IN THE SUPREME COURT OF FLORIDA

EMANUEL JOHNSON, :

Appellant, :

vs. : Case No. 78,336

STATE OF FLORIDA, :

Appellee. :

_____ :

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

SUPPLEMENTAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller, XIII Stetson L. Rev. 523 40

PRELIMINARY STATEMENT

This brief is being filed to comply with the Court's order that supplemental briefs be submitted on penalty issues in Appellant's cases.

Appellant, Emanuel Johnson, has two cases pending before this Court. References in this brief to the record in case number 78,336, in which the victim was Iris White, will be designated by "W," followed by the appropriate page number. References to the record in case number 78,337, in which the victim was Jackie MaCahon, will be designated by "M," followed by the page number.

Appellant also has two appeals pending in the Second District Court of Appeal. In case number 91-2368, in which the victim was Kate Cornell, Appellant was convicted of attempted murder, armed burglary of dwelling and armed robbery. In case number 91-2373, in which the victim was Lawanda Giddens, Appellant was convicted of battery, burglary of an occupied structure and robbery.

STATEMENT OF THE CASE AND FACTS

Appellant, Emanuel Johnson, will rely upon the Statement of the Case and Facts contained in his initial brief.

SUMMARY OF THE ARGUMENT

Appellant's sentence of death was rendered unconstitutional by the trial court's refusal to permit him to present to his penalty phase jury legitimate evidence and argument in support of a sentence less than death. He should have been allowed to argue to the jury that a death sentence was not needed due to the lengthy prison terms Appellant was potentially facing (and did in fact receive) in this case and other cases which were pending sentencing. Appellant should also have been allowed to show the jurors a picture of the daughter who would have been born if his fiancee had not suffered a miscarriage, and to present records pertaining to his suicide attempts at age 13 and when Appellant was incarcerated in the Sarasota County Jail. Furthermore, the court should have permitted the jurors to hear Appellant's evidence as to the lack of any deterrent effect of capital punishment, and the relative cost of a death sentence as opposed to life imprisonment. This was all valid evidence and argument which went either to mitigation, or to rebut concerns the jurors may have had that constituted nonstatutory aggravating circumstances.

The State offered irrelevant evidence and argument at penalty phase that tainted the jury's death recommendation. On cross-examination of defense witness Bridget Chapman, the prosecutor was allowed to elicit testimony about fights between Appellant and his fiancee during which he struck Chapman. This evidence did not serve to counteract Chapman's testimony on direct, but went only to portray Appellant in an unflattering light, and suggested that he

was guilty of an uncharged collateral crime. Similarly, in his closing argument at penalty phase, the prosecutor insinuated that Appellant was guilty of sexual improprieties during his assault on Iris White, even though Appellant had not been charged with any sexual offense, a highly inflammatory argument in any case, and particularly here where the defendant was a young black man and the victim was an elderly white woman.

The trial court erred in using an incorrect legal standard in rejecting the mental mitigator of extreme emotional disturbance. The evidence as to this factor was unrebutted. Contrary to the trial court's conclusions, it did not require corroboration apart from the evidence Appellant presented, and should have been found where it was not contradicted by "positive evidence."

Appellant's cause was submitted to his penalty phase jury pursuant to misleading and incomplete instructions, resulting in an unreliable penalty recommendation and sentence. In refusing Appellant's request to delete the word "extreme" from the charge on the section 921.141(6)(b) mitigating circumstance, and declining to charge the jury at all on the section 921.141(6)(f) factor, the court prevented the jury from giving proper and adequate to all the evidence Appellant presented in mitigation. Furthermore, the instructions as given failed to inform the jurors of the standard of proof by which they should weigh aggravation and mitigation, improperly shifted the burden of proof to Appellant to prove that he should be permitted to live, and denigrated the jury's critical role in the sentencing process.

The felony murder aggravating circumstance upon which Appellant's jury was instructed, and which the trial court found to exist in his sentencing order, is unconstitutional. As it is present in every case where a homicide occurs during the course of a felony, it fails genuinely to narrow the class of persons who may be sentenced to the ultimate punishment.

The especially heinous, atrocious or cruel aggravating circumstance is unconstitutionally vague and, as applied, does not genuinely limit the class of persons eligible for the death penalty. This aggravator has not been interpreted in a rational and consistent manner by this Court, and so sentencing judges are provided with inadequate guidance to enable them to separate the murders which qualify as especially heinous, atrocious or cruel from those which do not. Furthermore, Emanuel Johnson's jury was not given an instruction which would have enabled it to differentiate murders which qualify for the HAC aggravating factor from those which do not.

ARGUMENT

ISSUE I

THE TRIAL COURT IMPROPERLY REFUSED TO ALLOW MITIGATING EVIDENCE AND ARGUMENTS AND REFUSED TO ALLOW EVIDENCE THAT WOULD REBUT NONSTATUTORY AGGRAVATORS.

The trial court, in several respects, did not allow the defense to present mitigating evidence and arguments and refused to allow evidence that would rebut nonstatutory aggravators. In the Iris White case, during penalty phase opening statements, the defense told the jury that Appellant would die in prison, and the only question was how he would die. The court sustained an objection and instructed the jury that the two penalties were either death or life in prison without possibility of parole for 25 years. (W 5800-01) Later, the court refused to allow the defense to tell the jury in closing argument that Appellant was facing several potential consecutive life sentences for the non-capital felonies in Cornell, Giddens, and White and that the defendant probably would never be released from prison. (W 5870-86)

In the Jackie McCahon case, when this issue arose again, the trial court changed his position and allowed defense counsel to make an argument similar to the argument proffered in the White case regarding the potential sentences Appellant could receive, after being confronted with this Court's opinion in Jones v. State, 569 So. 2d 1234 (Fla. 1990). (M 5820-5830) In Jones the Court clearly held that it is improper for the trial court to preclude defense counsel from arguing that the lengthy prison sentences the

defendant might receive should be considered by the jury in deciding whether to recommend a life sentence:

> Seventh, Jones contends that the trial court improperly prevented him from arguing that he could be sentenced to two consecutive minimum twenty-five-year prison terms on the murder charges should the jury recommend life sentences. The state argues that this claim was speculative because the actual sentencing decision is purely within the province of the court, not the jury.
>
> The standard for admitting evidence of mitigation was announced in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The sentencer may not be precluded from considering as a mitigating factor, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604, 98 S.Ct. at 2965. Indeed, the Court has recognized that the state may not narrow a sentencer's discretion to consider relevant evidence "that might cause it to decline to impose the death sentence." McCleskey v. Kemp, 481 U.S. 279, 304, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262 (1987) (emphasis in original; footnote omitted). Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. The potential sentence is a relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering.

Jones, 569 So. 2d at 1239-1240. The refusal to allow the defense in White to argue that the judge could impose consecutive life sentences for the non-capital and capital cases and that the defendant would likely never be released from prison was clear error under Jones, as the trial court implicitly recognized in McCahon. The likely sentences were valid mitigation in themselves

and also served to mitigate the convictions in Cornell and Giddens which the state used in aggravation.[1]

In White, the defense tried to introduce a small picture of the miscarriage of Bridget Chapman's and Johnson's baby. This picture was very special to Appellant, and it would demonstrate the impact that the miscarriage had on him. The prosecutor objected that the picture was prejudicial and that the jury had already heard evidence about the miscarriage. The judge would not allow the picture as evidence, even though he recognized that it was specially significant to Johnson. Upon defense request, however, the court did allow evidence that the picture had written on it, "My first kid. I thank God for her." (W 5981-84, 5998, 8632)

Disallowing this evidence was error because it corroborated and emphasized the devastating effect that the miscarriage had on Johnson. He kept this picture in his wallet, often showed it to others, always talked about the child, and visited her grave often. (W 5833, 5913-14, 5997) He sent a Mother's Day card to Bridget from Emmanuelle, the child depicted in the photo. (W 5913) After the miscarriage, Bridget thought that Emanuel became distant and may have blamed himself for not taking her to the hospital. (W 5914-15) Emanuel also had a car accident at that time, and his brother, Kenneth, noticed that he seemed changed after the accident and miscarriage. (W 5833) Consequently, this picture was valid

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[1] At sentencing, the trial court did in fact impose lengthy prison terms upon Appellant, including multiple life sentences on several of the charges. (W 6238-6246)

mitigation because it showed how Appellant may have become unbalanced by the death of his child.

As with other evidence, the test for the admissibility of photographs is relevancy. Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990). To be relevant, photographs must be probative of an issue in the case. Wilson v. State, 436 So. 2d 908, 910 (Fla. 1983). This picture was probative of an issue and therefore relevant. Given the multitude of duplicative, bloody, and grotesque photographs that the State introduced in the guilt phase about matters that the State's witnesses had already orally discussed at length for the jurors, the State could not fairly complain when the defense tried to introduce one small picture in the penalty phase.

In both White and McCahon, the court would not admit as evidence a Mississippi hospital record of a 1977 suicide attempt when Johnson was thirteen years old, and he was admitted to the hospital after taking twelve sleeping pills. The court ruled that the medical records would not add to Appellant's mother's testimony. (W 5986-88, 8675-76, M 5979) The court also disallowed 1989 medical records from the Sarasota jail that Johnson had slashed his wrists and was taken to the hospital, where he chewed out his stitches. The court and the prosecutor believed the records should be excluded not because they were hearsay but because they did not speak for themselves and were unclear. (W 6011-88, 8677-84, M 5979)

Exclusion of this evidence was error. Evidence of suicide attempts is valid mitigation, because it helps to establish that the defendant may be mentally unbalanced or may be remorseful.

Evidence of suicide attempts was introduced at trial as mitigating evidence and implicitly approved by this Court in Daugherty v. State, 419 So. 2d 1067 (Fla. 1982). Because the evidence was excluded, the defendant had no evidence at all of the jail suicide attempt and only the mother's testimony on the Mississippi attempt. Her testimony of course lacked the credibility that the objective medical records had. See Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986).

Hearsay is admissible in a capital penalty phase if it has probative value. § 921.141(1), Fla. Stat. (1987). The medical records had probative value, and the prosecutor's objection that these records were unclear is mystifying. One record squarely said that Johnson was admitted to the hospital after taking an overdose of pills. The other squarely said that Johnson had slashed his wrists in the jail and later chewed out his stitches. Appellant does not know how these records could be clearer. Certainly, the prosecutor could have called his own witnesses from the jail if he believed that the jail records should be rebutted in any way.

The judge also would not allow evidence of studies that showed the death penalty does not function well as a deterrent. (W 1800-1806, 6713-6714, M 1799-1805) Many people, such as juror Lahiff in White (W 3503) and juror Hanaway in McCahon (M 3637), incorrectly think that the death penalty functions as a deterrent to others. It is proper mitigation to argue that, under the circumstances of a particular case, a person's life should not be taken simply to deter others from committing the crime and that, furthermore, the

death penalty does not deter others from committing the crime. "[T]here is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" Skipper, 476 U.S. at 7, quoting Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). The defense was also entitled to correct the common misconception of jurors on this point. It would certainly be a miscarriage of justice and a violation of the Eighth and Fourteenth Amendments if jurors voted for death based on their own misunderstanding of the deterrent effect of capital punishment.

A similar conclusion applies to the evidence the defense wished to present that imposing the death penalty was more expensive than imprisoning the defendant for life. (W 1800-1806, M 1799-1805) Many jurors believe that the death penalty should be imposed because it is cheaper than a life sentence, and those that realize the truth of the matter are more likely to be in favor of life. For example, prospective juror Fitzwater said in White, "[B]y the time you go through three, four, five appeals, and it costs I have read three million dollars, where we can house that prisoner in the state pen, as a taxpayer, I would just as soon do that as pay the money for the appeals." (W 3788) By contrast, juror Revels in McCahon thought that death was appropriate because, "I'm a taxpayer and I understand that it takes a lot of money to keep these people in that have committed a murder." (M 3589) Similarly, juror Tigges said, "I hate to say that, because we should not take anybody's life, but if you really think, you know,

cost a lot of money to keep a person for years and years and--." (M 3724)

The widely shared belief that death should be imposed because it is cheaper than life is a horrible idea and a nonstatutory aggravating circumstance and therefore cannot be considered. The defense should be allowed to combat this wide-spread misconception and be allowed to present evidence against this nonstatutory aggravating circumstance. By analogy to Jones, if evidence that the defendant will spend his life in jail is admissible to counteract the mistaken belief that the defendant might get out and commit more crimes, then evidence that death is more expensive is relevant to counteract the nonstatutory aggravating circumstance and the mistaken belief by many jurors that death is appropriate because it is cheaper. In any event, permitting any juror to vote for death based on the false belief that death is cheaper is a grotesque travesty and a violation of the Eighth and Fourteenth Amendments.

The sentencer in a capital case may not be precluded from considering, and may not refuse to consider, any relevant evidence which the defense offers as a reason for imposing a sentence less than death. Parker v. Dugger, 498 U.S. 308, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991); McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); Lockett. This Court has held that "[T]he only limitation on introducing mitigating evidence is that it be relevant to the case at hand . . . ." King v. State, 514 So. 2d 354, 358 (Fla. 1987) (emphasis added). See also

O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989) and Harvard v. State, 486 So. 2d 537 (Fla. 1986). Appellant has demonstrated that the argument and evidence he wished to present to his sentencing jury was relevant to the penalty determination. The trial court's disallowing of this evidence and argument violated constitutional principles, and the result must be new penalty proceedings for Appellant in both cases.

ISSUE II

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INJECT IRRELEVANT AND HIGHLY PREJUDICIAL FACTORS INTO APPELLANT'S PENALTY PROCEEDING THROUGH ITS IMPROPER CROSS-EXAMINATION OF A DEFENSE WITNESS AND ITS IMPROPER ARGUMENT TO THE JURY.

At least twice during Appellant's penalty phase, the prosecution injected into the proceedings irrelevant and highly inflammatory matters that tainted the jury's death recommendation herein and rendered unreliable the resulting sentence of death. The first such incident occurred during the State's cross-examination of one of the defense witnesses, Bridget Chapman, with whom Appellant had lived prior to his arrest and by whom he had a son, Emanuel Johnson, Jr. Bridget offered testimony concerning Appellant's good work record, and the fact that he was a loving companion to her, and an excellent father figure to Emanuel, Jr., as well as to Bridget's daughter, Crystal, from a previous relationship. (W 5901-5920) Prior to cross-examining the witness, the prosecutor stated that he wished to elicit testimony to show Appellant's "violent tendency toward this woman." (W 5920-5923) Over defense objections, the prosecutor then cross-examined Bridget Chapman as follows (W 5923-5926):

> Q Ms Chapman, during the four years that you lived with Emanuel Johnson, isn't it true that you and Emanuel Johnson fought, you had fights?
>
> A Well, we, over the three years and about 7 months we was together, we had one--we had one fight, and then we had an argument. It was nothing serious.

Q In fact, it was two fights, wasn't it?

A Two fights, well, no. I say on the second one, maybe he hit me and I hit him back, and that was about it. It was no big fight or anything.

Q These fights were violent.

A No; there was nobody bleeding or anything, no broken bones.

Q He hit you with his fist?

A No; I think it was with an open hand more.

Q Do you remember giving a deposition to me?

A I don't know exactly. I remember in the office that day.

Q Do you remember March 14, 1990, you coming down to our office?

A Yes.

Q Do you remember the defense attorney, Tobey Hockett, being present?

A Yes.

Q Do you remember being sworn in at that time?

A Yes.

Q Do you remember telling me at that time that he struck you with his fist?

A No.

MR. TEBRUGGE [Defense counsel]: Your Honor, objection. The prosecuting attorney must show the witness the statement before impeaching her.

THE COURT: That is not correct as far as impeaching with a deposition.

He can read and give the question and the answer.

THE WITNESS: Well. I don't think I could have said a fist. I think it was more of an open hand.

Q Do you remember these questions: Would he get violent during these fights?
Answer: We fought.
Describe how you would fight?
We just fought every--he fought, I fought.
Question: Physically, he hit you?
Yeah; I hit him, too.
Did he ever hurt you?
No.
How would he hit you?
How? I guess with his fist. We were fighting.
He would punch you?
I wouldn't say he would punch me hard. He might have hit me a few times, but nothing, no black eyes, no bloody nose or anything like that, no.

A That's exactly what I'm saying here now. We had a fight, but it was nothing serious. We would both fight. [H]e would hit me and I would hit him back.

Q He hit you with his fist, correct?

A I don't know whether it was his fist or with his open hand.

[Whereupon, the court sustained a defense objection on the basis that the questions had been asked and answered.]

The problem with the cross-examination undertaken by the prosecutor below is that it did not address the subjects broached by the defense on direct. That is, Bridget Chapman did not testify regarding Appellant's non-violent character, or his non-violent conduct toward her, and so it was improper for the State to present to the jury evidence of specific acts of violence allegedly perpetrated by Appellant. See Weatherford v. State, 561 So. 2d 629 (Fla. 1st DCA 1990); Francis v. State, 512 So. 2d 280 (Fla. 2d DCA

1987); Kruse v. State, 483 So. 2d 1383 (Fla. 4th DCA 1986). Furthermore, any marginal relevance the above-quoted testimony may have had was far outweighed by its prejudicial impact (see section 90.403, Florida Statutes), serving as it did to portray Appellant in an extremely damaging light as one who brawled with a woman, and suggesting that Appellant was guilty of a collateral crime (battering Bridget Chapman), when there was no evidence that he had ever been charged with that offense, let alone convicted.

The prosecutor suggested to the jury that Appellant may have been guilty of another uncharged offense in his penalty phase closing argument when he referred to Appellant having inflicted "wounds to the anus, to the vaginal area of Iris White for his own purpose." (W 6090)[2] He further stated that Dr. Clack had testified that Appellant "used his hand...to pry open those orifices." (W 6090) He continued: "What was going through this sensitive man's mind as he attacked Iris White's pubic area and left his pubic hair in hers[?]" (W 6090-6091)[3]

Again, Appellant had not been charged with, let alone convicted of, any offense involving sexual improprieties against Iris White. It was highly prejudicial for the State to inject into the penalty proceedings below the emotionally-charged suggestion

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[2] Dr. William Pearson Clack, the medical examiner, testified that although the injuries in question were "most likely a part of the overall injury pattern" to Iris White near the time of her death, he could not "completely exclude the possibility of those injuries having occurred in some other fashion." (W 5446)

[3] Although defense counsel did not object to the prosecutor's comments at the time they were made, he did subsequently move for a mistrial, which the court denied. (W 6130)

that Appellant was guilty of sexually battering this elderly white female.

As this Court stated in Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990):

> Evidence of collateral crimes, wrongs, or acts committed by the defendant is admissible if it is relevant to a material fact in issue; such evidence is not admissible where its sole relevance is to prove the character or propensity of the accused.

The evidence elicited from Bridget Chapman, and the argument advanced by the State in closing, were not relevant to any material fact in issue at Appellant's penalty phase and should not have been permitted.

In Craig v. State, 510 So. 2d 857, 863 (Fla. 1987) this Court noted that evidence of collateral crimes "is given special treatment because of the danger of prejudicing the accused...by depicting him as a person of bad character..." The Court further noted that the jury's attention "should not be diverted by information about unrelated matters." 510 So. 2d at 863.

Furthermore, this Court has recognized that erroneous admission of irrelevant collateral crimes evidence "is presumed harmful..." Straight v. State, 397 So. 2d 903, 908 (Fla. 1981). Accord: Keen v. State, 504 So. 2d 397, 401 (Fla. 1987); Peek v. State, 488 So. 2d 52, 56 (Fla. 1986). See also Nickels v. State, 90 Fla. 659, 106 So. 479 (Fla. 1925); Dixon v. State, 426 So. 2d

1258 (Fla. 2d DCA 1983).[4] Appellant presented a substantial case in mitigation at his penalty phase to offset the State's case in aggravation; the trial court himself found no less than 15 mitigating circumstances in his sentencing order. (W 8813-8814) Therefore, the improper testimony and argued presented by the State cannot be considered harmless; it might well have tipped the balance against Appellant and resulted in the death recommendation herein. Appellant's sentence of death must be vacated in favor of a new penalty proceeding (or a life sentence).

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[4] Pursuant to section 90.404(2)(b)1., when the State intends to introduce evidence of collateral wrongdoing allegedly committed by the defendant, it must provide him with written notice of same at least 10 days before trial. The record does not reflect that Appellant was provided with the required notice.

ISSUE III

THE COURT BELOW USED AN INCORRECT LEGAL STANDARD IN REJECTING THE MENTAL DISTURBANCE MITIGATOR AND SHOULD INSTEAD HAVE FOUND IT TO EXIST.

The court below refused to find that the extreme mental disturbance mitigator existed. This refusal was error, as the defense argued in its sentencing memorandum in both White and McCahon.

> Testimony . . . showed that the Defendant was a very sensitive young man. At the age of 13 the Defendant attempted suicide by taking an overdose of his mother's medication because he felt that she did not love him any longer. . . . [F]ollowing the miscarriage of [his] first child . . . he grieved excessively. . . . [He] took photographs of the dead child and sent copies of these photographs to other family members. . . . [He] visited the child's grave on a daily basis. . . . [F]ollowing the miscarriage, [he] became distant and withdrawn.
>
> The crimes themselves show that they were a product of mental confusion. For instance, in [McCahon], the alleged motive of the offense was robbery. However, the Defendant had just given the victim a large sum of money prior to the crime occurring. It makes no sense that [he] would give [her] $120, only to return a few hours later in order to kill her to get $60 back. Likewise, in [White], the alleged motive was robbery. However, the testimony showed that [he] left the residence after the killing and did not take any money with him. He later returned to the residence in order to take money. If the primary motivation for the offense was robbery, then clearly [he] would have taken the property with him in the first instance. Instead, it is clear that the crimes were the product of mental confusion. This is further demonstrated by the number of wounds to the victim. Far more wounds were inflicted than were necessary to cause death. The number of wounds to each victim would indicate that these were acts of rage as opposed to rational robbery based killings.
>
> Furthermore, ample evidence to support this mitigating factor [is] found in [his] confession. . . . [H]e vividly describes the pressure in his head. He tells the police how the pressure has been building up for a long time and how he has tried to talk with people about it but that no one would listen. He describes to the police

being able to control this pressure initially but gradually losing control which ultimately resulted in the homicides. [He] ends his confession with a final plea that "maybe I can get some help now and not just be locked up in some cell."

Following [his] arrest it was necessary to treat him with the antipsychotic medication Mellaril. This treatment had some beneficial effect upon [him] and ultimately . . . was discontinued. However, following the discontinuation of the medication, [he] attempted suicide in the jail by slashing his wrist. [He] was transported to the hospital and his wrist was stitched up. Thereafter, [he] chewed the stitches out of his wrist with his teeth. Furthermore, throughout the pendency of this case [he] has frequently exhibited bizarre or unusual behavior which has led his attorneys to repeatedly suggest . . . that he was not competent to proceed. [He] refused to cooperate with the competency examination ordered by the Court as he would not speak with the Court appointed psychiatrist. This does not change the fact that [he] has a severe mental disturbance. There is sufficient evidence in the record to allow for the Court to find this mitigating circumstance even without specific psychiatric testimony as to this point. See Campbell v. State, 571 So. 2d 415 (Fla. 1990) (where defendant attempted suicide in jail and was subsequently placed on thorazene, a high potency antipsychotic drug, the trial court erred in failing to recognize that Campbell suffered from impaired capacity).

(W 8773-75, M 8589-8591)

This evidence of mental disturbance was entirely unrebutted. In rejecting this mitigator, the judge found only that no evidence was presented that

> the Defendant had ever discussed any emotional pressures with his family members as alleged in his confession. Additionally, the Defendant was examined by numerous psychological experts but no psychological testimony from any experts was presented to the Court. The Court did consider the statements in the Defendant's confession that he was suffering from a great deal of pressure and further, his treatment with an antipsychotropic medication during his initial incarceration. These factors convinced the Court to consider that the Defendant was suffering from mental problems that did not rise to the level of extreme mental or emotional disturbance.

(W 8814-15)

Thus, the judge rejected the mental mitigator because the defense did not further corroborate the unrebutted evidence of mental disturbance. This was a clear mistake of law, because the judge's reasoning relied solely on negative evidence and the law required "positive evidence" to rebut the defense evidence. Cook v. State, 542 So. 2d 964, 971 (Fla. 1989). The test was not whether the defense corroborated its unrebutted evidence but rather whether positive record evidence existed to rebut the defense showing and thereby support the court's refusal to find the mitigator. Tellingly, the judge did not and could not point to the immediate circumstances of the crime to rebut this mitigating factor, because, as the defense sentencing memorandum pointed out, these circumstances themselves revealed that the defendant was acting under the influence of a severe mental disturbance.

> [W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances."

Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) (citation omitted).

The judge's reliance solely on negative evidence was particularly faulty because it drew conclusions from the defense decision not to call its psychiatric expert. This decision might have had many reasons. For example, the defendant might have refused to allow his lawyers to call the expert, the expert might not have been an effective witness, or the defense might have believed that

it would waive its objections to the admission of the confession in the guilt phase if it called the expert in the penalty phase. A trial judge may not draw legal conclusions from tactical defense decisions of this sort. Moreover, the defense was correct that this mitigating circumstance did not necessarily require expert testimony to establish it.

In Walls v. State, 19 Fla. L. Weekly S377 (Fla. July 7, 1994), this Court recently noted a distinction between factual testimony or evidence and opinion evidence. A trial court may reject opinion evidence, but "[a]s a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory. [Citation omitted.] This rule applies equally to the penalty phase of a capital trial. [Citation omitted.]" 19 Fla. L. Weekly at S380. Thus, if Appellant had relied upon expert opinion testimony to support the mitigator in question, the trial court could have rejected this evidence. He was not free, however, to discount the factual evidence Appellant presented where it did not suffer from the infirmities identified by this Court in Walls. Because the trial court should have found this mitigating factor but did not, Appellant's sentence of death must not be permitted to stand.

ISSUE IV

APPELLANT'S CAUSE WAS SUBMITTED TO HIS SENTENCING JURY UPON INCOMPLETE AND MISLEADING INSTRUCTIONS, RESULTING IN AN UNRELIABLE PENALTY RECOMMENDATION AND AN UNCONSTITUTIONAL DEATH SENTENCE.[5]

The trial court has a fundamental responsibility to give the jury full, fair complete and accurate instructions on the law. Foster v. State, 603 So. 2d 1312 (Fla. 1st DCA 1992). This obligation is not necessarily met by merely reading the Florida Standard Jury Instructions to the jurors; while the standard charges are presumed to be accurate, they are not always so. See Yohn v. State, 476 So. 2d 123 (Fla. 1985) (standard jury instruction on law of insanity incorrect); Sochor v. Florida, 504 U.S. ___, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992) (standard instruction defining statutory aggravating circumstance in terms of "especially wicked, evil, atrocious or cruel" unconstitutionally vague).

> While the standard jury instructions are intended to assist the trial court in its responsibility to charge the jury on the applicable law, the instructions are intended only as a guide, and can in no wise relieve the trial court of its responsibility to charge the jury correctly in each case.

Steele v. State, 561 So. 2d 638, 645 (Fla. 1st DCA 1990). The court below relied too heavily upon the standard instructions in charging Emanuel Johnson's penalty phase jury. This resulted in the jury not being properly instructed, and its penalty recommenda-

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[5] The improper jury instruction that was given to Appellant's jury on the especially heinous, atrocious or cruel aggravating circumstance is dealt with separately in this brief in Issue VI.

tion therefore being unreliable, tainting the sentence of death imposed by the court.

A. Instruction on "mental" mitigation

Through his counsel, Appellant requested the trial court to instruct the jury on both of the "mental" mitigating circumstances set forth in section 921.141(6) of the Florida Statutes, with modifications. He asked that the word "extreme" be deleted from the factor dealing with extreme mental or emotional disturbance, and that the word "substantially" be deleted from the factor dealing with impairment of the ability to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law. (W 5864-5866, 6044-6047, 8488) The court refused to change the standard instructions on these circumstances, and refused to instruct at all on the section 921.141(6)(f) statutory mitigating factor, even though defense counsel argued that this circumstance was probably more suited to the evidence presented than was the section 921.141(6)(b) mitigating circumstance. (W 5864-5866, 6044-6047, 8488) The court instead instructed the jury on mitigation as follows (W 6107-6108):

> Among the mitigating circumstances you may consider if established by the evidence are:
>
> One, the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> Two, the age of the defendant at the time of the crime.

> Three, any other aspect of the defendant's character or record, and any other circumstance of the offense.[6]

The problem with the standard instructions given below is that they unduly limited the jury's consideration of the evidence Appellant presented as to the "mental mitigators." (This evidence is discussed is Issue III in this brief.) The content and placement of the instructions misled the jury into thinking that, if the mental or emotional disturbance was not extreme, then it could not be considered in mitigation, or at least was not important.

A sentencer cannot be precluded from considering, and may not refuse to consider, valid mitigating evidence. Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). In Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990), this Court made it clear that, in order for capital sentencing statutes to pass constitutional muster, "...any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say." [Emphasis in original.] A judicial instruction that the jury should not consider a particular form of

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[6] The trial court's overly narrow view of the applicability of the mental mitigating circumstances can be seen not only in the way in which he instructed the jury, but in his written sentencing order. There he found that Appellant suffered from "mental pressure which did not reach the level of statutory mitigating factors." (W 8814) He cited certain "factors [which] convinced the Court to consider that the Defendant was suffering mental problems that did not rise to the level of extreme mental or emotional disturbance." (W 8815) The court's rejection of the section 921.141(6)(b) aggravating circumstance is dealt with fully in Issue III in this brief.

mitigating evidence is plain error. Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987). And it is essential that the jury be instructed in such a way as to give effect to the mitigating evidence presented--the jury must know that it can consider mental mitigation that does not necessarily rise to the level of the statutory mitigating circumstances. See Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989); Eddings.

In Penry the Supreme Court held the petitioner's death sentence to be constitutionally infirm where the standard jury instructions failed to apprise Penry's jury that it could consider evidence of his mental retardation and abused background as mitigating circumstances. The court stated:

> In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response to that evidence in rendering its sentencing decision. Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not "risk that the death penalty may be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 US, at 605, 57 L Ed 2d 973, 98 S Ct 2954, 9 Ohio Ops 3d 26; Eddings, 455 US, at 119, 71 L Ed 2d 1, 102 S Ct 869 (O'Connor, J., concurring). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 US, at 605, 57 L Ed 2d 973, 98 S Ct 2954, 9 Ohio Ops 3d 26.

106 L. Ed. 2d at 284.

As in Penry, the standard jury instructions in this case did not sufficiently apprise Appellant's jury to consider his mental state, which may not have risen to the level of the statutory mitigating circumstances, as a nonstatutory mitigating factor. The catchall referred only to any other aspect of Appellant's character, and therefore did not save the initial misleading instruction on the mental mitigator. Pursuant to the catchall, only other aspects of Appellant's character could be considered, not any non-extreme mental or emotional disturbance, as this was already covered in the previous instruction, which said that the disturbance had to be extreme. The jury's death recommendation thus is unreliable, and Appellant's death sentence has been imposed in violation of the United States and Florida Constitutions. Art. I, §§9, 16, 17 and 22, Fla. Const.; Amends. V, VI, VIII and XIV, U.S. Const. His death sentence must be vacated.[7]

B. Failure to instruct on standard of proof by which jury should weigh aggravation and mitigation

The defense argued that the standard jury instructions erroneously failed to inform the jury that it could not recommend death unless the aggravation outweighed the mitigation beyond a reasonable doubt. (M 1806-07, 5785, 6550, 8519, W 5754, 6042, 6710)

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[7] Appellant is aware that in Stewart v. State, 558 So. 2d 416 (Fla. 1990), this Court found no error in the trial court's refusal to modify the standard instructions regarding the section 921.141-(6)(b) and (f) mitigating circumstances by deleting the qualifiers "extreme" and "substantially," but feels that this issue must be revisited in the context of his case, and, of course, must raise the issue here in order to preserve it for possible later review in another forum.

The standard jury instructions told the jury to "weigh the aggravating circumstances against the mitigating circumstances." (W 6108) Aggravating circumstances had to be proved beyond a reasonable doubt; mitigating circumstances were proved if the jury was "reasonable convinced [sic]" that they existed. (W 6108) The instructions, however, did not say by what standard the jury should determine that the aggravation outweighed the mitigation. (W 6105-6111) The standard of proof might have been "more likely than not," or "clearly and convincingly," or "beyond a reasonable doubt." Because the instruction was and is subject to these different interpretations, different juries--and indeed, different jurors within the same jury--would likely use different standards, resulting in arbitrary and nonuniform sentencing. Certainly, a strong instruction that the aggravation must outweigh the mitigation "beyond a reasonable doubt" would have had a substantially greater effect on the jury than a weak instruction that the aggravation must "more likely than not" outweigh the mitigation. "Instructions which establish no guidance for the consideration of mitigating circumstances . . . activate the admonition against a procedure that would 'not guide sentencing discretion but [would] totally unleash it.'" Brown v. State, 565 So. 2d 304, 308 (Fla. 1990) (citation omitted).

The Supreme Court said of the Georgia death penalty scheme in Zant v. Stephens, 462 U.S. 862, 891, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), that "the Constitution does not require a State to adopt specific standards for instructing the jury in its consider-

ation of aggravating and mitigating circumstances." Unlike Florida, however, Georgia is not a weighing state, and, in this context, Stephens meant that the Constitution does not require states to weigh aggravation and mitigation. In weighing states, by contrast, juries must be told by what standard the aggravation must outweigh the mitigation, because the state must "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Lewis v. Jeffers, 497 U.S. 764, 774, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990) (citations omitted).

> [T]he difference between a weighing State and a nonweighing State is not one of "semantics" . . . but of critical importance. . . . [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume that it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer v. Black, 503 U. S. _____, 112 S. Ct. _____, 117 L. Ed. 2d 367, 379 (1992) (emphasis added) (citation omitted). In the present cases, the weighing process was skewed and constitutional error occurred, because the jury was not given "specific and detailed guidance" on how to conduct the weighing.

Even if the error was not of federal constitutional dimension, this Court should decide as a matter of Florida law that the appropriate weighing standard is "beyond a reasonable doubt." This

Court in Arango v. State, 411 So. 2d 172 (Fla. 1982), said that the standard instructions do not unconstitutionally shift the burden of proof to the defendant, but it did not say what the burden of proof was on the State to prove that the aggravation outweighed the mitigation. Arango implied, however, that the aggravation must outweigh the mitigation by the same standard that the aggravation must be established, namely, beyond a reasonable doubt. This Court should now make this implication the law and reverse for a new penalty phase.

C. Shifting of burden of proof to defense to establish that mitigation outweighed aggravation

The defense objected to the standard jury instruction which required the jury to determine "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (W 5761, 5846, 6042, M 5783, 5785, 6015) The standard instruction put the burden on the defendant to establish that the mitigation existed and it then told the jury to determine whether this mitigation outweighed the aggravation. The burden was thus on the defendant to show that the mitigation outweighed the aggravation. As the defense pointed out, it also failed to explain what should happen if the aggravation equaled the mitigation.

Placing the burden on the defendant was unconstitutional under state and federal law. Shifting the burden of proof to the

defendant is dangerous. Jackson v. Dugger, 837 F. 2d 1469 (11th Cir. 1988).[8]

Failing to tell the jury what to do when the aggravation equaled the mitigation was also improper. It was similar to the mistaken instruction that seven or more jurors had to agree on the jury's recommendation. Harich v. State, 437 So. 2d 1082 (Fla. 1983). Because the instructions were misleading and incomplete, remand is necessary for a new penalty phase.

D. Improper denigration of jurors' role in sentencing process

The standard jury instructions repeatedly stated that the penalty phase jury's recommendation was only advisory and that the final decision on punishment belonged to the judge. The judge repeatedly overruled defense objections that these instructions improperly denigrated the jury's role. (W 5756-60, 5845, 8325-8326, M 4766-69, 4797, 5779-85) He also refused to instruct the jury that its recommendation was entitled to great weight. (W 6053-58, 8474, 8482, M 5782) See Tedder v. State, 322 So. 2d 908 (Fla. 1975).

In Florida, a jury's recommendation of life can be overridden only if virtually no reasonable person could differ on the appropriateness of imposing death. Tedder. The jury is a co-sentencer with the judge. Espinosa v. Florida, 505 U.S. _____, 112 S. Ct.

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[8] Appellant recognizes that this Court has rejected the argument he makes here in Arango v. State, 411 So. 2d 172 (Fla. 1982), but asks the Court to reconsider this issue, and raises it here for preservation purposes.

_____, 120 L. Ed. 2d 854 (1992); Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). Consequently, the standard jury instructions misled the jury and deceptively suggested that its recommendation was mere advice which the judge could ignore. The jury was incorrectly "led to believe that the responsibility for determining the appropriateness of the defendant's death rest[ed] elsewhere." Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). The court should have given the requested defense instruction, which would have corrected the misleading impression created by the standard instructions.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), cert. denied, 489 U.S. 1071, 109 S. Ct. 1353, 103 L. Ed. 2d 821 (1989), the court vacated a death sentence because the jury was misled about its role in the sentencing procedure. Under the circumstances, the denial of certiorari strongly suggested that the higher court agreed with Mann. Appellant recognizes that Combs v. State, 525 So. 2d 853 (Fla. 1988), rejected this argument, but this Court should recede from Combs, and remand for a new penalty phase with proper instructions to the jury.

ISSUE V

THE FELONY MURDER AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONAL, AS IT FAILS TO GENUINELY NARROW THE CLASS OF INDIVIDUALS WHO MAY BE SENTENCED TO DEATH. THE COURT BELOW THEREFORE ERRED IN INSTRUCTING APPELLANT'S JURY ON THIS FACTOR, AND ERRED IN FINDING IT TO EXIST IN HIS SENTENCING ORDER.

The defense argued that the felony murder aggravator was unconstitutional and the jury should not be instructed on it because it duplicated an element of the crime and therefore failed to narrow the class of death-eligible persons. (M 1806-07, 5788, 6547, W 5754, 5852, 6042, 6707) At least three state courts have agreed with this argument. State v. Cherry, 257 S. E. 2d 551 (N.C. 1979); Engberg v. Meyer, 820 P. 2d 70 (Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992)

This Court has agreed with an almost identical argument in the context of the coldness aggravating circumstance.

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2742, 77 L. Ed. 2d 235 (1983) (footnote omitted). Since premeditation already is an element of capital murder in Florida, section 912.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder. Therefore, section 921.141(5)(i) must apply to murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first degree murder.

Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990) (footnotes omitted). Logically, if the coldness aggravating circumstance is

constitutional only because it requires proof of more than mere premeditation, then the felony murder aggravator is unconstitutional because it is does not require proof of more than felony murder.

The United States Supreme Court has approved the Louisiana felony murder aggravator. Lowenfield v. Phelps, 484 U. S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988). In Louisiana, however, the narrowing function occurs during the guilt phase. Louisiana's procedure is different from Florida's, in which the narrowing does not occur until sentencing. Stringer v. Black, 117 L. Ed. 2d 367, 378-83 (1992). Accordingly, Lowenfield is inapplicable to Florida, and the felony murder aggravator in Florida functions as the unconstitutional, non-narrowing "thumb [on] . . . death's side of the scale" which Stringer condemned. 117 L. Ed. 2d at 379.

The judge instructed the jury on this aggravator and later found it to exist. (M 8791, W 8812) Accordingly, error occurred, and remand is necessary for a new penalty phase jury and for a new sentencing order.[9]

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[9] Appellant is aware that this Court has rejected similar arguments regarding the constitutionality of the felony murder aggravating circumstance. Parker v. Dugger, 537 So. 2d 969 (Fla. 1989); Bertolotti v. State, 534 So. 2d 386 (Fla. 1988). However, he asks the Court to reconsider the issue, and also raises it for the purpose of preserving the point for possible future litigation in another forum.

ISSUE VI

EMANUEL JOHNSON'S DEATH SENTENCE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AS WELL AS ARTICLE I, SECTIONS 9 AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA, BECAUSE THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE IS VAGUE, IS APPLIED ARBITRARILY AND CAPRICIOUSLY, AND DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY. FURTHERMORE, THIS AGGRAVATING FACTOR WAS SUBMITTED TO JOHNSON'S JURY UPON AN IMPROPER AND INADEQUATE INSTRUCTION.

During Appellant's penalty phase jury charge conference, defense counsel took the position that Appellant's jury should not be instructed on the especially heinous, atrocious or cruel aggravating circumstance, arguing that it is unconstitutionally vague, and citing the Supreme Court's decision in Maynard v. Cartwright [486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988)]. (W 5786, 5858) Counsel also argued that the evidence was insufficient to support the giving of a charge on this aggravator. (W 5859-5864) The court overruled the defense objections, and submitted this factor for Appellant's penalty phase jury to consider upon the following instruction (W 6107):

> Three, the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> Heinous menas [sic] extremely wicked or shockingly eveil [sic].
>
> Atrocious means outraageously [sic] wicked and vile.
>
> Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.

> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional facts that show the crime was conscienceless or pityless [sic] and was unnecessarily torturous to the victim.

The trial court also found the HAC circumstance to exist in his order sentencing Appellant to death. (W 8812-8813)

In Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), the United States Supreme Court upheld Florida's death penalty statute against an Eighth Amendment challenge, indicating that the required consideration of specific aggravating and mitigating circumstances prior to authorization of imposition of the death penalty affords sufficient protection against arbitrariness and capriciousness:

> This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." 428 U.S. at 195 n. 46, 49 L.Ed.2d 859, 96 S.Ct. 2909. To avoid this constitutional flaw, an aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235, 249-250 (1983) (footnote omitted). See also Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). As it has been applied, however, Florida's especially heinous, atrocious or cruel aggravating factor has not passed constitutional muster under

the above-stated principles, as it has not genuinely limited the class of persons eligible for the ultimate penalty. This fact is evidenced by the inconsistent manner in which this Court has applied the aggravator in question, resulting in a lack of guidance to judges who are called upon to consider its application in specific factual settings. The standard of review has vacillated. For instance, in Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), this Court stated that application of the HAC statutory aggravating factor "pertains more to the victim's perception of the circumstances than to the perpetrator's," 578 So.2d at 692, whereas in Mills v. State, 476 So. 2d 172, 178 (Fla. 1985), the analysis concerned the perpetrator's intent: "The intent and method employed by the wrong-doers is what needs to be examined."

As this Court stated in Smalley v. State, 546 So. 2d 720 (Fla. 1989), the Supreme Court of the United States upheld the facial validity of the HAC factor in Proffitt against a vagueness challenge because of the narrowing construction this Court set forth in State v. Dixon, 283 So. 2d 1 (Fla. 1973). However, in Sochor v. Florida, 504 U.S. ____, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992), the Supreme Court strongly suggested that this Court has not adhered to the limitations purportedly imposed upon HAC in Dixon:

> In State v Dixon, 283 So 2d 1 (1973), cert denied, 416 US 943, 40 L Ed 2d 295, 94 S Ct 1950 (1974), the Supreme Court of Florida construed the statutory definition of the heinousness factor:
>
> > "It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain

> with utter indifference to, or even enjoyment of the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless of pitiless crime which is unnecessarily torturous to the victim." 283 So 2d, at 9.
>
> Understanding the factor, as defined in Dixon, to apply only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim," we held in Proffitt v Florida, 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960 (1976), that the sentencer had adequate guidance. See id., at 255-256, 49 L Ed 2d 913, 96 S Ct 2960 (opinion of Stewart, Powell, and Stevens, JJ.).
>
> Sochor contends, however, that the State Supreme Court's post-Proffitt cases have not adhered to Dixon's limitation as stated in Proffitt, but instead evince inconsistent and overbroad constructions that leave a trial court without sufficient guidance. And we may well agree with him that the Supreme Court of Florida has not confined its discussions on the matter to the Dixon language we approved in Proffitt, but has on occasion continued to invoke the entire Dixon statement quoted above, perhaps thinking that Proffitt approved it all. [Citations omitted.]

119 L. Ed. 2d at 339 [emphasis supplied].

The Supreme Court has also indicated in other post-Proffitt cases that even definitions such as those employed in Dixon are not sufficiently specific to enable an aggravator like HAC to withstand a vagueness challenge. Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990); Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988).

Deaths by stabbing, such as this case involves, provide but one of many specific examples which could be cited of the Court's

failure to apply the section 921.141(5)(h) aggravating circumstance in a rational and consistent manner. In cases such as Nibert v. State, 574 So. 2d 1059 (Fla. 1990), Mason v. State, 438 So. 2d 374 (Fla. 1983), and Morgan v. State, 415 So. 2d 6 (Fla. 1982), the Court has approved findings of especially heinous, atrocious, or cruel where the deaths resulted from stabbings. In Wilson v. State, 436 So. 2d 908 (Fla. 1983), however, a killing that resulted from a single stab wound to the chest was held not to be especially heinous, atrocious or cruel. In Demps v. State, 395 So. 2d 501 (Fla. 1981) the victim was held down on his prison bed and knifed. Even though he was apparently stabbed more than once (the opinion refers to "stab wounds" (plural) 395 So. 2d at 503), and lingered long enough to be taken to three hospitals before he expired, this Court nevertheless found the killing not to be "so conscienceless or pitiless' and thus not apart from the norm of capital felonies' as to render it especially heinous, atrocious, or cruel' [citations omitted]." 395 So. 2d at 506. See also opinion of Justice McDonald concurring in part and concurring in the result in Peavy v. State, 442 So. 2d 200 (Fla. 1983) simple stabbing death without more not especially cruel, atrocious, and heinous). [For other examples of how various aggravating circumstances have been applied inconsistently, please see MELLO, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller, XIII Stetson L. Rev. 523 (1983-84).] The result of the illogical manner in which the section 921.141(5)(h) aggravator has been applied is that sentenc-

ing courts have no legitimate guidelines for ascertaining whether it applies. Any killing may qualify, and so the class of death-eligible cases had not been truly limited.

The inconsistent rulings by this Court applying or rejecting the HAC factor under the same or substantially similar factual scenarios show that the factor remains prone to arbitrary and capricious application. These infirmities render the HAC circumstance violative of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, sections 9 and 17 of the Constitution of the State of Florida. (Please see Hale v. State, 630 So. 2d 521 (Fla. 1993), in which this Court recently noted that Florida's constitution may arguably provide greater sentencing protection than the federal constitution, as Article I, section 17 of the state constitution prohibits cruel or unusual punishment, whereas the Eighth Amendment to the United States Constitution addresses cruel and unusual punishments.) Emanuel Johnson's sentence of death imposed in reliance on this unconstitutional factor must be vacated.

Johnson's jury also was given an improper and inadequate instruction on the especially heinous, atrocious, or cruel aggravating circumstance. The instruction quoted above was similar to the modified standard instruction approved by this Court in In re Standard Jury Instructions Criminal Cases--No. 90-1, 579 So. 2d 75 (Fla. 1990), which read:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outra-

> geously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

The definitions of "heinous," "atrocious," and "cruel" were formulated by this Court in State v. Dixon, 283 So. 2d 1 (Fla. 1973), and were included in a former jury instruction on HAC, but were subsequently eliminated, apparently because the definition of "cruel" improperly invited the jury to consider evidence of lack of remorse in aggravation, Pope v. State, 441 So. 2d 1073 (Fla. 1983), only to be reinstated by this Court's opinion in In re Standard Jury Instructions Criminal Cases--No. 90-1. The former jury instruction on the section 921.141(5)(h) aggravating circumstance, which defined it in terms of "especially wicked, evil, atrocious or cruel," was held by the Supreme Court of the United States in Espinosa v. Florida, 505 U.S. ____, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992) not to pass muster under the Eighth Amendment, as it was too vague to afford sufficient guidance to the jury for determining the presence or absence of the factor. Although the court below attempted to provide Emanuel Johnson's jury with more guidance than what the former standard jury instruction afforded, the charge given was still deficient. As noted above, the Supreme Court made it clear in Sochor v. Florida that it had not approved the complete language in Dixon upon which this Court based its approval of the new standard jury instruction in In re Standard Jury Instructions

Criminal Cases--No. 90-1; specifically, the Court did not approve the Dixon definitions of "heinous," "atrocious" and "cruel." Furthermore, in Shell v. Mississippi, the Supreme Court held that a limiting instruction used by the trial court to define the "especially heinous, atrocious, or cruel" factor was not constitutionally sufficient; the concurring opinion in Shell v. Mississippi explains why limiting constructions such as that attempted in Dixon are not up to constitutional standards:

> The basis for this conclusion [that the limiting construction used by the Mississippi Supreme court was deficient] is not difficult to discern. Obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction itself "provide[s] some guidance to the sentencer." Walton v. Arizona, 497 US ___, ___, 111 L Ed 2d 511, 110 S Ct 3047 (1990). The trial court's definitions of "heinous" and "atrocious" in this case (and in Maynard [v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)] clearly fail this test; like "heinous" and "atrocious" themselves, the phrases "extremely wicked or shockingly evil" and "outrageously wicked and vile" could be used by " [a] person of ordinary sensibility [to] fairly characterize almost every murder.'" Maynard v. Cartwright, supra, at 363, 100 L Ed 2d 372, 108 S Ct 1853 (quoting Godfrey v. Georgia, 446 US 420, 428-429, 64 L Ed 2d 398, 100 S Ct 1759 (1980) (plurality opinion) (emphasis added).

112 L.Ed.2d at 5. In Atwater v. State, 626 So. 2d 1325 (Fla. 1993), this Court itself recently recognized that an instruction providing only the Dixon definitions of terms discussed above would be inadequate. Thus, the court below read to Emanuel Johnson's jury definitions which have not been sanctioned by the Supreme Court, but have been held invalid to pass constitutional muster.

The remaining portion of the charge given to the jury, telling them that "[t]he kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional facts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim[,]" failed to cure the constitutional infirmities inherent in the instruction. Although similar language from Dixon was approved as a constitutional limitation on HAC in Proffitt, its inclusion did not cure the vagueness and overbreadth of the whole instruction, which still focused on the meaningless definitions condemned in Shell. This language merely followed those definitions as an example of the type of crime the circumstance is intended to cover, but left the jury with discretion to follow the first, disapproved portion of the instruction. Even assuming this language could be interpreted as a limit on the jury's discretion, the disjunctive wording would allow the jury to find HAC if the crime was "conscienceless" even though not "unnecessarily torturous;" the word "or" could be interpreted to separate "conscienceless" and "pitiless and was unnecessarily torturous." The wording in Dixon, however, is actually different and less ambiguous, as it reads: "conscienceless or pitiless crime which is unnecessarily torturous to the victim." 283 So. 2d at 9 [emphasis supplied]. Furthermore, the terms "conscienceless," "pitiless" and "unnecessarily torturous" are also vague and subject to overbroad interpretation; a jury could easily erroneously conclude that any homicide which was not instantaneous would qualify for the HAC circumstance. Also, this Court indicated in

Pope that an instruction which invites the jury to consider if the crime was "conscienceless" or "pitiless" improperly allows the jury to consider lack of remorse in aggravation.

The Supreme Court emphasized the importance of suitable jury instructions in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976):

> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. [Footnote and citation omitted.] When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

49 L.Ed.2d at 885-886. Johnson's jury was not "carefully and adequately guided" in its deliberations; the inadequate jury instruction on HAC tainted the jury's penalty recommendation and rendered it unreliable. In Florida, the "capital sentencing jury's recommendation is an integral part of the death sentencing process," Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987), and the trial court is required to give the jury's penalty recommendation great weight. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). See also Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Riley. Thus, not only did the trial court directly weigh the invalid aggravating circumstance of HAC in her sentencing order, in according the tainted recommendation of Appellant's

sentencing jury the weight he was required to give it under the law, the trial court also necessarily indirectly weighed the invalid aggravating circumstances in the sentencing process, in violation of the constitutional principles expressed in Espinosa, in which the Supreme Court noted that when a weighing state such as Florida "decides to place capital-sentencing authority in two actors rather than one [that is, in both the jury and the judge], neither actor must be permitted to weigh invalid aggravating circumstances." 120 L. Ed. 2d at 859. For these reasons, Emanuel Johnson's sentence of death cannot be permitted to stand.[10]

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[10] Appellant's counsel submitted a written jury instruction on HAC which the trial court denied. (W 8481) Although this proposed instruction did not necessarily provide greater guidance to the jury than the instruction the court gave, the defense position was that the aggravator in question is simply too vague to be submitted to the jury upon any instruction; no instruction can cure the constitutional problems inherent in the capital punishment statute. However, the issue Appellant's raises here should also be considered in the interest of justice. If the Court disagrees that the aggravator itself is too vague to pass constitutional muster, then the adequacy of the instruction read to Appellant's jury must be addressed.

CONCLUSION

Appellant's sentence of death must be vacated in favor of a life sentence. In the alternative, his death sentence must be vacated, and he must be granted a new penalty proceeding before a new jury. If neither of these forms of relief is forthcoming, Appellant asks that his death sentence be vacated and his cause remanded for resentencing by the trial court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 9th day of September, 1994.

Respectfully submitted,

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