another that he wanted to end the interrogation, but the police failed to honor this request.

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

Miranda v. Arizona, 384 U.S. 436, 473-74 (1966) (emphasis added); see also Traylor v. State, 596 So. 2d 957, 966 (Fla. 1992) ("Under section 9, if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop") (emphasis added).

Michigan v. Mosley, 423 U.S. 96 (1975), explained in more depth the nature of a suspect's right to cut off questioning.

A reasonable and faithful interpretation of the Miranda

> opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his right to silence and to assure that the exercise of the right will be scrupulously honored. . . ." 384 U.S. at 479. . . . The critical safeguard identified in the passage at issue is a person's right to cut off questioning. Id. at 474. . . . Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether "his right to cut off questioning" was "scrupulously honored."

Id. at 103-04 (footnote omitted, emphasis added).

Whether a suspect has asserted a right to cut off questioning is determined not by fragmented statements taken out of context but rather by the totality of the circumstances. State v. Rowell, 476 So. 2d 149 (Fla. 1985). This totality is measured, however, only by the circumstances occurring prior to the assertion of the right. Smith v. Illinois, 469 U.S. 91, 99 (1984). The police may not continue to question suspects in the hope that a later answer will cast doubt on an earlier request to end the interrogation.

Sometimes, even under the totality of the prior circumstances, a request to remain silent is not clear but equivocal. In such cases, the police and the courts must apply the same standard applied to equivocal requests for the assistance of counsel. Unless the police immediately limit their next questions to clarifying the equivocal request and obtaining the suspect's permission to proceed, any resulting statements are inadmissible at trial.

> "[W]henever even an equivocal request for an attorney is made by a suspect during a custodial interrogation, the scope of that interrogation is immediately narrowed to

> one subject and one subject only. Further questioning thereafter must be limited to clarifying that request until it is clarified. . . . And no statement taken after that request is made and before it is clarified . . . can clear the Miranda bar." . . . We see no reason to apply a different rule to equivocal invocations of the right to cut off questioning.

Martin v. Wainwright, 770 F.2d 918, 924 (11th Cir. 1985), quoting Thompson v. Wainwright, 601 F.2d 768, 771-72 (5th Cir. 1979). Like the eleventh circuit in Martin, this Court also adheres to "the well-established rule that a suspect's equivocal assertion of a Miranda right [to cut off questioning] terminates any further questioning except that which is designed to clarify the suspect's wishes." Owen v. State, 560 So. 2d 207, 211 (Fla. 1990).

In this case, Johnson made at least four requests to cut off questioning which were initially equivocal and later became unequivocal. First, Johnson was originally reluctant to talk about White and wanted to talk about McCahon instead. This desire was equivocal because it was subject to two interpretations. He might have wanted to talk about McCahon first, without necessarily precluding talking about White later, or he might not have wanted to talk about White at all. The police were required to clarify this desire, because, in the latter event, he had invoked his right to silence, albeit about White, and any statements he made thereafter were inadmissible.

This Court in Owen agreed that the police must clarify equivocal requests of this sort before proceeding.

> Owen had indicated his desire to confess to crimes for which he felt the police had sufficient evidence to convict. Consequently, there evolved a procedure whereby the police officers would present their evidence and attempt to persuade him that they had the sufficient proof.

> . . . However, when police inquired about a relatively insignificant detail, he responded with "I'd rather not talk about it." Instead of exploring whether this was an invocation of the right to remain silent or merely a desire not to talk about the particular detail, the police urged him to clear matters up. He was soon responding with inculpatory answers and asking questions of his own. After further exchanges and a question on another relatively insignificant detail, Owen responded with "I don't want to talk about it." Again, instead of exploring the meaning of the response, the police pressed him to talk. . . . [These] responses were, at the least, an equivocal invocation of the Miranda right to terminate questioning, which could only be clarified. It was error for the police to urge appellant to continue his statement.

Id. at 210-11 (emphasis added).

Unlike the officers in the present case, the officers in Otey v. Grammer, 859 F.2d 575 (8th Cir. 1988), correctly "did not ask again the specific questions which Otey previously was hesitant to answer. 'A person in custody may selectively waive his right to remain silent by indicating that he will respond to some questions, but not to others.'" Id. at 579, quoting United States v. Lopez-Diaz, 630 F.2d 661, 664 n.2 (9th Cir. 1980). Because the officers never clarified whether Johnson did not want to talk about White, his statement about her should ipso facto have been suppressed, and his statements about McCahon, Giddens, and Cornell should have been suppressed as the fruit of the illegal interrogation about White. Johnson's fifth amendment rights were not case-specific and applied to all cases, White, McCahon, Giddens, and Cornell. Arizona v. Roberson, 486 U.S. 675 (1988).

A second equivocal request to cut off questioning occurred when Johnson said he was tired after the officers pressed him harder and told him about the fingerprint match (without telling him whether it occurred at White's residence or McCahon's). This

statement of fatigue was equivocal because it had two and possibly three interpretations.

The least plausible interpretation was that it was Johnson's way of stalling or saying he did not want to discuss the particular subject in question, without necessarily refusing to discuss others. This interpretation was implausible, because a statement of fatigue by its nature applies generally to all subjects of conversation. A person who is too tired to answer some questions would normally be too tired to answer all others as well. A tired person either will answer all questions or not want to answer any. Consequently, this Court should not consider this interpretation as a reasonable explanation of Johnson's statement of fatigue.

In any event, however, even if the statement did mean only that Johnson was stalling and did not want to discuss or answer the particular question, the officers had to clarify what he did or did not want to discuss. Owen, Otey, and Mosley mean that suspects can determine the subjects of their discussions with the police. Defendants under interrogation have the right to control "the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." Mosley, 423 U.S. at 103-04 (emphasis added). Consequently, if Johnson here indicated a desire not to discuss a particular matter, the fifth amendment required the officers to clarify what he meant, but they did not do so.

A second interpretation was that the statement was merely a statement that Johnson was tired, without necessarily implying that he wanted the officers to leave immediately. Although this interpretation might be plausible in some cases, it was implausible

under the totality of the prior circumstances in this case. Detective Sutton said that Johnson was not tired at the time the statement was made. In fact, Sutton "never saw any physical symptoms of him being tired in the entire interview." (W508-09) Detective Sullivan likewise believed that Johnson was wide-awake and not really asking for sleep; he was only asking for it because he was being pressed. (W927) A person accused of murder would not suddenly get sleepy. "They would be the most alert they've been in their life." (W775, 911-15)

Because the officers were certain that Johnson was wide-awake and not tired, they could not properly interpret his statement of fatigue as a simple statement of being tired. Everyone below -- prosecutors, police officers, and judge -- overlooked this painfully self-evident fact. Indeed, it was the prosecutor who repeatedly and expressly elicited the testimony that Johnson was very alert. This fact (according to the police) that Johnson was not tired destroyed the State's hypothesis that his statement of being tired was only a simple statement of fatigue. **Clearly, he would not have said he was tired if he was alert unless he had some other purpose in mind.** Consequently, under the totality of the prior circumstances, interpreting the statement as a simple statement of fatigue was impossible from the police perspective.

The third and only plausible interpretation of the statement was that it was Johnson's polite way of telling the officers to go away and leave him alone. Understandably, he did not want to seem uncooperative by telling them directly that he did not want to talk to them. He still hoped they would decide to let him go because

they did not have enough evidence. Uncooperativeness might lessen his chances of immediate release. Consequently, he chose this politer means of attempting to end the conversation. When asked to do something, people often say they are tired (or have a headache or have another engagement) just to avoid the request, even though they may not in fact be tired (or have a headache or have another engagement). This stratagem is not as direct as a simple "no," but its intent is nevertheless clear. The person does not wish to agree to the request or participate in the requested event.

This interpretation is exactly applicable here. Johnson wanted the police to go away. Through the simple stratagem of asserting fatigue, he hoped they would let him go and not become suspicious or upset with him. At the very least, the police had to clarify whether this interpretation of his statement was accurate, particularly because the only other two possible interpretations made no sense under the prior circumstances. Because the police did not clarify this matter, the trial court should have suppressed the resulting confession.

Shortly after this statement, the police asked Johnson if he would take a polygraph test, and he agreed. He thought that he would pass the test and that the police would then allow him to go home. (W1091-92) Consequently, although he stated after the first set of polygraphs that he was tired, he was willing to continue with the second set at that point because he now had a ray of hope that the polygraphs would prove he had not committed the crimes and that the police would release him.

After the second set of polygraphs was over and Sergeant

Stanton began the final round of accusatory interrogation, however, this hope was gone. Johnson had no reason to think that the police believed him, no reason to think that they would release him, and no reason to continue the conversation. Consequently, as Stanton bore down on him, he made a third request to cut off the questions when he said agitatedly, "Well, you know, I'm getting a little tired." Standing outside, detective Sullivan heard Johnson say he was tired three or four times, whenever Stanton was getting "close." (W911-12)

Under the totality of the prior circumstances, these unequivocal statements could have one and only one possible meaning for the police. It did not and could not mean that Johnson was merely telling them generally that he was tired, because they believed he was extremely alert and agitated. Under the tense circumstances at that point, he had no reason to make polite social conversation about his fatigue. It did not and could not mean that he was merely stalling and trying to avoid a particular question, because the particular question/accusation was that he had killed White and McCahon, and this question/accusation encompassed the entirety of the interrogation. If he wanted to stall and not discuss this question/accusation, then he did not want to discuss any part of what the police wanted to discuss. Instead, the only possible interpretation of this statement was that he wanted the police to go away and end the interrogation. His obvious agitation supported this interpretation because it showed he was upset about the failure of the polygraph testing and the obliteration of his chance for freedom. Now that his hope of passing the polygraph and

persuading the police of his innocence was gone, he had no more reason to talk to them.

Indeed, the police themselves interpreted this statement as a request to end the interrogation. Sergeant Stanton characterized it as and believed it was an "objection to proceeding on." Moreover, Stanton's response that he was "tired too but this is more important I think to proceed on" treated the statement as a request to stop the interview. By saying that "proceed[ing] on" was more important, he directly replied to Johnson's request not to proceed, and he assumed that it was such a request. Mosley forbade this transparent but successful effort "to persuade [him] to reconsider his position." 423 U.S. at 104; Cribbs v. State, 378 So. 2d 316, 319 (Fla. 1st DCA 1980).

As Dr. Ofshe observed, Stanton's response was a technique designed to sidestep and deny Johnson's request to end the interrogation and to move Johnson in the direction Stanton wanted him to go. Rather than clarify the request as the law required, Stanton ignored it.

> [I]t's a technique for denying someone's request and then moving on with the interrogation. It's a way of overcoming a request by simply ignoring it. It would be a way of deflecting someone any time they start to talk about something that is leading the interrogation in a direction that the interrogators don't want it to go. So it would be a way of neutralizing denials. It also might be a way of forestalling discussion about a subject such as attorney, or stop, or I don't want to talk anymore, or I'm tired. That would bring the interrogation to a halt when the interrogators wish to have the interrogation continue.

(W1116) (emphasis added)

Detective Sullivan similarly used the same technique to

deflect Johnson's final request to end the interrogation -- his explosive declaration at the beginning of the tape, "When can I get some sleep, man?" As Dr. Ofshe pointed out, this declaration was "part of a string of statements which he's been making over the course of the interrogation claiming that he's tired and asking that the interrogation be stopped so that he can get some sleep." (W1114) (emphasis added) Like Stanton, Sullivan ignored rather than clarified this request; he instead moved Johnson past this potential termination of the interview by asserting that the tape would not take long and he merely wanted a summary of their conversation. Just as in State v. Sawyer, 561 So. 2d 278, 292 (Fla. 2d DCA 1990), the "detectives thereupon steer[ed] the interrogation away from the request for an attorney," -- or in this case the request to remain silent. Moreover, by saying that the tape would not take long, Sullivan (like Stanton) directly responded to Johnson's request to end the interrogation and assumed that it was such a request. Like Stanton, Sullivan effectively "persuade[d] [him] to reconsider his position." Mosley, 423 U.S. at 104; Cribbs.

Numerous cases have held that requests such as these were at least equivocal requests to cut off questioning which the police had to clarify before "proceeding on." For example, in Sawyer, the suspect said that he needed to rest. The officer responded, "I got to lay down and rest too. But that's not a priority now for me. It's not a priority for you neither, to lay down and rest." Id. at 295. This response in Sawyer was strikingly similar to Stanton's response in the present case that the interrogation was more

important. Sawyer found that the "request for sleep was no more than another simple request to stop the interrogation." Id. at 296 (emphasis added). An identical conclusion applies in the case at hand.

In State v. Wininger, 427 So. 2d 1114 (Fla. 3d DCA 1983), the defendant was willing to talk to the police about a homicide until they told him he was a suspect. He said, "I don't believe it. I want to go home. Can I?" Id. at 1115. The officer said he could go home, but the officer wanted to talk to him about this serious matter. This response, of course, was again very similar to Stanton's adept response in the present case that "proceeding on" was more important. The similarity of the response in the present case, Sawyer, and Wininger shows that it is a standard technique taught to police interrogators at their interrogation schools.

Wininger correctly characterized the issue as whether the defendant's words "indicated in any manner that the defendant wished to invoke his right to remain silent." Wininger found that the

> request, made on the heels of being informed for the first time that he was a suspect, was, at the least, an indication in some manner that the defendant did not want to answer further questions. . . . But if, however, the police were in doubt as to the meaning of the defendant's request to go home, then further inquiry should have been limited to clarifying the defendant's wishes.

Id. at 1115-16. The present case is similar to Wininger because, like the defendant in Wininger, Johnson repeatedly asked in some manner to end the interview when the police directly pressed him and accused him of committing the crime. Moreover, the defendant's request in Wininger to go home was very similar to Johnson's statements that he was tired and wanted sleep.

Wininger rejected the State's claim that the defendant's continuing to answer questions showed that his request was not really a request to cut off questioning.

> [T]he very protection which this aspect of Miranda v. Arizona is designed to afford is to preclude the State from using the defendant's answers to questions asked after the defendant has invoked his right to remain silent. It is sophistry to suggest that the act of answering questions after the invocation of the right to remain silent, an act deemed by Miranda to be the "product of compulsion subtle or otherwise," 384 U.S. at 474, . . . can be used to show that the defendant really did not mean it when he earlier indicated his desire to remain silent.

Id. See also Smith v. Illinois, 469 U.S. 91, 99 (1984) ("under the clear logical force of settled precedent, an accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself"). Similarly, in this case, the defendant's continued response to the "subtle compulsion" of further police questions did not alter the necessity for the police to honor "scrupulously" his equivocal and unequivocal requests to end the interrogation.

Other cases are also similar. Stokes v. State, 541 So. 2d 642, 645 (Fla. 1st DCA 1989) (juvenile's statement to her father, "Daddy, I can't handle no more of this," required the officers "to limit inquiry at that point to a clarification of any doubt presented by the request"); State v. Chavis, 546 So. 2d 1094, 1096 (Fla. 5th DCA 1989) (defendant's statement that he did not want to talk "right now" while he was eating his sandwich was an equivocal request to remain silent which the officers scrupulously honored by immediately stopping the questioning); Bain v. State, 440 So. 2d 454 (Fla. 4th DCA 1983) (defendant's statement that "he was unsure

of himself" invoked his right to remain silent); Martin v. Wainwright, 770 F.2d 918, 923 (11th Cir. 1985) ("A: He said something about, 'Can't we wait until tomorrow?' Q: In response to that, you just kept questioning him, didn't you? A: Yes, sir. I said, 'Let's go on.'"); Holiday v. State, 369 S.E.2d 241 (Ga. 1988) (when defendant said he was tired, the officers honored this request by allowing him to rest before talking to him further); State v. Zimmerman, 802 P.2d 1024 (Ariz. App. 1990) (defendant's statement, "That is all I want to say, I am tired," was ambiguous invocation of the right which the officer immediately clarified by asking him if he wanted to continue); Phillips v. State, 701 S.W.2d 875, 891-92 (Tex. Cr. App. 1985) (suspect's statement that he "wanted a little time" to think about it invoked his right to remain silent); People v. Williams, 155 Cal. Rptr. 414, 426 (Cal. App. 1979) (defendant's ambiguous answers -- "Man, really, I'm confused," "I don't know what to do, to say or what" -- invoked right to cut off questioning).

In this case, Johnson's multiple statements of fatigue in direct response to pressing accusations of guilt, coupled with (1) the police admission that these statements of fatigue constituted an "objection to proceeding on" and (2) the police belief that Johnson was in fact extremely alert and not tired, meant that he at least equivocally, if not unequivocally, indicated "in some manner" that he "object[ed] to proceeding on" and therefore wanted the questions to cease. Accordingly, because the police made no effort to clarify his desires, they did not scrupulously honor his Miranda right to cut off the interrogation, and the trial judge should have

suppressed the resulting statements.

D. Voluntariness

Before the State may use confessions as evidence of guilt, the confessing defendants must under the totality of the circumstances have waived their rights, not only knowingly and intelligently but also voluntarily. "[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." Moran v. Burbine, 475 U.S. 412, 421 (1986). This voluntariness requirement means that the police may not obtain confessions through "[t]echniques calculated to exert improper influence." Thomas v. State, 456 So. 2d 454, 458 (Fla. 1984); Brewer v. State, 386 So. 2d 232 (Fla. 1980). Due process principles governing the admissibility of confessions apply not only to physical coercion but also to "more subtle forms of psychological persuasion." Colorado v. Connelly, 479 U.S. 157, 164 (1987). "[T]his Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

In this case, the police repeatedly exploited coercive techniques and circumstances to overcome Johnson's will and obtain his confessions. If the police had capitalized on only one or two of these circumstances and techniques, the confessions might have been voluntary. Some cases have upheld the voluntariness of confessions when only one or two of these circumstances were present. These cases, however, are not pertinent here because the law requires

consideration of the totality of the circumstances.

The totality of the circumstances below painted an indelible picture of a suspect who resolutely did not want to confess but whose will and freedom of choice were overborne by three, experienced, sophisticated, well-trained interrogation experts. Their sole purpose was to induce his confession by putting a psychological "hook" into him. After several hours of incommunicado interrogation without food or rest through the night and into the morning, deceptions about the evidence and the status of his arrest, dramatic charges of failing six pseudo-scientific polygraph tests which supposedly proved his guilt beyond doubt, multiple insinuations of psychiatric illness, pledges of help for Johnson's sexual perversity, false expressions of sympathy, an ever-noisier crescendo of accusations, and a final, stagy denunciation which simultaneously promised assistance for his sexual problems, Johnson's emotions were aroused, and, weeping, he confessed involuntarily.

The circumstances which substantiated the involuntariness of the confessions were many and varied. First, the record undeniably showed that Johnson did not want to confess. He steadfastly denied the police accusations through the early morning hours and tried desperately even at the eleventh hour to tell the police to leave him alone, when he responded to their denunciations by saying he was becoming tired. As in Martinez v. State, 543 So. 2d 466, 467 (Fla. 4th DCA 1989), the "record in this case clearly indicates that [the defendant] did not initially intend to confess to the crime."

Second, although the experts below disputed the exact level of

Johnson's intelligence, the degree of his mental disturbance, and the likelihood of his malingering, no one disputed his below-average intellectual functioning, with an IQ of 82. Moreover, the jail doctor prescribed anti-psychotic medication for him, and the only other doctor to examine him shortly after the interrogation session found him to be psychotic, vague, and loose in his thinking. (W788-95, 1348-55) The undisputedly diminished mental functioning was a significant and relevant circumstance in determining the voluntariness of Johnson's confessions. Thompson v. State, 548 So. 2d 198 (Fla. 1989); Henry v. Dees, 658 F.2d 406 (5th Cir. Unit A Oct. 1981).

Third, the police deliberately combined several circumstances of the interrogation to create a coercive atmosphere of hopelessness and isolation. Rather than question him at his house in his own surroundings, they arrested him and intentionally brought him to the police headquarters, an inherently coercive setting for questioning. Drake v. State, 441 So. 2d 1079 (Fla. 1983). The interrogation room was small, a factor many cases have mentioned in assessing voluntariness. The police then intensively interrogated him incommunicado for several hours during the night and through the pre-dawn hours, without food or aid of others. "Petitioner had been in the continuous custody of the police for over eight hours and had not been fed at all during that time. He had not been given access to family, friends, or counsel at any point." Sims v. Georgia, 389 U.S. 404, 407 (1967).

Miranda emphasized the significance of this isolation at the police headquarters.

> The "principal psychological factor contributing to a successful interrogation is privacy -- being alone with the person under interrogation." . . . "If at all practicable the interrogation should take place in the interrogator's office. . . . The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior. . . . Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law."

Miranda v. Arizona, 384 U.S. 436, 449-50 (1966) (quoting police manuals). Miranda concluded

> that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles -- that the individual may not be compelled to incriminate himself.

Id. at 457-58.

Accordingly, Miranda devised its now-famous procedures to combat the coercive effects of police interrogation at the station. These coercive effects, however, still exist even after the Miranda warnings are given. "It is beyond dispute that the giving of the warnings alone is not necessarily sufficient to protect one's privilege against self-incrimination." People v. Leonard, 397 N.Y.S.2d 386, 393 (N.Y. App. Div. 1977). When the police use other coercive techniques, then the prophylactic effect of the warnings is overborne and the confessions become involuntary despite the warnings given. "One could not seriously contend, for example, that a confession which had been beaten out of a man should be admissible by reason of the fact that the letter of the Miranda

ritual had been complied with." Id. "Under such circumstances the fact that the police may have warned petitioner of his right not to speak is of little significance." Sims, 389 U.S. at 407.

Fourth, in any event, as previously argued in this brief, the police deliberately diluted the prophylactic effect of the Miranda warnings by promising Johnson that the polygraph session would not be used against him in court. Through this promise, they persuaded him to continue to talk, and, once they had him talking, they never readvised him of his right to end the questioning. They segued without pause from the middle part of the polygraph session to the final part and never clearly explained to him that, at that point, the State could use his statements in court to prove his guilt. Consequently, the deliberately diluted Miranda warnings could not and did not overcome the coercive effects of the police interrogation tactics.

Fifth, as previously argued in this brief, the interrogation was otherwise over until the police tempted Johnson into continuing to talk for the polygraph. Johnson agreed to take the polygraph and nothing more. His mere reading of the "Notification of Rights" form and willingness to take the polygraph did not clearly signify a waiver of rights and agreement to renewed interrogation after the polygraph machine test was concluded. Consequently, the reading of the Miranda warnings did not extend to and did not shield the post-polygraph interrogation.

Sixth, the promise that the polygraph session would not be used against him in court rendered these statements involuntary. "A promise of immunity, calculated to extract a confession or

incriminatory statement, renders the statement involuntary. . . . [I]t was error to admit the . . . statement made prior to his arrest because it . . . was taken amidst assurances that the statement would not be used against him." Ponticelli v. State, 593 So. 2d 483, 488 (Fla. 1991).

Seventh, the police adeptly ignored Johnson's repeated statements of fatigue; they told him rest was not a priority. They knew he had not slept since the previous night. Although they also believed he was in fact wide awake and not tired, the repeated expressions of tiredness and the continuing of the interrogation into the early morning hours without food were certainly factors relevant to assessing voluntariness. As in State v. Sawyer, 561 So. 2d 278, 288 (Fla. 2d DCA 1990), the

> record in this case shows sleep deprivation to be one of the critical factors. . . . [The defendant's] protestations of wanting to sleep, to rest, to lie down, [were] all ignored and deliberately utilized by the detectives. . . . Rest, they told Sawyer, was not a priority, despite their knowing that Sawyer in his last twenty-four hours before entering the interrogation room had had only three hours' sleep and an arduous outdoor workday as a groundskeeper at a golf course.

See also Spradley v. State, 442 So. 2d 1039, 1043 (Fla. 2d DCA 1983) ("In sum, her taped confession was extracted from her only after she was placed in the coercive atmosphere of a station-house setting, was subjected to a barrage of questions during the predawn hours, . . . was not afforded an opportunity to sleep, and was not permitted to eat.").

Eighth, because these statements of fatigue were either equivocal or unequivocal requests to end the interrogation, the Miranda procedure was negated and the prolonged custodial interro-

gation in a small room at the police station at 3:30 a.m. was coercive as a matter of law. "If the individual indicates in any manner, at any time . . . during questioning, that he wishes to remain silent, the interrogation must cease. . . . [A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." Miranda, 384 U.S. at 473-74 (emphasis added).

Ninth, the police deceived Johnson about his true situation by saying or implying that his fingerprints were inside at the McCahon crime scene when in fact they were on the outside of White's house, where he had previously worked as White's yardkeeper. They also violated section 901.16 or 901.17, as argued in case number 78,337, by falsely implying that he was under arrest for killing both White and McCahon. These misleading deceptions created fear because the police apparently had strong evidence against him. These undue fears and delusions which the police created through calculated trickery about Johnson's true position were another important factor in the voluntariness calculus.

> For a confession to be admissible as voluntary, it is required "that at the time of the making of the confession the mind of the defendant be free to act uninfluenced by hope or fear. The confession should be excluded if the attending circumstances, or the declarations of those present at the making of the confession, are calculated to delude the prisoner as to his true position, or to exert improper and undue influence over his mind."

Brewer v. State, 386 So. 2d 232, 235-36 (Fla. 1980), quoting Frazier v. State, 107 So. 2d 16, 21 (Fla. 1958); see also Thomas v. State, 456 So. 2d 454, 458 (Fla. 1984) (techniques calculated to trick the suspect require exclusion of the confession); Henry v.

Dees, 658 F.2d 406, 410 (5th Cir. Unit A Oct. 1981) (false police statements are relevant to the coerciveness of the interrogation).

Tenth, the police gave Johnson not only false fears but also false hopes that they might release him if he could talk his way out of the mess he was in. The polygraph test was a prime example of this technique. Dr. Ofshe characterized it as a method of inducing suspects to talk, "by representing the machine as a machine that the police use to clear people as well as convict people. . . . The representation would typically take the form that . . . if you pass the polygraph . . . I'll believe that you didn't do the crime and it will clear things up." (W1090-91)

The police, however, had an arrest warrant signed by a judge. Having started the judicial process and obtained a judicial finding of probable cause, the police had no intention of freeing Johnson, regardless of his performance on the polygraph. This false manufacturing of hope for freedom was inconsistent with the law, which requires "that in order for a confession to be admissible in evidence, the mind of the defendant, at the time of the making of said confession, be free to act uninfluenced by either hope or fear." Brooks v. State, 117 So. 2d 482, 484 (Fla. 1960) (emphasis added); Brewer, 386 So. 2d at 235-36.

Eleventh, the six polygraph tests over the course of several hours were themselves coercive acts, with their wire attachments, electronically metered measurements, and pseudo-scientific aura of definitude.

> The situation a lie detector test presents can best be described as a psychological rubber hose. A defendant, when suddenly faced with the impersonal accuracy of a

> machine, may believe it is safer to confess and place himself at the mercy of the law rather than lie to the examiner and sacrifice any possibility of leniency.

State v. Faller, 227 N.W.2d 433, 435 (S.D. 1975) (emphasis added); see also Henry, 658 F.2d at 410 (the defendant "was in no position to dispute the polygraph examiner or the ominous 'lie detector' machine").

Twelfth, after two-and-one-half hours of polygraph testing, Sergeant Stanton theatrically accused Johnson of failing the tests, denounced him for unquestionably committing the crimes, and charged him with being out of control and needing help. According to Stanton, the issue was now not whether Johnson committed the crimes but why. Stanton played Johnson like a piano, moving abruptly from the high notes to the low. Having raised his hopes by offering the polygraph, Stanton purposely dashed them dramatically and thus circumscribed Johnson's options to only one, to confess and beg for mercy. Stanton's tactics were like those in Sawyer, in which the police used "a shock, an accusatory approach." Stanton's polygraph procedure was "a 'set-up' to make [the defendant] flunk the test. The impact on [him] was devastating." 561 So. 2d at 287, 290.

Stanton's manipulation had no real factual foundation because, although the record does not reflect the actual results of the tests, the police certainly knew that such tests at 2:30 a.m., after sustained interrogation and lack of food, were unreliable. See Leonard, 397 N.Y.S.2d at 395 n.4 ("the accuracy of polygraphic examination results can be affected by excessive fatigue, prolonged interrogation, the use of drugs, and a number of other factors, including the voluntary submission of the subject to the test");

Sawyer, 561 So. 2d at 290-91 (polygraph results unreliable because suspect was tired from prolonged interrogation; defendant made the "critical mistake of taking the test after hours of interrogation and accusation, his mental and physical state of nervousness and sleep deprivation, and his hands shaking with sweat").

In any event as Dr. Ofshe pointed out, "getting a suspect to take a polygraph and then reporting to the suspect that he has failed the polygraph, whether accurately or inaccurately, . . . is an influence technique that can be quite powerful in an interrogation." (W1091) According to Dr. Ofshe, Sergeant Stanton played the

> not atypical post-polygraph out-of-control behavior theme. And this is consistent with the methodology of the polygraph machine itself, that the machine is measuring impulses that you can't control that reside within you, that we have a way of reading you against your will and the machine is all-powerful and that there are things going on inside you that you can't control. He develops the theme that . . . you're caught and that there's something dramatic going on inside you and it's driving you to commit these crimes and also is revealing itself through the machine.

(W1107-08)

In light of this police misuse and abuse of the polygraph and the totality of the other police techniques at work here, the confession was "the product of an unacceptable level of psychological coercion exerted by the polygraph examiner." State v. Davis, 485 So. 2d 24, 25 (Fla. 2d DCA 1986). These techniques -- claiming that the polygraph proved guilt beyond doubt and demanding why rather than whether -- were techniques which Miranda expressly condemned.

> To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt. . . . The guilt of

> the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. . . . It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation.

384 U.S. at 450, 457 (emphasis added).

Stanton's reliance on the infallible machine, the emphasis on the incriminating fingerprint evidence, and the insinuation of need for help were virtually identical to the polygraph examiner's techniques condemned in Martinez v. State, 545 So. 2d 466, 467 (Fla. 4th DCA 1989) (emphasis added).

> [A]fter having examined the polygraph results, the polygraphist told Martinez that it was "impossible" that he was being truthful. He also told Martinez that the state had many witnesses against him, and that "everybody has already said what they had to say and you're going to wind up in a problem and you will be the only one that's going to wind up in problems." Thus, the polygraphist exerted improper influence over Martinez by emphasizing that both the polygraph results and the state's witnesses would contradict his story, and by telling him that he was going to wind up in a problem.

Leonard likewise censured these calculated and coercive tactics.

> The use of a polygraph will not, in and of itself, render a confession inadmissible as the product of coercion. However, the use or misuse of a polygraphic examination is certainly a factor to be considered in determining whether there was impermissible coercion. In the instant case the evening examination was misused as a sophisticated tool for attempting to extract a confession. The examiner was there to "help" the defendant; he even offered to get psychiatric help for this defendant, who had admittedly seen a psychiatrist before; his machine was infallible and knew the truth just like defendant and God; only the guilty wanted the polygraph attachments removed. The psychologically coercive effect of this kind of interrogation -- especially in view of defendant's physical and mental condition, and in the light of the intensive interrogation which preceded it is to be condemned. The coercive nature of the testing was compounded by Detective Ambrose's deception in telling defendant

that the polygraph proved he was lying.

397 N.Y.S.2d at 394-95 (emphasis added, citations and footnote omitted); see also People v. Sickley, 448 N.E.2d 612, 616 (Ill. App. 1983) ("Here, the alleged failure of the defendant to pass the polygraph examination was an event, if not the event, used by the examiner to confront the defendant and to coerce his cooperation. The defendant was in effect told that to take issue with such evidence . . . would be useless").

Thirteenth, after making his theatrical accusations, Stanton slyly suggested various scenarios in which Johnson would be innocent or his guilt would be mitigated. As Stanton admitted in his police report which he read aloud at the suppression hearing, the interrogation was replete with Stanton's leading suggestions of guilt, rather than any honest efforts to uncover volunteered truths from Johnson.

> Writer suggested that, under normal circumstances, given the way he felt about Iris, this probably would not have happened and that it must have been something unusual or something unforeseen that made him do this. Writer suggested that maybe he was just going to break into her house and take something but she woke up, recognized him and struggled with him, and out of fear he killed her. . . . Writer suggested that sometimes people do things they do not fully understand why they do them and later on cannot believe they actually did it. . . . Writer suggested that Johnson was doing this. . . . Writer . . . suggested that Johnson was out of control and screaming for help to stop what he was doing.

(W659-60) On cue, Sullivan later added to this litany with yet another suggestion that Johnson's guilt was not great -- because he had a psychological problem with women.

These repeated "suggestions" or scenarios were Stanton's and Sullivan's methods of putting words in Johnson's mouth and maneuv-

ering him to make incriminating statements because he was not really guilty and his acts were only inconsequentially blameworthy. Dr. Ofshe described the technique as making

> suggestions to the suspect that the crime was really not as morally heinous as . . . might . . . otherwise appear, so that suggesting scenarios in which the person just lost their temper . . . [or] it was the alcohol that made you do it, or it was the drugs that made you do it . . . offer[s] a socially meaningful if not legally meaningful excuse for the act and thereby mak[es] it easier for the person to admit having done it. . . . Also at the same time, . . . if the interrogator has been successful at manipulating guilt the person can express how sorry they are and go through the ritual of talking about the guilt feelings that they have. . . .

(W1084, 1087-88) As in Sawyer, each "'scenario' was essentially the product of manipulative forms of leading questions designed to achieve a desired result." 561 So. 2d at 289.

Naturally implicit in these suggestions was an assurance that, if he confessed to committing the deeds under these mitigating circumstances, he would not be punished harshly. This assurance of leniency was "calculated to induce a confession" and therefore rendered it involuntary. Foreman v. State, 400 So. 2d 1047, 1048 (Fla. 1st DCA 1981). Statements induced by assurances of leniency are inadmissible because a confession "cannot have been obtained by any direct or implied promise, however slight." Fillinger v. State, 349 So. 2d 714, 715 (Fla. 2d DCA 1977) (opinion by Judge Grimes).

These scenarios and suggestions were successful because the police thereby soothingly misled Johnson about his true situation and extenuated the seriousness of the deeds to which they wanted him to confess. This trickery was yet another standard technique

from the police manuals which Miranda criticized as coercive. "Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society." 384 U.S. at 450 (emphasis added, footnote omitted). Miranda's suggested "unrequited desire for women" was eerily prescient of Sullivan's suggested psychological "problem with women." Similarly, the instruction "to cast blame on the victim" foretold Stanton's suggestion to Johnson that Iris White had awakened at an inopportune time. These crafty suggestions were another important factor in the compulsion which overcame Johnson's will not to confess.

Fourteenth, the police falsely pretended that they were Johnson's sympathetic friends who wanted to help him. Detective Sullivan liked "to build up a friendship with a defendant so they'll open up to you after a few hours." (W880-81) This false friendship was yet another deliberately misleading tactic which deluded Johnson about his true situation. Sullivan admitted he was part of the interrogation team because he had extensive training in obtaining confessions and generally could elicit them when he put his mind to it. (W879-80) His real purpose was not to be Johnson's friend but rather to obtain his confession and send him to prison and perhaps to the electric chair.

As Dr. Ofshe analyzed the police tactics (W1083-84, 1086),

> manipulating a person's guilt, trying to heighten their guilt, heighten their distress and at the same time provide a sympathetic ear and a sympathetic person to whom

> the person, the guilt-ridden suspect can now say I did it, I'm sorry, and get some kind of personal support from the interrogator for doing that is a way of introducing a gain for confessing into the interrogation. In order to accomplish that, the interrogators need to develop a rapport, need to be thought of as sympathetic if not friendly, understanding, and accepting of the suspect. . . . [The police] make it seem that everyone is being quite sympathetic and that all you have to do is admit this and there will be lots of social support coming to you after you do this, because we all understand essentially that you are not a bad person, that this is an unusual event. . . .

This false use of pretended friendship and the other circumstances were markedly similar to the tactics employed in Spano v. New York, 360 U.S. 315 (1959). Strikingly, the final recorded statement in Spano began at 3:25 a.m. and ended at 4:05 a.m., almost exactly the times in the present case. Later, just as in the present case, the police in Spano resumed the questioning to find the murder weapon.

> [The defendant] did not make a narrative statement, but was subject to the leading questions of a skillful prosecutor in a question and answer session. . . . Petitioner was questioned for virtually eight straight hours before he confessed, with his only respite being a transfer to an arena presumably considered more appropriate by the police for the task at hand. Nor was the questioning conducted during normal business hours, but began in early evening, continued into the night, and did not bear fruition until the not-too-early morning. The drama was not played out, with the final admissions obtained, until almost sunrise. In such circumstances slowly mounting fatigue does, and is calculated to, play its part. . . .
>
> The use of [officer] Bruno, characterized in this Court by counsel for the State as a "childhood friend" of petitioner's, is another factor which deserves mention in the totality of the circumstances. . . . [The officers] instructed Bruno falsely to state that petitioner's phone call had gotten him into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child. . . . Petitioner was apparently unaware of John Gay's famous couplet:
>
> > "An open foe may prove a curse,
> > but a pretended friend is worse,"

> and he yielded to his false friend's entreaties.
>
> We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused. . . . Here a grand jury had already found sufficient cause to require petitioner to face trial on a charge of first degree murder, and the police had an eyewitness to the shooting. The police were not therefore merely trying to solve a crime, or even to absolve a suspect. . . . They were concerned primarily with securing a statement from the defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these.

Id. at 322-24 (emphasis added). The police tactics below were strikingly similar to those in Spano.

Fifteenth, the police preyed on Johnson's guilt over his sexual perversion and lust. Stanton told him he had a problem, was scared of his actions, was out of control, and was screaming for help to stop his behavior. (W610, 659-60) Later, after hearing from detective Redden about Johnson's alleged beatings of prostitutes, Sullivan reentered the small interrogation room and expanded on this theme as the dramatic denouement of the skillful police inquisition in this case. "Why don't you listen to this man, he's trying to help you. We're all trying to help you, but you just don't want any help. I know you've got a problem with women, and you know you've got a problem with women. Why don't you talk about this." (W491, 663, 916) (emphasis added)

Sullivan here deliberately played on and used Johnson's sexual desires and fears to obtain the confession. The police feeding on Johnson's guilt over his sexual problems with prostitutes and other women was a patently and grossly coercive ploy. A more manipula-

tive tactic than this crass exploitation of sexual insecurity, perversion, and lust is difficult to imagine.

The police may not use sexual faults or frailty to obtain evidence of crime. See Myers v. State, 499 So. 2d 894 (Fla. 5th DCA 1986); Spencer v. State, 263 So. 2d 282, 283 (Fla. 1st DCA 1972) (condemning the use of female agents of apparently questionable virtue -- "[g]overnment detection methods must measure up to reasonably decent standards"). Such tactics violate substantive due process, which "prohibits the government from obtaining convictions 'brought about by methods that offend a sense of justice.'" State v. Williams, 18 Fla. L. Weekly S371, 372 (Fla. July 1, 1993), quoting Rochin v. California, 342 U.S. 165, 173 (1952). The police may not obtain evidence through a technique which "falls below standards, to which common feelings respond, for the proper use of governmental power." Cruz v. State, 465 So. 2d 516, 521 (Fla. 1985) (citation omitted). "[C]ertain interrogation techniques, . . . as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned. . . ." Miller v. Fenton, 474 U.S. 104, 109 (1985) (emphasis added).

The police exploitation of Johnson's guilt over his sexual insecurity, perversion, and desire was similar to the infamous Christian burial technique, by which the police prey on a suspect's guilt that the victim will not receive a proper Christian burial. This Court has strongly condemned this tactic. "The use of the 'Christian burial technique' by law enforcement personnel is unquestionably a blatantly coercive and deceptive ploy." Roman v.

State, 475 So. 2d 1228, 1232 (Fla. 1985); see also Brewer v. Williams, 430 U.S. 387, 412 (1977) (Powell, J., concurring) ("the entire setting [surrounding the use of the Christian burial technique] was conducive to the psychological coercion that was successfully exploited"). Preying on Johnson's guilt over his sexual perversions with prostitutes was no different from preying on a suspect's guilt over a non-Christian burial and had the same involuntary effect. It "exert[ed] an improper and undue influence over his mind" and therefore rendered the confession inadmissible. Traylor v. State, 596 So. 2d 957, 964 (Fla. 1992), quoting Simon v. State, 5 Fla. 285, 296 (1853).

Sixteenth, when Stanton suggested that Johnson was screaming for help, Stanton thereby offered him help if he would only confess. Sullivan later made this offer or promise of help more explicit, saying that Stanton and everyone else were trying to help Johnson. If he would just "talk about this," he would receive the help which he desperately needed, particularly in light of his problem with women. The offer or promise of help for his sexual inadequacies and problems in return for "talking about this" explicitly exploited the already coercive use of Johnson's sexual guilt and made the involuntary compulsion even greater.

The police may not obtain confessions through direct or indirect promises. Even a "mild promise" to "a defendant in custody" bars use of a confession "because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and difficult to assess." Brady v. United States, 397 U.S. 742, 754 (1970). "[T]he inquiry is whether the confession was

'free and voluntary; that is [it] must not be . . . obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . .'" Brewer v. State, 386 So. 2d 232, 235 (1980), quoting Bram v. United States, 168 U.S. 532, 542-43 (1897). In Brewer, the police among other things said, "Hell you're sorry for what you've done. I know you are. Tell us about it. Get it off your conscience. We'll help you out." 386 So. 2d at 234 (emphasis added).

The offer of help for Johnson's sexual problems was a direct or implied promise which rendered his confession involuntary. It was identical to the offer of help for the defendant's "serious problem in the area of sexual abuse" in State v. Griffin, 754 P.2d 965, 970 (Utah App. 1988).

> Do you realize how much easier this would make this on everybody if you simply admitted what you have done? . . . [Y]ou've got a serious problem in the area of sexual abuse, do you understand that? Then why can't you just admit that there is a problem? Don't you think it would be easier on your own peace of mind and all the little children concerned to tell us what has gone on? . . . [I]n order for you to receive any help for the problem, you are going to have to admit there is a problem. Right now, I am only charging you with one. But more charges are going to follow. It boils down to the fact that you did do it and you need some help and we can get you that help. [W]hether or not you admit it to me, I'm going to build a case against you and I'm going to convict you.

Griffin held that "the manner of interrogation utilized by the officers was so outrageous and coercive as to overcome defendant's will and 'induce him to talk when he otherwise would not have done so.'" Id. at 971 (emphasis added), quoting State v. Hegelman, 717 P.2d 1348, 1350 (Utah 1986). An identical conclusion applies to the case at hand.

The pledges of help were particularly egregious because they reinforced the prior deceptions about the fingerprints, the basis of the arrest, and the conclusiveness of the polygraph results. The supposedly overwhelming evidence, Johnson's hopeless position, and his apparent inability to control his hidden beliefs and desires in front of the impersonal and scientific polygraph machine reinforced the police insinuations that he must need the help that the police promised to get him, if he would only "talk about this." The promises of help which exploited the prior deceptions made the confession involuntary.

People v. Hogan, 647 P.2d 93 (Cal. 1982), was similar. In Hogan, the officer told the suspect, "[I]f there was a mental problem involved in this situation that I would like to know what it was and we would see what we could do to help." The officer later said, "[I]f it's a mental problem, whatever it might be, maybe we can help you with this part of the treatment or you know what might happen." Id. at 104, 106. Hogan found that these promises of help which exploited other deceptions invalidated the confession.

> "[A]ny promise made by an officer or person in authority, express or implied, of leniency or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and to make it involuntary as a matter of law." The comments made to appellant by the police . . . clearly implied an advantage to the appellant if he talked since it was indicated that, if he cooperated, the police would help him. . . .
>
> Indeed, reliance on a belief induced by police deception is particularly misplaced. While the use of deception or communication of false information to a suspect does not alone render a resulting statement involuntary, such deception is a factor which weighs against a finding of voluntariness. Also deception which is "used to make more plausible" a promise of assistance does render a statement inadmissible. . . . [T]he false information regarding eyewitnesses had caused appellant to doubt his

> own sanity, and thus made more plausible the police offer of help for any mental problem appellant might have. . . .
>
> [C]ercion also includes "the brainwashing that comes from repeated suggestion and prolonged interrogation. . . . It is a truism of the modern world that when sufficient pressures are applied most persons will confess. . . ." It was repeatedly suggested to appellant that he was unquestionably guilty and that he suffered from mental illness. The certainty of his guilt was suggested by deceptive references to non-existent witnesses and proof of rape. . . . On this evidentiary basis, this court cannot conclude beyond a reasonable doubt that appellant's admissions were "freely determined" as required by due process.

Id. at 106-09 (citations omitted, emphasis added). When this Court substitutes the exploitation of false claims about polygraphs and fingerprints, deceptions about the arrest, and lying indications of sympathy in the present case for the exploitation of false claims about non-existent witnesses and proof of rape in Hogan, the present case is virtually identical to Hogan.

That Johnson confessed as a result of this proffer of aid for his mental and sexual problems is patently apparent from his immediately ensuing confession. After Sullivan's well-timed, theatrical accusation and offer of help if he would just "talk about this," Johnson waited briefly and then said he felt great pressure in his head. As Dr. Ofshe pointed out, detective Sutton then was "able to manipulate Mr. Johnson by . . . bringing up pressure and getting him to admit . . . to the crimes by reminding him of the pressure." (W1117) When Sutton pounced and asked if the emotional pressure was responsible for White's death. Johnson said it was. When Sutton later asked on tape if the pressure had "just escalated," Johnson said it "just kept building, man," it "never stopped." (W6805, 6807)

On the tape, Johnson made clear that he thought the police would get him help for his sexual problems and for the "pressure" in his head. He was "glad" that the officers "done got me man," "because I might be able to get some help now." (W6811, 6814) The officers were "the right people, man." Sutton replied, "You just had to be convinced we were the right people." (W6814) At the end of the tape, Johnson said, "I hope I just don't get locked up in some cell without help." (W6816) Shortly afterward, Johnson saw Stanton and shook his hand, thanking him for his help.

In Leyra v. Denno, 347 U.S. 556, 559-60 (1954) (emphasis added), the

> techniques of a highly trained psychiatrist were used to break petitioner's will. . . . [T]he psychiatrist told petitioner how much he wanted to and could help him, how bad it would be for petitioner if he did not confess, and how much better he would feel, and how much lighter and easier it would be on him if he would just unbosom himself to the doctor. Yet the doctor was at that very time the paid representative of the state. . . .

Exactly as in Leyra, the police in the present case used the psychological techniques of a highly trained polygraph examiner and other police officers to break Johnson's will through promises of help for Johnson's mental and sexual problems. See also Leonard, 397 N.Y.S.2d at 394 ("The examiner was there to 'help' the defendant; . . . he even offered to get psychiatric help for this defendant. . . .") In detective Sutton's words, the officers "convinced [him that they] were the right people" to help him. Accordingly, the resulting confession they extracted in return for this pledge of help was involuntary in both law and fact.

Seventeenth, the police exploited Johnson's growing agitation

and aroused his emotions to the point that he wept as he confessed. Stanton saw that Johnson became increasingly agitated as Stanton pressed him. (W615-16) By the time of the tape, he was still more emotional and was crying. (W751) As in DeConingh v. State, 433 So. 2d 501 (Fla. 1983), the police improperly took advantage of Johnson's distraught condition. Significantly, the police in DeConingh also used the false friendship ploy which Spano and Leyra condemned.

> DeConingh, insisting that the deputy was her friend and that she could not let him think badly of her, gave a narrative statement of what happened. . . . Deconingh's obvious respect for the deputy personally and concern over what he thought of her, when coupled with her incapacity due to the administration of powerful tranquilizers and her distraught condition -- add up to more than a mere admission to a disinterested party. The deputy here took impermissible advantage of the situation, resulting in psychological coercion.

433 So. 2d at 502-03.

Similarly, the confession in Rickard v. State, 508 So. 2d 736, 737 (Fla. 2d DCA 1987) (emphasis added), was involuntary and inadmissible because the suspect was "crying and distraught."

> An accused's emotional condition when giving such statements may have an important bearing on their voluntariness. . . . [F]rom the testimony of the officers we can readily perceive the highly charged environment in which the defendant's statements were made. . . . [H]ere the totality of the circumstances demonstrated such an exertion of undue influence and implied promise of benefits as to render the defendant's admissions involuntary.

See also Breedlove v. State, 364 So. 2d 495, 497 (Fla. 4th DCA 1978) (Defendant was "crying and very upset. . . . [Her] emotional confusion raises serious doubts as to whether her statements were knowingly and intelligently made") (emphasis added); Hoqan, 647 P.2d at 108 ("The tone of appellant's voice [on the tape recording]

revealed him to be in a highly emotional state") (emphasis added).

Under the totality of these seventeen circumstances, the judge should have suppressed Johnson's confession as the product of psychological coercion. Accordingly, this Court must reverse.

E. Violation of right to counsel

1. Factual background

A prosecutor assisted detective Sutton in preparing the probable cause affidavit and arrest warrant and with other matters during the afternoon and evening. (W511, 572-74) The formal affidavit prepared with the prosecutor's assistance and approval and sworn to Judge Silvertooth by Sutton said that "based upon positive fingerprint identification of Emanuel Johnson probable cause exists for Johnson's arrest." (W6452) Judge Silvertooth signed the formal arrest warrant and wrote on it with his initials, "No Bond, to be set by Court." (W6450)

The warrant, directed to sheriffs and other law enforcement officials, read as follows:

> WHEREAS, complaint on oath and in writing, supported by sworn testimony has been made before me . . . by
> Detective P. K. Sutton . . .
> [who] states that the laws of the State of Florida to wit Homicide, . . . Sexual Battery, . . . and Armed Burglary . . . were violated at 1775 10th Street, the victim being Iris White. . . .
> And it appears to the Court that probable cause for issuance of this warrant has been shown thereby and the Court being satisfied of the existence of the grounds therefore, now therefore
> YOU ARE HEREBY COMMANDED with such proper and necessary assistance that may be required to arrest Emanuel Johnson and bring him forthwith before me or said other Magistrate who shall have jurisdiction of said offense.
> . . .
> WITNESS MY HAND AND SEAL this 11th day of Oct., . . . 1988.

(W6450) (emphasis added)

After arresting Johnson, the police immediately obtained his address from him and secured his apartment by 10:15 p.m. (W1223) Between 10 p.m. and midnight, they prepared search warrants and affidavits for searches of Johnson's body, car, and apartment. A judge signed the warrants at midnight. (W1202-03) The apartment search warrant was executed at 12:35 a.m., and the search lasted until 2:10 a.m. About 2:30 a.m., after Johnson had completed a polygraph exam, the police gave him a copy of the search warrant return with the items seized. (W1206-09, 1224-26)

After arresting Johnson, the police did not immediately bring him to the jail and book him but instead interrogated him for several hours. Because formal charges were made and booking could feasibly have occurred immediately, Johnson's state and federal constitutional rights to counsel had attached. Moreover, because he did not adequately waive these rights, the judge should have suppressed the resulting confessions.

2. By finding probable cause to arrest, obtaining an arrest warrant, ordering that Johnson not be released on bail, and searching his house, the State instituted judicial proceedings to which the right to counsel attached.

A necessary prerequisite for the right to counsel under the sixth amendment and article I, section 16, of the Florida Constitution is the existence of a "crucial" stage of the prosecution. "In order for this right [to counsel] to have meaning, it must apply at least at each crucial stage of the prosecution. For purposes here, a 'crucial stage' is any stage that may significantly affect the outcome of the proceedings." Traylor v. State, 596 So. 2d 957, 968

(Fla. 1992) (footnotes omitted).

> [T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings.

United States v. Wade, 388 U.S. 218, 224 (1967).

Patently, Johnson's interrogation was a "crucial stage" which "significantly affect[ed] the outcome of the proceedings." It may have been the most important stage in the case. "Because the . . . recordings could significantly affect the outcome of the prosecution, the taping constituted a crucial encounter between State and accused. . . ." Peoples v. State, 612 So. 2d 555, 556 (Fla. 1992). Accordingly, the prerequisite component of Johnson's right to counsel was satisfied.

The question remains, however, whether the right to counsel had attached at that time. According to Kirby v. Illinois, 406 U.S. 682, 688-90 (1972), the sixth amendment right to counsel attaches upon

> the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. . . .
>
> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.

In this case, formal charges were made. Detective Sutton formally swore to the judge that probable cause existed for Johnson's arrest. The judge signed a formal written warrant which found probable cause and characterized Sutton's affidavit as a "complaint." The warrant formally commanded the police to arrest Johnson and bring him before a judge "forthwith." These actions occurred with the prosecutor's formal knowledge, approval, and participation, and the defendant was thereby "faced with the prosecutorial forces of organized society." Moreover, the judge signed an order that Johnson could not be released on bond without the court's permission.

Because the judge made this formal "probable cause determination" and issued an "arrest warrant," no further pretrial probable cause determination was necessary under Florida Rule of Criminal Procedure 3.133. A person arrested on a warrant is treated differently in Florida from one arrested without a warrant. The warrant arrest meant that Johnson was more firmly in the grasp of the "forces of organized society" for purposes of the sixth amendment and section 16 rights to counsel.

Furthermore, the police obtained search warrants for Johnson's apartment and searched it. They took numerous items and gave Johnson a list of items they had seized, before he confessed. These seizures further illustrated that the prosecutorial forces of society were firmly and formally working against the defendant.

Accordingly, the State had "committed itself to prosecute" and "the adverse positions of government [had] solidified." As the "no bond" order demonstrated, the State could not and would not release

Johnson, and the purpose of obtaining more evidence from Johnson was not to investigate or accuse but solely to increase the likelihood that the prosecutor could convict at trial. These formal charges with the prosecutor's knowledge and concurrence and the judge's formal orders and commands were "the starting point of . . . [the] system of adversary criminal justice."

In Peoples, 612 So. 2d at 557, this Court approved Sobczak v. State, 462 So. 2d 1172 (Fla. 4th DCA 1984), rev. denied 469 So. 2d 750 (Fla. 1985). Sobczak found that "the execution of an order by a judge ordering the defendants to participate in a lineup must surely be viewed as an adversary judicial proceeding for purposes of the sixth and fourteenth amendment rights." Id. at 1173. Similarly, Judge Silvertooth in this case executed an order ordering the defendant to be arrested and brought before a judge "forthwith." Further, he ordered that Johnson not be released without a judge's permission. These orders were conceptually no different from the order in Sobczak for sixth amendment and section 16 purposes.

In other states, the right to counsel attaches upon the signing of the arrest warrant. For example, in People v. Samuels, 400 N.E.2d 1344 (N.Y. 1980), the defendant's right to counsel attached upon his arrest on a warrant after the officer swore to a complaint. The officer's complaint was similar to Florida's probable cause affidavit; indeed Judge Silvertooth's arrest warrant characterized detective Sutton's affidavit as a "complaint." The warrant and complaint in Samuels constituted judicial proceedings to which the right to counsel attached. Accordingly, Samuels

suppressed the defendant's statements at the police station.

> [T]he defendant's right to counsel attached when the felony complaint was filed and the arrest warrant issued. . . . [U]nlike an indictment, a felony complaint may not serve as a basis for prosecution. . . . [Nevertheless,] if the court issues an arrest warrant on the basis of the complaint, it must direct that the defendant be promptly brought before the court for arraignment. . . .
>
> Thus, like an indictment, a felony complaint is a formal accusation which the defendant must answer in court. . . . [O]nce the accusation has been made in court the case is no longer merely a subject of investigation. It is a matter in litigation and, we have noted, this "is precisely the juncture at which legal advice is crucial. . . . Once a matter is the subject of a legal controversy any discussions relating thereto should be conducted by counsel: at that point the parties are in no position to safeguard their rights."
>
> The fact that the defendant may not actually be tried on the felony complaint is of no consequence. A defendant who is called to answer a felony charge in court has a need and a right to counsel at all preliminary proceedings, including arraignment on a felony complaint. The police, as noted, must see that he is promptly arraigned so that he may be informed of the pending charge and given an opportunity to consult counsel, assigned if necessary, without delay. And when "all that stands between the entry of counsel into the proceedings and nonrepresentation is the ministerial act of arraignment, there may be no waiver of the right to counsel unless an attorney is present.

Id. at 1346-47 (citations omitted).

United States ex rel. Robinson v. Zelker, 468 F.2d 159, 163 (2d Cir. 1972), likewise found that the right to counsel attached after the judge signed the warrant.

> Here the arrest warrant itself commanded that appellant be brought forthwith before the Criminal Court "to answer the said charge, and to be dealt with according to law." These were formal criminal proceedings, for the warrant had been signed by a judge based on an "information upon oath" that appellant did commit the crimes. . . .

Similarly, in People v. Coleman, 534 N.E.2d 583 (Ill. App. 1989), the right to counsel attached after a warrant was issued and the officer swore to a complaint markedly similar to detective

Sutton's affidavit in this case.

> [T]he warrant for the arrest of Coleman was based on a complaint for preliminary examination subscribed and sworn to . . . by [a] police officer. . . . The complaint alleged that "Maurice Coleman . . . committed the offense of murder in that he killed Terrell Jackson without lawful justification by shooting him with a gun. . . ." The record also reveals that the judge before whom the complaint was presented, examined the complaint and the officer who presented it, heard evidence thereon, and was satisfied that there was probable cause for filing the complaint, granted leave to file the complaint and issued the warrant for Coleman's arrest. Adversary judicial criminal proceedings . . . were thereby commenced. . . .

Id. at 591; see also Ormond v. State, 599 So. 2d 951, 956 (Miss. 1992) (right to counsel under Mississippi law attached when warrant was issued or the offender was bound over to appear in court).

In this case, not only did Judge Silvertooth sign the arrest warrant, but he also issued an order that the defendant be denied bond. The denial or granting of bail is a crucial stage at which the right to counsel attaches. Coleman v. Alabama, 399 U.S. 1, 9 (1970); Smith v. Lockhart, 923 F.2d 1314 (8th Cir. 1991).

> The setting of bail certainly is a "critical stage" in the criminal proceedings. . . . Its importance to defendant in terms of life and livelihood cannot be overstated. . . . Being jailed, for however short a time, is a significantly unpleasant experience. . . . The opportunity to consult with counsel, to find witnesses, to obtain evidence and, in general, to prepare a defense is clearly restricted when a defendant is kept in jail.

State v. Fann, 571 A.2d 1023, 1030 (N.J. Super. L. 1990).

For these reasons -- the arrest warrant to bring Johnson "forthwith" to a judge, the significant prosecutorial involvement in the obtaining of the warrant, the judge's order of no bond, and the search warrants for and seizures at Johnson's apartment -- adversarial judicial proceedings had commenced, and the sixth

amendment and section 16 rights to counsel had attached at that point.

3. Florida's right to counsel attached when the police brought Johnson to the station because they could feasibly have brought him across the street to the jail immediately for booking.

According to Traylor and the right to counsel under article I, section 16, of the Florida Constitution, "[b]ecause a prime interest that is protected is the right of the individual to exercise self-determination in the face of criminal charges, prosecution begins under the Counsel Clause when an accused is charged with a criminal act." Traylor, 596 So. 2d at 968. After discussing Article I, section 2, regarding the equal protection rights of the indigent to the assistance of counsel, Traylor relied on Florida Rule of Criminal Procedure 3.111 to define the point at which Florida's right to counsel begins under section 16.

> In other words, a defendant is entitled to counsel at the earliest of the following points: when he or she is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at first appearance. Although rule 3.111 speaks specifically to indigents, we conclude that the procedural rights of nonindigents under Section 16 are at least coextensive with those of indigents.
>
> Rule 3.111 was adopted from The American Bar Association's Standards for Criminal Justice and was intended to provide for equal representation commencing early in the proceedings. The rule is grounded in Sections 2 and 16 of our state Constitution. Assistance of counsel -- either retained or appointed -- begins under these two sections as provided in rule 3.111.

Traylor, 596 So. 2d at 970 (footnotes omitted, emphasis added).

Traylor said that "[a]s a general rule, **assignment of counsel is feasible by the time of booking.**" Id. at 970 n.38 (emphasis added). Traylor quoted with approval the commentary to the American Bar Association standards that "counsel be provided 'as soon as

feasible after custody begins,' assuming that this event occurs, as it usually does, prior to the defendant's appearance before a judicial officer or the filing of formal charges. Effective representation of the accused requires that counsel be provided at the earliest possible time." Id. at 970 n.42 (emphasis added).

In this instance, when the police took Johnson to the police station after his arrest, they had no intention of releasing him, especially since Judge Silvertooth had ordered them not to release him. Moreover, they could just as easily have taken him first across the street to the jail for booking before questioning him. Indeed, as argued in case number 78,337, section 907.04 required them to take him "immediately" to the jail. For this reason, whether the police booked Johnson before or after talking to him was an arbitrary fact of no substantive significance to the attachment of the right to counsel under Florida's Counsel Clause. Booking was clearly feasible before the officers questioned him. Consequently, when the police first brought Johnson to the station, his right to counsel under section 16 and Rule 3.111 attached at that time, "as soon as feasible after custodial restraint," pursuant to Traylor's "general rule" that "assignment of counsel is feasible by the time of booking."

4. No effective waiver occurred.

Unlike the fifth amendment right to counsel, a sixth amendment or section 16 waiver of the right to counsel depends not on whether the defendants asserted their rights but rather whether they waived them. McNeil v. Wisconsin, 115 L. Ed. 2d 158, 169 (1991) ("the relevant question was not whether the Miranda 'Fifth Amendment'

right had been asserted, but whether the Sixth Amendment right to counsel had been waived"). Waivers of the sixth amendment and section 16 rights to counsel require the State to prove "'an intentional relinquishment or abandonment of a known right or privilege.' . . . [T]he right to counsel does not depend upon a request by the defendant, and . . . courts indulge in every reasonable presumption against waiver. . . ." Brewer v. Williams, 430 U.S. 387, 404 (1977) (citations omitted). "[T]he accused must 'know what he is doing' so that 'his choice is made with his eyes open.' . . . [He must have] 'a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" Patterson v. Illinois, 487 U.S. 285, 292 (1988) (citations omitted). "Any waiver of the Section 16 right to counsel must be knowing, intelligent, and voluntary." Traylor, 596 So. 2d at 972.

Patterson held that, in the immediate post-indictment context, a simple waiver of Miranda fifth amendment rights also generally waives a defendant's sixth amendment rights. Traylor cited Patterson with approval and held that mere Miranda warnings are usually sufficient for "general Section 16 purposes." 596 So. 2d at 973 & 973 n.47. For several reasons, however, although the police in this case did administer Miranda warnings at the beginning of Johnson's interrogation, his failure to assert his rights at that time did not also constitute a valid waiver of his sixth amendment and section 16 rights to counsel.

First, Patterson reasoned that a mere postindictment Miranda waiver was sufficient because the petitioner in Patterson could not

"articulate with precision what additional information should have been provided to him before he would have been competent to waive his right to counsel." 487 U.S. at 294. Patterson, however, expressed no opinion on the

> occasional suggestion that, in addition to the Miranda warnings, an accused should be informed that he has been indicted before a postindictment waiver is sought. Because, in this case, petitioner concedes that he was so informed, we do not address the question whether or not an accused must be told that he has been indicted before a postindictment Sixth Amendment waiver will be valid.

487 U.S. at 295 n.8 (citations omitted).

In this case, although the officers did mention the arrest warrant which started the judicial proceedings and caused the right to counsel to attach, they did not explain the warrant's significance. "[M]ere knowledge of a pending indictment [or warrant], without understanding of its meaning, may not allow the accused to 'appreciate the gravity of his legal position or the urgency of his need for a lawyer's assistance.'" United States v. Mohabir, 624 F.2d 1140, 1149 (2d Cir. 1980).

Even more importantly, the officers never told Johnson about the judge's "no bond" order that they had in their pocket. He therefore did not know the true state of affairs -- that he had no chance of release even if he passed the polygraph or otherwise cooperated with the officers. "[A]n unrevealed indictment [or 'no bond' order] might be significant if ignorance of it precludes defendant from being able to appraise his position and therefore from making an intelligent waiver." United States v. Payton, 615 F.2d 922, 924 (1st Cir. 1980).

Because judicial proceedings had started and the sixth amend-

ment right had attached through the "no bond" order, the sixth amendment and section 16 obligated the officers to tell Johnson that judicial proceedings had commenced through this order and that he thereby had no chance of release. Logically, before defendants can waive their sixth amendment right, they must know of the order which caused the right to attach and understand the order's significance. Otherwise, by definition, they do not "'know what [they are] doing' so that '[their] choice is made with [their] eyes open.'" See United States v. Clements, 713 F.2d 1030, 1036 (4th Cir. 1983) ("individual at a minimum must be informed that he or she is under indictment"). Similarly, if the officers had booked Johnson first as section 16 required, Johnson's knowledge of the true state of affairs would have been substantially different. He would have known through the booking process that he would not be released from jail.

The officers of course were fully familiar with these matters. They did not want him to know his rights under the sixth amendment and section 16. Specifically, they did not want him to know that he had no chance of being released or realistic hope of freedom because the judicial process had started through the judge's "no bond" order. Had he known the true facts -- and he had a right to know them under the sixth amendment, section 16, and Rule 3.111 -- the likelihood that he would confess would have been substantially less. He would have had no reason to try to get into the officers' good graces and perhaps obtain his release by talking to them.

Instead, the officers tricked him into talking. They tempted him with a nonexistent hope of freedom if he could convince them of

his innocence. Although they knew that his hope of speedy freedom was completely unfounded, they exploited his ignorance and illusory hopes to get him to start talking and take the polygraph.

> The record here suggests that appellant did not understand the gravity of his position; he apparently hoped that he would aid his case by telling "his side of the story." . . .
>
> Prior to indictment -- before the prosecution has taken shape -- there may be reasons why a suspect might rationally wish to deal with agents without the intervention of counsel. By getting in their good graces and being useful to the government he might be able altogether to avoid indictment or any legal entanglement. No such opportunity is open to him after a grand jury has spoken [or the judge has issued a "no bond" order]. At that point he cannot make any arrangement with agents or prosecutor that is not subject to ultimate approval by the court, and counsel is obviously important to advise him on what terms such approval is likely to be forthcoming and how best to obtain it.
>
> **The Miranda warnings appellant received did not call attention to this critical distinction. . . .**

Mohabir, 624 F.2d at 1149-50 (citation omitted, emphasis added).

The officers below thus obtained Johnson's confession by deliberately exploiting his ignorance of his rights under the counsel clauses and Rule 3.111 to know about the judicial orders entered in his case and to know "as soon as feasible after custodial restraint" at booking that he would be in jail indefinitely regardless of what he said. The connection between (1) this exploitation of Johnson's hope for freedom, which was illusory because the "no bond" order had been signed, (2) the institution of judicial proceedings directly through the arrest warrant and "no bond" order, (3) the consequent attachment of the section 16 and sixth amendment right to know how and why judicial proceedings had begun, and (4) the specific and precise use of his ignorance about

the judicial directives in order to obtain the confession, could not be more direct. Johnson's waiver of counsel was therefore not "knowing, intelligent, and voluntary" for sixth amendment and section 16 purposes, because he did not understand the nature and significance of the judicial process which had caused the right to counsel to attach.

Second, not only did the officers not tell Johnson that he would remain in jail regardless of what he said, they also did not tell him that a lawyer would be available to see him soon in any event at first appearances pursuant to Florida Rule of Criminal Procedure 3.130. Johnson started confessing at 3:30 a.m.; the public defender's investigator started interviewing clients at 6:30 a.m., only three hours later. Had the investigator seen Johnson, he would have told him not to talk to the police. (W978-79, 982-90)

If the police had booked Johnson "as soon as feasible after custodial restraint" as Rule 3.111 required, the booking officer would have advised him under Rule 3.111(c)(1) "of the right to counsel and that if [he was] unable to pay a lawyer, one [would] be provided <u>immediately</u> at no charge" (emphasis added). Johnson would likely have told the booking officer that he could not afford an attorney. Rule 3.111(c)(1) would then have been required the officer to place him "<u>immediately and effectively</u> . . . in communication with the (office of) public defender." Clearly, the police did not book him immediately in part because they did not want him to know he had this right under Florida law to talk to a public defender who would be available immediately (at least at first appearances in a few hours).

Consequently, when Patterson could not "identify any meaningful additional information that [the suspect] should have been, but was not, provided" in addition to the Miranda warnings, 487 U.S. at 295, it was not considering Florida's procedural rules which afford a right to talk with a public defender within twenty-four hours or, in this case, within three hours. Indeed, Patterson specifically distinguished situations like those in Moran v. Burbine, 475 U.S. 412 (1986), in which the defendants' lawyers are trying to reach the defendants at the time of the police interrogation. Information that the defendants' lawyers are or soon will be available is meaningful and relevant to the suspects' decision to talk to the police and waive their rights under the sixth amendment -- albeit perhaps not under the fifth amendment.

> [Not] all Sixth Amendment challenges to the conduct of postindictment questioning will fail whenever the challenged practice would pass constitutional muster under Miranda. For example, we have permitted a Miranda waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning; **in the Sixth Amendment context, this waiver would not be valid**. See Moran v. Burbine, 475 U.S. at 424. . . . [B]ecause the Sixth Amendment's protection of the attorney-client relationship -- "the right to rely on counsel as a 'medium' between [the accused] and the State" -- extends beyond Miranda's protection of the Fifth Amendment right to counsel, there will be cases where a waiver which would be valid under Miranda will not suffice for Sixth Amendment purposes.

487 U.S. at 296 n.9 (emphasis added).

Moreover, refusing to tell suspects that their lawyers are available to give initial advice violates Florida's section 9 right to due process, even if the section 16 right to counsel has not yet attached. As this Court said in Haliburton v. State, 476 So. 2d 192 (Fla. 1985), a suspect "must be informed when his counsel

actually seeks to advise him and must knowingly and intelligently reject such opportunity before subsequent statements may be taken and used against him." Id. at 194, quoting State v. Burbine, 451 A.2d 22, 35 (R.I. 1982) (Bevilacqua, C.J., dissenting).

After the United States Supreme Court vacated Haliburton, this Court nevertheless held to its original position. Not allowing identified attorneys to talk to their clients violated section 9 due process.

> "To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run." . . . We find that this conduct [of not allowing an identified attorney to provide initial assistance and advice] violates the due process provision of article I, section 9 of the Florida Constitution.

Haliburton v. State, 514 So. 2d 1088 (Fla. 1987) (emphasis added), quoting State v. Haynes, 602 P.2d 272, 278 (Ore. 1979). Haliburton is applicable to Johnson's confession, which occurred in 1988. Jones v. State, 528 So. 2d 1171 (Fla. 1988).

Defendants have a right to know, after judicial process has started and their sixth amendment and section 16 rights have attached, that as part of the standard judicial procedure their lawyers are or (within three hours) will be "available to provide at least initial assistance and advice." This is "meaningful additional information" as defined in Patterson which clearly can affect their decision to waive their rights immediately. Defendants sometimes talk to the police despite the Miranda warnings because they believe they will not actually see their lawyers for several weeks. Rather than wait in jail during this time, they

take matters into their own hands, hoping that they can win immediate release.

They might not waive their rights and talk to the police so quickly, however, if they know that their lawyer will be available immediately or within three hours. This was "meaningful, additional information" which Johnson had a right to know under both the sixth amendment and section 16 and which would dramatically have affected his decision to talk. This was particularly true if he had also known that he would not be released in any event. Had the police told him these two critical facts about the judicial process that had already started and which had caused his sixth amendment and section 16 rights to attach, the likelihood of his confession would have been minuscule.

Furthermore, for purposes of section 16 and the sixth amendment, no conceptual difference exists between the public defender representative who would be available in three hours in this case and the lawyers in Haliburton and Burbine who were available immediately to give "initial assistance and advice." Because the judicial process had started, knowledge that a lawyer would as a matter of course and as part of standard court procedure be available immediately or within a few hours was valuable information about the judicial process which Johnson had a right to know before he chose to waive his rights. Because the police in this case never advised him of this important information, his purported waiver of his rights was not knowing or intelligent and was therefore invalid.

Third, the purported waiver of rights was also invalid under

Rule 3.111(d) which provides as follows:

> (2) A defendant shall not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into accused's comprehension of that offer and his capacity to make that choice intelligently and understandingly has been made.
>
> (3) No waiver shall be accepted where it appears that the defendant is unable to make an intelligent and understanding choice because of his mental condition, age, education, experience, the nature and complexity of the case, or other factors.
>
> (4) A waiver of counsel made in court shall be of record; a waiver made out of court shall be in writing with not less than two attesting witnesses. Said witnesses shall attest the voluntary execution thereof.

Traylor held that this rule provides "express guidelines" and "specific requirements" for the waiver of the section 16 right to counsel. 596 So. 2d at 972, 973. Unlike the officers in Traylor, id. at 973, the detectives in this case violated Rule 3.111(d)(2) by making no inquiry whatsoever into Johnson's comprehension of the offer of counsel and his capacity to make the choice intelligently and understandingly. Further, they violated Rule 3.111(d)(3) because the record reflects that Johnson was unable to make an intelligent and understanding waiver, given the psychological coercion employed on him to the point of causing weeping and severe emotional distress.

Finally, unlike the police in Traylor, the police in this case violated Rule 3.111(d)(4) because Johnson did not waive his rights in writing with two witnesses who attested to the voluntary execution of the waiver. Although Johnson did sign a "Notification of Rights" form, this form was not a waiver of rights. (W6766) Further, it was signed by only one witness, Sergeant Stanton, and he did not attest to its voluntary execution. By requiring a written

waiver, Traylor in effect overruled Jordan v. State, 334 So. 2d 589 (Fla. 1976). See State v. Wyer, 320 S.E.2d 92 (W. Va. 1984) (requiring written waiver of sixth amendment right to counsel, because sixth amendment waivers should be judged by stricter standards than fifth amendment waivers).

Because (1) Johnson did not execute a properly attested written waiver of his section 16 and Rule 3.111 right to counsel, (2) no thorough inquiry was made into his capacity to waive his rights, (3) the psychological coercion employed on him affected his capacity to waive his rights knowingly and voluntarily, (4) he did not know that judicial process had started, and a lawyer would be available within three hours, and (5) he did not know that the start of judicial process meant he would remain in jail no matter what he said, the purported waiver of counsel was not "knowing, intelligent, and voluntary" within the meaning of the sixth amendment, section 16, and Rule 3.111, and the court should have suppressed the confessions thereby obtained.

5. The section 16 and sixth amendment violation affects all of the cases for which the officers obtained confessions.

Appellant recognizes that Traylor and McNeil held that the section 16 and sixth amendment rights to counsel are "offense-specific." Nevertheless, the violation of his right to counsel in White should require the suppression of his statements in Johnson's other cases as well. The confessions in McCahon, White, Giddens, and Cornell were intertwined in the same session. The police could not have used the coercive effects of custody to interrogate Johnson about the other cases if they had not had him in custody in

White. They deliberately did not tell him which case the arrest warrant was for and let him think it was for McCahon as well as White.

If Johnson had known his rights, known that a "no bond" order was signed, known that he would not be released in any event, and known that his lawyer would be available to talk to him in a few hours, his understanding of the true state of affairs in all of the cases would have been substantially different. To suppose that, had Johnson known about his section 16 and sixth amendment rights in White, he would have confessed about the other cases but not about White, is **totally absurd.** His primary desire not to go to jail was **patently** not an "offense-specific" concern, because he would be in jail in any event, whether on one charge or on sixteen.

Moreover, if this Court suppresses only the White confession, the police will have a powerful incentive to violate the right to counsel. The police know that, if suspects are informed in cases similar to the present one that (1) they will not get out of jail no matter what they say and (2) a lawyer will be available within a few hours, they will not likely say anything about any crime, including the crimes to which the sixth amendment right has not yet attached. The police will therefore not advise suspects of these important facts, on the theory that, even if a confession to one crime is suppressed on sixth amendment grounds, at least the police will get confessions to other crimes which they would not otherwise get and which the courts will not suppress because the sixth amendment right has not yet attached in those cases. McNeil's and Traylor's view that the right to counsel is "offense-specific"

therefore explicitly rewards illegal police interrogations.

For these reasons, distinguishing the right to counsel in White as "offense-specific" in this case is an exercise in pure semantics with no substantive real-world application except to invite illegal police conduct. The law should not depend on such hyper-technical distinctions which create mischievous results. At least, if this Court continues to believe that the right to counsel is "offense-specific," it should restrict this belief to cases in which the different offenses are the subject of separate interrogation sessions, as occurred in McNeil, rather than intertwined as they were in this case. Accordingly, this Court should suppress all of the confessions and not only the confession in White.

ISSUE II

THE POLICE SEIZED CLOTHING WITHOUT PROVIDING PROBABLE CAUSE THAT EVIDENCE WOULD BE FOUND AND WITHOUT DESCRIBING WITH PARTICULARITY THE ITEMS TO BE SEIZED.

Before trial, the defense filed a motion to suppress, arguing inter alia that the affidavit and search warrant for the search of Johnson's apartment did not provide probable cause to believe that evidence relating to the crime would be found in the apartment and that the officer's sworn affidavit omitted important facts. (W239-49) The defense later filed another motion to suppress the red and the black T-shirts which were found in a laundry basket in a hall closet and which were the *source of the fiber evidence in this* case. The defense argued that the warrant did not specify clearly the items to be seized. "The police had essentially no idea what they were looking for," that the only clothing authorized to be

seized was blood-stained clothing, and that the two T-shirts were not blood-stained. The State responded that the evidence was admissible because the warrant authorized the officer to seize "hair, fiber, tissue, or any other items of forensic comparison value." The judge denied the motions to suppress. (W4669-79, 4966-68, 6329-35)

The denial of the motions to suppress violated the defendant's state and federal constitutional rights for three reasons. First, the affidavit said that hair, blood, fingerprints, shoe print impressions, and knife impressions had been collected to compare to possible suspects. It did not, however, say that fibers were collected at the scene or elsewhere. (W6331) Consequently, the affidavit did not establish probable cause to seize fibers because it (1) did not show that fibers were found at the scene and (2) therefore did not establish that any fibers at the apartment might be evidence of the crime. In this case, the two T-shirts that were seized were ultimately used because their fibers were compared to fibers found at the scene. Because the affidavit did not provide probable cause for this seizure of fibers, the seizure was unconstitutional.

Moreover, because the affidavit alleged that the suspect's clothing would probably be bloody (W6331), the absence of blood on the T-shirts affirmatively indicated that they likely would not provide evidence of the crime. Consequently, they likely did not have evidence of "forensic comparison value" because the absence of blood meant that the shirts probably were not worn when the crime occurred. Under the terms of the warrant, these items should not

have been seized even if the affidavit was proper.

Finally, the affidavit failed to establish probable cause for seizure of fiber evidence because the search occurred seven days after the crime was committed. It was not committed in Johnson's apartment. The delay substantially lessened the likelihood of finding relevant forensic fiber evidence, absent a specific allegation that fibers had in fact been collected.

State v. Tamer, 475 So. 2d 918 (Fla. 3d DCA 1985), was directly on point.

> [T] here are not facts stating therein which indicate that the subject clothing constituted some evidence relevant to proving the aforesaid arson. Indeed, the affidavit makes no mention whatever of the aforesaid clothing. This being so, no probable cause was stated in the affidavit for the seizure of this clothing, the search and seizure of the clothing was unreasonable, and the clothing was properly suppressed as being inadmissible in evidence. See United States v. Thompson, 612 F.2d 233 (6th Cir. 1979).

475 So. 2d at 919.

Similarly, in United States v. Holzman, 871 F.2d 1496, 1511 (9th Cir. 1989), the Court suppressed "bonds and notes obtained through a fraud scheme" because the affidavit did not establish that bonds and notes would be found on the premises, although it did establish the existence of several other specific items that the officers seized, such as credit cards, cash, and jewelry.

> [T]he data necessary to demonstrate probable cause for the issuance of a warrant must be "contained within the four corners of a written affidavit given under oath." Neither bonds nor notes were mentioned or discussed as part of the fraud scheme in the affidavit. . . . Thus, . . . the magistrate could not have had a substantial basis for concluding that probable cause existed to search for bonds.

Id. (citation omitted); see also People v. Smith, 526 N.W.S.2d 682,

683 (N.Y. App. 1988) (warrant affidavit for "soiled mens clothing . . . failed to establish that the clothing sought was connected in any way with criminal activity").

Just as the affidavit in Tamer did not mention clothing and the affidavit in Holzman did not mention bonds, so also the affidavit in this case did not mention fibers or non-bloodstained clothing. Consequently, the affidavit did not provide probable cause for seizure of the clothing and its fibers.

Second, the phrase "hair, fiber, tissue, or any other items of forensic comparison value," was too broad and encompassed everything in Johnson's apartment. For example, the affidavit mentioned that Johnson's fingerprints had been found at the scene. Every item in the apartment might have had Johnson's fingerprints on it and therefore could be seized for "forensic comparison value." Similarly, every item in the apartment could have had hair on it. The officers could have seized all of the furniture, carpet, and clothing in the apartment, even clothing worn by other people. They could have taken every letter or hand-written document, for "forensic" hand-writing comparisons.

This warrant did not limit the searching officer's discretion in any way and was an illegal general warrant. It unconstitutionally authorized "a general, exploratory rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). It improperly left to the officer's discretion which items of "forensic comparison value" would be seized.

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a

> warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Marron v. United States, 275 U.S. 192, 196 (1927). The warrant likewise violated section 933.05, Florida Statutes (1987), which provided that a "search warrant cannot be issued except upon probable cause supported by affidavit or affidavits, naming or describing the person, place, or thing to be searched and particularly describing the property or thing to be seized."

"Common sense shows just how broad this warrant was, as does, of course, the government's concession at argument that there is not a single record which the warrant fails to reach." Roberts v. United States, 656 F. Supp. 929, 935 (S.D.N.Y. 1987), affirmed United States v. Roberts, 852 F.2d 671 (2d Cir. 1988). "Absent any limitation of the warrant term 'monies,' the agents conducting the search were effectively permitted by the warrant's terms, on this item alone, to rummage through . . . the **entire house** in an unrestricted search for currency. . . ." United States v. One Parcel of Property at 18 Perkins Road, 774 F. Supp. 699, 706 n.9 (D. Conn. 1991) (emphasis added).

Because the warrant was improperly general, the police could engage in a general exploratory search for evidence of crime, and they clearly believed that they could seize anything they felt like taking. As often occurs, the proof was in the pudding, namely, the other items that they seized. These items included McCahon's business card, a public defender's card, court receipt, heart-shaped lady's silver watch, Storer cable television box, pellet gun, black shoulder holster, videocassette tape, miscellaneous legal papers,

newspaper articles, poetry, letters, jewelry box, and jewelry. (W6336) Although each of these items arguably in an extremely broad sense had some "forensic comparison value," the breadth and variety of this seized evidence proved that the warrant was general and allowed the police to seize everything in the apartment.

The illegal general search warrant in this case was much more general than the search warrant authorizing the seizure of "documents recording the extension of credit," which Polakoff v. State, 586 So. 2d 385, 392-93 (Fla. 5th DCA 1991), found was too vague. It was more general than the direction to seize blue wheelbarrows, which was too vague in Sims v. State, 483 So. 2d 81 (Fla. 1st DCA 1986), because it did not specify which blue wheelbarrows to take. It was no better than the warrant in Perez v. State, 521 So. 2d 262 (Fla. 2d DCA 1988), which only discussed cocaine and guns and therefore did not authorize seizure of a VCR. It was similar to the description, "other things of value," which "failed to describe with particularity" the items seized in United States v. Viers, 637 F. Supp. 1343 (W.D. Ky. 1986). Moreover, the clothing was not contraband, for which warrants may sometimes authorize searches in more general terms. Carlton v. State, 449 So. 2d 250 (Fla. 1984).

Third, the search warrant affidavit omitted material facts. It incorrectly stated that the pubic hair on White's thighs was from a male. It did not mention fingerprints on the lamp near the body which were not Johnson's fingerprints, did not say that Johnson's fingerprints were found outside the house, and did not mention the open front door which could have been the point of entry instead of the window. (W140-45, 165-66, 170-71, 6457-59)

Appellant has argued in case number 78,337 that these omitted facts could have or would have changed the probable cause determination, and he will rely on and not repeat that argument here.

The good faith exception is inapplicable because the affidavit wholly failed to provide probable cause that fibers of comparison value would be found, wholly failed to describe the items to be seized with particularity, and, as argued in case number 78,337, omitted material facts.

> The facial invalidity evident in the warrant in question precludes resort by the State to the good faith exception to the exclusionary rule enunciated in United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). Indeed, the . . . Court in that case specifically stated that the exception should not be available, although the officers acted in good faith, where the warrant is facially deficient "in failing to particularize the place to be searched or the things to be seized" on the basis that the executing officer cannot under such circumstances, "reasonably presume [the warrant] to be valid." 104 S. Ct. at 3422.

Sims, 483 So. 2d at 82. See also Getreu v. State, 578 So. 2d 412 (Fla. 2d DCA 1991) (good faith exception not applicable when law enforcement officer should know that warrant is invalid); Renckley v. State, 538 So. 2d 1340 (Fla. 1st DCA 1989) (same). Consequently, the Leon exception did not apply in this case because the officer should have known that the warrant was too general and that he had not established any probable cause for seizing fiber evidence.

The Leon exception did not apply also because the warrant violated section 933.05, which (1) did not and does not contain a good faith exception, (2) forbids the issuance of warrants on less than probable cause, and (3) requires particular descriptions of

the things to be seized. See § 775.021(1), Fla. Stat. (1987) (penal code statutes must be strictly construed in favor of defendant); Bonilla v. State, 579 So. 2d 802, 805 (Fla. 5th DCA 1991) ("[s]tatutes . . . authorizing search and seizure must be strictly construed"); State v. Hume, 512 So. 2d 185 (Fla. 1987) (treating knock-and-announce issue solely as statutory, rather than constitutional, matter).

Four justices of this Court now believe that the 1982 amendment to article I, section 12, of the Florida Constitution only requires this Court to follow those United States Supreme Court cases in effect in 1982. Perez v. State, 18 Fla. L. Weekly S361 (Fla. June 24, 1993). Leon was decided in 1984, and section 933.05 was first enacted in Laws 1923, c. 9321, § 5. The legislature patently did not know about Leon when section 933.05 became law in 1923. Under these circumstances, a judicial insertion of the Leon good faith exception into a statute first enacted more than sixty years earlier would be absurd.

Consequently, the trial judge erred by not suppressing this evidence, and remand is necessary for a new trial.

ISSUE III

THE TRIAL COURT SHOULD HAVE EXCUSED FOR CAUSE A JUROR WHO WOULD VOTE FOR DEATH AS THE PROPER PUNISHMENT FOR ALL FIRST DEGREE MURDERS AND WOULD NOT CONSIDER MITIGATING FACTORS.

During voir dire, when the judge asked juror Lahiff whether she would automatically vote for the death penalty, she said, "Not automatically, no." When asked if she could follow the law on aggravating and mitigating factors and recommend life or death, she

said, "I would hope so." (W3496-97) Juror Lahiff told the prosecutor that she had feelings more strongly for the death penalty than against it. She said affirmatively that death was appropriate in some circumstances and could "occasionally" envision circumstances where it was not. When the prosecutor asked if she could recommend a life sentence if the aggravation did not outweigh the mitigation, she did not answer the question and instead said she "would certainly weigh the facts." She would only say that "hopefully" she would weigh the aggravation and mitigation and recommend life or death. (W3497-98)

Thus, juror Lahiff's answers to the judge and the prosecutor showed that she favored death, and her equivocal responses to some of the questions suggested that she might be unduly reluctant to recommend life and to consider the mitigating factors as required by law. Any doubt on this score, however, was removed by her forthright answers to defense counsel's questions.

> Q: Could I ask you what is the basis of your feelings [in favor of the death penalty]?
>
> A: Well, basically, I think the eye for the eye philosophy. I think if it were a little more closely tied to the incident, it would be a little more effective than drawn out the way it is.
>
> Q: You have heard again the allegations against Mr. Johnson in this case. If you were a juror and Mr. Johnson was to be found guilty of those allegations, what do you think should happen to Mr. Johnson?
>
> A: I think if it were as I understand it to be that it would be that the death penalty would be in order.
>
> Q: Now, could I ask you under what circumstances would you think that maybe it wouldn't be in order, if you can think of any?
>
> A: Humm, I wouldn't know. I would have to listen to what

the facts were. . . . [I]t would be difficult to think of a male attacking a female, and without thinking, that would be a real tough call.

Q: If it was proven and the Court instructed you that the defendant's mental health could be considered as a mitigating factor, can you accept that, or do you personally think that that is just not appropriate?

A: I don't really think that's appropriate in most situations.

Q: If it was proven and the Court instructed you that the defendant's background could be taken into account as a mitigating circumstance, could you accept that or do you think that's not appropriate?

A: Not appropriate.

Q: At this point in time, can you think of any circumstances that someone who's been convicted of first degree murder, that it could be shown to you where it would not warrant the death penalty if they were in fact guilty of first degree murder?

A: I can't think of any right now.

Q: Ma'am, would you agree, then, that it most likely would be difficult for you to recommend a life sentence if you found that the person was guilty of first degree murder.

A: No.[2]

Q: Would you agree, ma'am, that it would be difficult for you to follow the law with respect to the mitigating circumstances that we talked about, for instance, the mental health or the defendant's background?

A: Would have an effect on the guilt or innocence?

Q: No, not on the guilt or innocence, but on the sentence that should be received.

A: I would think it would be the same answer to both of those, yes, sir.

---

[2] In context, this answer does not make much sense. The court reporter may have reported it incorrectly, or the juror may have been confused by the wording of the question. The next question was phrased the same way, and she also had trouble with it.

(W3501-03)

Juror Lahiff here clearly stated that she would vote for death based solely on the bare allegations she had heard in this case. She could not think of any circumstances in which she would vote for life for someone convicted of first degree murder. She did not think it was appropriate to consider mitigation, such as the defendant's mental health or background. She thought that the same answer should be given to the question of guilt or innocence as to the question of life or death. In other words, anyone guilty of first degree murder should die -- an eye for an eye.

The judge tried to rehabilitate this juror but without success. When the judge asked if she could set aside her personal opinions and follow the law, she answered only, "I think I would try to make a decision based upon the facts and the law." When the judge asked the same question again, she again did not answer it clearly and said instead, "I would hope so." (W3503-04) She did not in fact say that she would set aside her personal opinions.

The court twice denied a defense challenge for cause on juror Lahiff. (W3506, 4045) The defense peremptorily excused this juror, exhausted its peremptories, and identified other jurors it would have challenged had its request for more peremptory challenges been granted. (W4049, 4110, 4155-56, 4164)

Juror Lahiff's responses were strikingly similar to the juror's responses in Hill v. State, 477 So. 2d 553 (Fla. 1985). Like juror Lahiff, the juror in Hill thought that the defendant should receive a death sentence based on the little he knew about the case. When asked whether he would impose death for all

premeditated murders, the Hill juror equivocated and said the question was hard to answer, just as juror Lahiff said to a similar question that "that would be a real tough call." The Hill juror "was inclined toward the death penalty," just as juror Lahiff had feelings "probably more strongly towards the death penalty." (W3497) Unlike the Hill juror, juror Lahiff went further and forthrightly said later that she could not think of any circumstances in which life would be appropriate in first degree murder cases. Consequently, if the Hill juror's responses gave rise to a reasonable doubt that he should serve on the jury, then Lahiff's responses certainly provided this reasonable doubt and she should have been excused.

In the present case, the juror never said she could follow the law and set aside her personal opinions. She said only that she would "try" to base a decision on the facts and law and "hopefully" would recommend life or death. Merely "trying" to be fair was insufficient when her answers raised a reasonable doubt about her fairness.

The case for excluding juror Lahiff was even stronger because, unlike the juror in Hill, juror Lahiff expressly said that a defendant's background was not appropriately considered as mitigation, and she made similar comments about a defendant's mental illness. This response was squarely contrary to Florida and federal law, which finds that these factors are proper mitigation for the jury to consider. Campbell v. State, 571 So. 2d 415 (Fla. 1990); Eddings v. Oklahoma, 455 U.S. 104 (1982).

Consequently, the denial of the cause challenge violated

Thomas v. State, 403 So. 2d 371 (Fla. 1981). "The admitted refusal of [the] juror . . . to weigh mitigating circumstances in the sentencing phase presents a clear case in which a challenge for cause should have been granted." Id. at 376. It also violated Morgan v. Illinois, 119 L. Ed. 2d 492, 502-03 (1992).

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, . . . the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, . . . a capital defendant may challenge for cause any prospective juror who maintains such views.

The proper remedy is a new guilt phase. Requiring defense counsel to challenge the juror peremptorily because of her views on the penalty phase meant that counsel could not challenge other jurors because of their views on the guilt phase. For example, juror Seymour, whom the defense would have challenged if possible, had been the victim of a car burglary and a bicycle theft. (W4127, 4164) The present case was also a burglary. Consequently, the defense likely wanted to exclude her because of her views on the guilt phase. Instead of using the challenge on Seymour for guilt phase purposes, however, the defense had to use it on Hanaway, who was an undesirable juror for penalty purposes. Consequently, reversible error occurred in the guilt phase as well as the penalty phase.

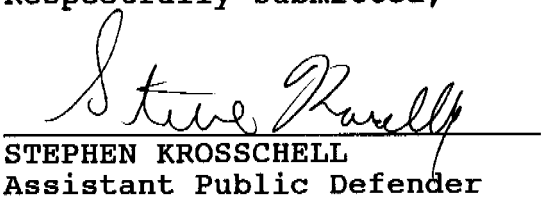
CONCLUSION

This Court should reverse.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this _____ day of September, 1993.

Respectfully submitted,



JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
(813) 534-4200

STEPHEN KROSSCHELL
Assistant Public Defender
Florida Bar Number 351199
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

SK/ddv