IN THE SUPREME COURT OF FLORIDA

FRANK A. WALLS,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

CASE NO. 80,364

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i,ii,iii, iv
TABLE OF CITATIONS	v,vi,vii, viii,ix, x,xi
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
Procedural Progress of the Case	2
Facts -- Guilt Phase	5
Penalty Phase and Sentencing	13
SUMMARY OF ARGUMENT	23
ARGUMENT	27
ISSUE I	
THE TRIAL COURT ERRED IN DENYING CAUSE CHALLENGES TO A PROSPECTIVE JUROR WHOSE BELIEFS IN FAVOR OF THE DEATH PENALTY RENDERED HER UNABLE TO FAIRLY CONSIDER A LIFE SENTENCE RECOMMENDATION FOR PREMEDITATED MURDER.	27
ISSUE II	
THE PROSECUTOR'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACKS FROM THE JURY DENIED WALLS HIS RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.	34

TABLE OF CONTENTS (cont'd)

PAGE(S)

ARGUMENT (cont'd)

ISSUE III

THE TRIAL COURT ERRED IN REQUIRING THE JURY TO WORK EXTENDED HOURS THROUGHOUT THE TRIAL, THEREBY DEPRIVING WALLS OF A JURY SUFFICIENTLY RESTED TO GIVE APPROPRIATE ATTENTION TO ITS DECISION MAKING DUTIES, THEREBY DEPRIVING WALLS OF A FAIR TRIAL AND HIS RIGHT TO DUE PROCESS. 41

ISSUE IV

THE TRIAL COURT ERRED IN IMPROPERLY INSTRUCTING THE JURY ON VARIOUS AGGRAVATING AND MITIGATING CIRCUMSTANCES DURING THE PENALTY PHASE OF THE TRIAL. 49

A. The Trial Court Erred In Instructing The Jury On The Heinous, Atrocious Or Cruel Aggravating Circumstance By Giving An Instruction Which Unconstitutionally Failed To Limit And Guide The Jury's Consideration Of The Evidence When Evaluating Whether The Circumstance Was Proved. 49

B. The Trial Court Erred In Giving The Standard Penalty Phase Jury Instruction On The Premeditation Aggravating Circumstance Which Fails To Apprise The Jury Of The Limiting Interpretation This Court Has Given To The Circumstance. 54

C. The Trial Court Erred In Refusing To Give Walls' Requested Penalty Phase Jury Instructions Since The Instructions As Given Effectively Limited The Jury's Consideration Of Non-statutory Mitigating Circumstances. 61

D. The Trial Court Erred In Refusing To Instruct The Jury On The Mitigating Circumstance Concerning A Defendant Being Under Extreme Duress At The Time Of The Offense. 63

TABLE OF CITATIONS (cont'd)

PAGE(S)

ARGUMENT (cont'd)

ISSUE V

THE TRIAL COURT ERRED IN ANSWERING A JURY QUESTION CONCERNING EMOTIONAL DISTURBANCE AS A MITIGATING CIRCUMSTANCE WHICH MISLED AND IMPROPERLY RESTRICTED THE JURY'S CONSIDERATION OF THAT MITIGATING FACTOR. 66

ISSUE VI

THE TRIAL COURT ERRED IN SENTENCING WALLS TO DEATH BECAUSE IT CONSIDERED IMPROPER AGGRAVATING CIRCUMSTANCES NOT PROVEN BEYOND A REASONABLE DOUBT. 68

A. The Trial Court Should Not Have Found And Considered As An Aggravating Circumstance That The Homicide Was Especially Heinous, Atrocious Or Cruel. 68

B. The Trial Court Erred In Finding And Considering As An Aggravating Circumstance That The Homicide Was Committed In A Cold, Calculated And Premeditated Manner. 73

C. The Trial Court Should Not Have Found As An Aggravating Circumstance That The Homicide Occurred During A Kidnapping Because The Jury Was Never Instructed That A Homicide During A Kidnapping Was A Potential Aggravating Circumstance. 77

D. The Trial Court Should Not Have Found As An Aggravating Circumstance That The Homicide Was Committed To Avoid Arrest. 79

E. The Trial Court Should Not Have Doubled The Aggravating Circumstances Of The Homicide Occurring During A Burglary And The Homicide Committed For Pecuniary Gain. 81

TABLE OF CONTENTS (cont'd)

PAGE(S)

ARGUMENT (cont'd)

ISSUE VII

THE TRIAL COURT ERRED IN USING THE WRONG LEGAL STANDARD -- PREPONDERANCE OF THE EVIDENCE -- IN DETERMINING WHETHER A MITIGATING CIRCUMSTANCE HAD BEEN ESTABLISHED BY THE EVIDENCE. 84

ISSUE VIII

THE TRIAL COURT ERRED IN FAILING TO FIND AND WEIGH AS A STATUTORY MITIGATING CIRCUMSTANCE WALLS' EXTREME EMOTIONAL DISTURBANCE AND SUBSTANTIALLY IMPAIRED MENTAL CAPACITIES AT THE TIME OF THE OFFENSE. 87

ISSUE IX

THE TRIAL COURT ERRED IN SENTENCING WALLS TO DEATH, BECAUSE THE ULTIMATE PENALTY IS DISPROPORTIONAL TO THE CRIME COMMITTED. 91

CONCLUSION 95

CERTIFICATE OF SERVICE 95

TABLE OF CITATIONS

CASE(S)	PAGE(S)
Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)	29
Amazon v. State, 487 So.2d 8 (Fla. 1986)	81,91,92, 93
Amoros v. State, 531 So.2d 1256 (Fla. 1988)	70
Armstrong v. State, 399 So.2d 953 (Fla. 1981)	70
Atwater v. State, Case No. 76,327 (Fla. Sept. 16, 1993)	52,53
Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986), rev. denied, 506 So.2d 1043 (Fla. 1987)	27
Banda v. State, 536 So.2d 221 (Fla. 1988)	58
Bates v. State, 465 So.2d 790 (Fla. 1985)	80
Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)	34,40
Bonifay v. State, 18 Fla.L.Weekly S464 (Fla. 1993)	53,70
Brown v. State, 526 So.2d 903 (Fla. 1988)	67,70
Brown v. State, 565 So.2d 304 (Fla. 1990)	59,60
Bryant v. State, 601 So.2d 529 (Fla. 1992)	29
Burch v. State, 343 So.2d 831 (Fla. 1977)	91
Burns v. State, 609 So.2d 600 (Fla. 1992)	53

TABLE OF CTIATIONS (cont'd)

CASE(S)	PAGE(S)
Campbell v. State, 571 So.2d 415 (Fla. 1990)	26,67,84, 90
Cannady v. State, 427 So.2d 723 (Fla. 1983)	76
Caruthers v. State, 465 So.2d 496 (Fla. 1985)	80,93
Cheshire v. State, 568 So.2d 908 (Fla. 1990)	62,68
Cochran v. State, 547 So.2d 928 (Fla. 1989)	67
Cooper v. State, 336 So.2d 1133 (Fla. 1976)	70
Cruse v. State, 588 So.2d 983 (Fla. 1991)	58
Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)	62
Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992)	50,51,56, 57,59,60, 78
Farinas v. State, 569 So.2d 425 (Fla. 1990)	58
Fead v. State, 512 So.2d 176 (Fla. 1987)	64
Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983)	28,92,93
Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988)	91,92,93
Floyd v. State, 497 So.2d 1211 (Fla. 1986)	73
Foster v. State, 436 So.2d 56 (Fla. 1983)	80
Gaskin v. State, 591 So.2d 917 (Fla. 1991)	53
Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 392 (1980)	56,57
Gorham v. State, 454 So.2d 556 (Fla. 1984)	70
Graham v. State, 470 So.2d 97 (Fla. 1st DCA 1985)	27
Green v. State, 583 So.2d 647 (Fla. 1991)	35

TABLE OF CITATIONS (cont'd)

CASE(S)	PAGE(S)
Hall v. State, 614 So.2d 473 (Fla. 1993)	50
Hamblen v. State, 527 So.2d 800 (Fla. 1988)	58,75
Hansbrough v. State, 509 So.2d 1081 (Fla. 1987)	73
Hardwick v. State, 461 So.2d 79 (Fla. 1984)	73
Henry v. State, 613 So.2d 429 (Fla. 1993)	85
Hill v. State, 477 So.2d 553 (Fla. 1985)	27,28
Hill v. State, 515 So.2d 176 (Fla. 1987)	73
Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)	62
Hodges v. Florida, __ U.S. __, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992)	60
Hodges v. State, 595 So.2d 929 (Fla. 1992)	60
Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990)	34
Holsworth v. State, 522 So.2d 348 (Fla. 1988)	91,93
Holton v. State, 573 So.2d 647 (Fla. 1990)	35
Jackson v. State, 498 So.2d 906 (Fla. 1986)	73,76
Jackson v. State, 502 So.2d 409 (Fla. 1986)	80
Jackson v. State, 522 So.2d 802 (Fla. 1988)	70
Jent v. State, 408 So.2d 1024 (Fla. 1981)	73
Jones v. State, 332 So.2d 615 (Fla. 1976)	91
Kennedy v. State, 455 So.2d 351 (Fla. 1984)	77
Kibler v. State, 546 So.2d 711 (Fla. 1989)	34

TABLE OF CITATIONS (cont'd)

CASE(S)	PAGE(S)
Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981), rev. denied, 407 So.2d 1106 (Fla. 1981)	27
Lewis v. State, 377 So.2d 640 (Fla. 1979)	70
Lightbourne v. State, 438 So.2d 380 (Fla. 1983)	83
Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)	62
Maggard v. State, 399 So.2d 973 (Fla. 1981)	83
Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)	50,51,56, 57,59
Maxwell v. State, 443 So.2d 967 (Fla. 1984)	76
McCray v. State, 416 So.2d 804 (Fla. 1982)	58
Miller v. State, 373 So.2d 882 (Fla. 1979)	91
Moore v. State, 525 So.2d 870 (Fla. 1988)	27
Nibert v. State, 574 So.2d 1059 (Fla. 1991)	84,90
O'Connell v. State, 480 So.2d 1284 (Fla. 1986)	28
Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)	62,63
Perry v. State, 522 So.2d 817 (Fla. 1988)	58,79,80, 81
Pope v. State, 441 So.2d 1073 (Fla. 1983)	53
Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1346, 113 L.Ed.2d 411 (1991)	34
Preston v. State, 444 So.2d 939 (Fla. 1984)	73
Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)	52,93

TABLE OF CITATIONS (cont'd)

CASE(S)	PAGE(S)
Rembert v. State, 445 So.2d 337 (Fla. 1984)	80,93
Richardson v. State, 437 So.2d 1091 (Fla. 1983)	93
Riley v. State, 366 So.2d 19 (Fla. 1978)	79
Rivera v. State, 545 So.2d 864 (Fla. 1989)	58
Rodriguez v. State, 609 So.2d 493 (Fla. 1992)	53
Rogers v. State, 511 So.2d 526 (Fla. 1987)	58,73,75, 77,90
Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988)	28
Routly v. State, 440 So.2d 1257 (Fla. 1983)	83
Ruffin v. State, 397 So.2d 277 (Fla. 1981)	78
Rutherford v. State, 545 So.2d 853 (Fla. 1989)	58
Santos v. State, 591 So.2d 160 (Fla. 1991)	70
Schafer v. State, 537 So.2d 988 (Fla. 1989)	58
Scull v. State, 533 So.2d 1137 (Fla. 1988)	58
Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990)	50,51,52, 53
Singer v. State, 109 So.2d 7 (Fla. 1959)	27
Slappy v. State, 522 So.2d 18 (Fla. 1988)	35,37
Smalley v. State, 546 So.2d 720 (Fla. 1989)	51,59,60
Sochor v. Florida, __ U.S. __, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992)	52,56,57, 78
Songer v. State, 365 So.2d 696 (Fla. 1978)	62

TABLE OF CITATIONS (cont'd)

CASE(S)	PAGE(S)
State v. Dixon, 283 So.2d 1 (Fla. 1973)	52,53,68, 70
State v. Neil, 457 So.2d 481 (Fla. 1984)	34,40
Teffeteller v. State, 439 So.2d 840 (Fla. 1983)	70
Thomas v. State, 403 So.2d 371 (Fla. 1981)	28
Thompson v. State, 456 So.2d 444 (Fla. 1984)	76
Thompson v. State, 565 So.2d 1311 (Fla. 1990)	58
Toole v. State, 479 So.2d 731 (Fla. 1985)	64
Trotter v. State, 576 So.2d 691 (Fla. 1991)	28,33
United States v. McLain, 323 F.2d 1457 (11th Cir. 1987)	47,48
Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)	28,29,32
Walls v. State, 580 So.2d 131 (Fla. 1991)	1,3
Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)	56
White v. State, 446 So.2d 1031 (Fla. 1984)	76
Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)	28
Wright v. State, 586 So.2d 1024 (Fla. DCA 1991)	37

CONSTITUTIONS	PAGE(S)
Amendment V, United States Constitution	Passim
Amendment VI, United States Constitution	Passim
Amendment VIII, United States Constitution	Passim
Amendment XIV, United States Constitution	Passim
Article I, Section 9, Florida Constitution	Passim
Article I, Section 16, Florida Constitution	Passim
Article I, Section 17, Florida Constitution	Passim
STATUTES	
Section 921.141(5)(d), Florida Statutes	78,82
Section 921.141(5)(e), Florida Statutes	78
Section 921.141(5)(f), Florida Statutes	82
Section 921.141(5)(h), Florida Statutes	50,68
Section 921.141(5)(i), Florida Statutes	54,73
Section 921.141(6)(b), Florida Statutes	87
Section 921.141(6)(e), Florida Statutes	63
Section 921.141(6)(f), Florida Statutes	87
OTHER AUTHORITIES	
Florida Standard Jury Instruction (Crim) Penalty Proceedings -- Capital Cases	26,84

IN THE SUPREME COURT OF FLORIDA

FRANK A. WALLS,

Appellant,

v. CASE NO. 80,364

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Frank Walls appeals from the retrial of his capital case. On April 11, 1991, this Court reversed this case for a new trial. Walls v. State, 580 So.2d 131 (Fla. 1991). Pursuant to this Court's instructions, portions of the original record in this prior appeal (Case No. 73,261) were not reproduced for the appellate record of this retrial (Case No. 80,364). Consequently, references to pertinent portions of the prior record on appeal will be designated with the prefix "PR" followed by the page number from the prior record. References to the new record will be designated with the prefix "R."

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On August 10, 1987, an Okaloosa County grand jury returned a ten count indictment charging Frank A. Walls with the following offenses: (1) armed burglary of a dwelling located at Rodon's Auto Sales; (2) armed burglary of a conveyance, an automobile belonging to Rodon's Auto Sales; (3) theft of the same automobile; (4) first degree murder of Edward Alger; (5) first degree murder of Ann Louise Peterson; (6) armed burglary of a dwelling belonging to Alger and Peterson; (7) possession of burglary tools; (8) kidnapping of Edward Alger; (9) kidnapping of Ann Peterson; and (10) theft of $300 from Alger and Peterson. (PR 1865-1868) Walls pleaded not guilty on the same day. (PR 1869) A jury trial commenced on July 12, 1988. (PR 2, 27)

Walls moved for a judgment of acquittal at the close of the State's case. (PR 1262) The court partially granted the motion. (PR 1263-1273) Count one, charging armed burglary was reduced to unarmed burglary. (PR 1262) Counts two and three, charging burglary of a conveyance and theft of the automobile, were dismissed. (PR 1265) Count seven, charging possession of burglary tools was also dismissed. (PR 1267) Finally, count ten, charging grand theft, was reduced to petit theft. (PR 1273) The jury found Walls guilty of all charges as submitted. (PR 1391-1393) On the murder counts, the jury entered a specific verdict: felony murder for the death of Edward Alger and premeditated and felony murder for the death of Ann Peterson.

(PR 1392-1393) After hearing additional evidence in mitigation, the jury recommended a life sentence for the murder of Edward Alger and, by a vote of seven to five, a death sentence for the murder of Ann Peterson. (PR 1572-1574) Circuit Judge G. Robert Barron adjudged Walls guilty and sentenced him to death for the murder of Ann Peterson. (PR 2116-2118) He sentenced Walls to life for the murder of Edward Alger. (PR 2119)

Walls timely appealed to this Court on August 30, 1988. (PR 2138) This Court reversed the case for a new trial on April 11, 1991. Walls v. State, 580 So.2d 131 (Fla. 1991). The State proceeded to trial on the seven counts of the indictment which survived the first trial. (R 7)(PR 1265-1267) Because of pretrial publicity, the trial court changed venue for the trial from Okaloosa County to Jackson County. (R 1079-1080)

The jury found Walls guilty as charged. (R 1127-1129) As to the murder of Edward Alger, the jury found Walls guilty of first degree felony murder. (R 1127) The jury specified that the murder of Ann Peterson was both a felony murder and premeditated. (R 1128) A penalty phase was conducted for purposes of securing a jury sentencing recommendation for the murder of Ann Peterson and the jury recommended a death sentence. (R 1120)

Circuit Judge G. Robert Barron sentenced Walls on June 18, 1992. (R 1142-1171) Walls was sentenced to five years for the burglary of a structure (Count 1)(R 1145); twenty years for the armed burglary of a dwelling (Count 6)(R 1151); twenty years for kidnapping (Count 8)(R 1153); twenty years for kidnapping

(Count 9) (R 1155); and two months in jail for the petit theft (Count 10) (R 1157) For the murder of Edward Alger (Count 4), Walls was sentenced to life imprisonment. (R 1147-1148) Judge Barron sentenced Walls to death for the murder of Ann Peterson (Count 5). (R 1149-1150, 1161-1171)

The court found the following aggravating circumstances: (1) Walls had a previous conviction for a violent felony -- the contemporaneous murder of Edward Alger (R 1163); (2) the murder was committed during a burglary and kidnapping (R 1163-1164); (3) the murder was committed to avoid a lawful arrest (R 1164); (4) the murder was committed for pecuniary gain (R 1164-1165); (5) the murder was especially heinous, atrocious or cruel (R 1165-1166); and (6) the murder was committed in a cold, calculated and premeditated manner. (R 1166-1168) As statutory mitigating circumstances, the court found: (1) Walls had no significant history of prior criminal activity; and (2) Walls age (19 years) at the time of the crime. (R 1168-1169) The court acknowledged the expert testimony that Walls was under extreme mental or emotional disturbance at the time of the crime. (R 1168) However, the court concluded that the statutory mitigating circumstance had not been proven by the preponderance of the evidence. (R 1168) Additionally, the court specifically found that Walls was not suffering a substantially impaired capacity to appreciate the criminality of his conduct. (R 1169) Regarding nonstatutory mitigating circumstances, the court considered several and listed them as follows:

1. The defendant was classified by school counselors and psychologists as being emotionally handicapped based on his "acting out" behavior.

2. The defendant had apparent brain dysfunction possibly caused by slight brain damage, although not medically diagnosed. This dysfunction was manifested by the defendant's difficulty in learning mathematical and verbal skills.

3. The defendant's intelligence quotient decreased from the time he was school age to the present. His I.Q. scores dropped from "Average" level to "Low Normal." Dr. Hagerott testified that, in her opinion, the defendant is extremely immature and his behavioral control is in many ways consistent with a child in the middle to late elementary school age, and that the defendant is functioning intellectually at about the age of 12 or 13.

4. The defendant confessed to law enforcement officials and cooperated fully with the investigation. He voluntarily surrendered to authorities when apprehended.

5. The defendant maintained a loving relationship with his parents and sibling brother, and at times physically carried his brother around when his brother was incapacitated due to surgery from a club foot disorder.

6. The defendant was a good worked (sic) during the time periods he was employed.

7. The defendant had at times exhibited kindness and compassion toward weak, crippled or helpless persons and animals.

(R 1169-1170)

Walls filed his notice of appeal to this Court on August 12, 1992. (R 1212)

Facts -- Guilt Phase

Amy Ripley lived in a trailer park next door to her friends, Edward Alger and Ann Peterson. (R 412-413) Around

2:00 a.m. on the morning of July 22, 1987, she awoke to loud voices coming from her neighbor's trailer. (R 413) She did not recognize the voices since they were muffled. (R 413) The only word she could distinguish was "no" which was said a few times. (R 421) She also heard crashing noises. (R 413, 423) Ripley heard popping noises which sounded like three gunshots. (R 414) There was a pause after the first pop and before the second and third. (R 414) At the time, she assumed the noises were not gunshots; she thought someone might be nailing pictures on a wall. (R 414) She testified that she heard the words, "no, no, no" before the popping noises. (R 421) However, Ripley admitted that in her statement made the day after the incident she said the words "no, no, no" came after the three popping sounds. (R 423-424) Ripley got out of bed and observed Alger's trailer through her living room window. (R 414) A light in Alger's bedroom was going off and on. (R 415) Ripley walked outside of her trailer to investigate. (R 415-416) She watched Alger's trailer for a few minutes; she saw the silhouette of a clothed man in the living room and assumed it was Alger. (R 416-418) The light in Alger's bedroom went off again. (R 419) Believing that her neighbors merely had an argument, Ripley returned to bed at 2:14 a.m. (R 416, 419-420) After returning to bed, Ripley heard two more popping noises. (R 420-421)

Edward Alger failed to report for duty at Eglin Air Force Base on July 22, 1987. (R 426) His superior and co-worker, Sergeant John Calloway, telephoned Alger's residence several times during the day without receiving an answer. (R 426-427)

The next day, Calloway went to Alger's trailer. (R 427-428) With the help of the trailer park manager and a screwdriver, Calloway broke open the trailer door and went inside. (R 428-429) A friend of Alger's and Peterson's, who had lived with them for a time, said that they had used a screwdriver to open the door in the past when they had locked their keys inside. (R 438-441) In the front bedroom, Calloway saw the body of a woman. (R 428) He immediately left and telephoned the police. (R 429)

Investigators found the body of Ann Peterson lying face down on the floor of the front bedroom of the trailer. (R 433, 445) Her face rested on a pillow, and a lead bullet was found nearby. (R 395-396, 445) Peterson had suffered two wounds. According to the medical examiner, Dr. Kielman, a bullet penetrated the cranial cavity causing Peterson's death. (R 566-567, 575-577) A second wound to the cheek did little damage. (R 566-567) The medical examiner testified that this wound could have been caused by a glancing gunshot. (R 566-567) The penetrating wound to the head would have caused unconsciousness instantly. (R 587-588)

Edward Alger's body was found on the floor of the second bedroom in the trailer. (R 434, 445) His feet were tied with a drapery cord. (R 514-515, 611) A cord was also tied to his left wrist. (R 514-515, 611) The cord proved to be consistent with the curtain cord in the living room of the trailer which had been cut. (R 608-616) It appeared as if a struggle occurred in the bedroom because of the disarray. (R 405-451) A fan

was on the floor with a broken protective grate. (R 450) Alger had been shot three times and his throat cut. (R 547-554) The medical examiner found that a sharp object produced a single incised wound to Alger's throat. (R 551-554) His jugular veins were cut (R 554), but Alger would have remained conscious and able to struggle with this wound. (R 582-584) There were scratches on his feet which could have been caused by his stepping through the grate of the fan. (R 583) Two penetrating gunshot wounds to the head caused Alger's death. (R 547-550, 563) One entered above the left cheek and was fired from some distance away since there was no powder stippling to the wound. (R 549-551) The bullet traversed the brain and was recovered. (R 551, 562) The second gunshot wound was a near contact wound since there was some stippling around the wound. (R 548-549) This bullet entered above the right eye, went through the brain and was recovered. (R 548-549, 562) A third gunshot entered the neck at the end of the incised wound and travelled through the floor of the mouth. (R 551-552) The medical examiner believed this wound to be a contact wound because there was no stippling of the surrounding skin. (R 551-552)

Before midnight on July 21, Carol Simmons, who was then the manager of the bar, Kay's Body Shop, saw Frank Walls in the bar. (R 653) He was a regular patron and she did not pay much attention to him. (R 653) She said she did not know if he was drinking but she knew he was not spending much money. (R 653) She said that Frank normally did not talk much or spend much money. (R 653, 656) He left around midnight, but he returned

about 3:30, just before closing time. (R 654) Simmons said Frank was spending money, buying drinks and tipping the dancers. (R 654) He said he had won the money in a pool tournament at another bar. (R 654) After the bar closed, Simmons had a conversation with Frank which was unusual since Frank had not talked to her in the past. Simmons said that Frank had been drinking, but was not drunk. (R 654) Frank left the bar around 4:30 a.m. (R 655)

On the morning of July 22, a salesman at Rondon Auto Sales determined that the dealership had been burglarized. (R 642-643) The salesman, Delbert Allen, discovered a broken window in the office. (R 644) A fan, a telephone and a lawnmower were missing. (R 643-644) Also, a 1980 Oldsmobile had been driven and the side of the car had been scraped. (R 643) Whoever broke into the office would have had access to the keys to the cars on the lot. (R 644)

Deputy Peter Jones was securing the crime scene of the homicides on the morning of July 23. (R 436-437) Around noon, Frank Walls came by the scene in a vehicle driven by John Early. (R 437) Jones knew Walls and stopped him. (R 437) He engaged Walls in a brief conversation. (R 437) Walls said he had heard about the murder and told Jones that he hoped the perpetrator would be caught. (R 437)

Investigators executed a search warrant for John Early's trailer, where he and Frank lived, on July 24, 1987. (R 480-499, 507-508) Frank was present and cooperated with the officers during the search. (R 480-487) The officers seized

several items of evidence. (R 480-499, 507-508) Among the items were a .22 caliber revolver; three knives; several shirts and pants; cowboy boots; two fans; two cordless telephones; a piece of white drapery cord and an oversized, "biker" type wallet. (R 480-499, 507-508, 638) Frank's fingerprints were also obtained. (R 499-500) A friend of Edward Alger's and Ann Peterson's identified the wallet as similar to Alger's and one of the two fans as Peterson's. (R 648-650) The salesman from Rodon's Auto Sales identified the telephones and one fan as similar to the ones missing from the car lot office. (R 643-647) Testing on the clothing, boots and knives revealed the presence of blood on some of the items. (R 616-630) One of the knives had blood on it, but there was insufficient quantity to determine if it was human or animal. (R 623) One T-shirt had a blood stain which was too small to test for human characteristics. (R 624) Two other shirts had human blood on them, and one had blood which proved to be consistent with that of Edward Alger's. (R 625, 627-628) Alger's blood type was also found on a pair of jeans. (R 629-630) A small amount of human blood was detected on one of the cowboy boots. (R 625-626) Ballistic testing showed that Alger and Peterson were killed with .22 caliber bullets, but these bullets were too badly damaged for comparison purposes. (R 639-640) However, the bullet found on the floor near Peterson's head matched the ballistic characteristics of the .22 revolver seized. (R 640-641) The drapery cord seized was similar in size, color and construction to the cord used to tie Alger and other pieces of cord found at the

crime scene. (R 608-615) Finally, Frank's fingerprints matched latent prints developed on a picture in Edward Alger's bedroom and on the fan seized during the search which was identified as Ann Peterson's. (R 599-601, 604)

Deputy Robert Hughs and Investigator Don Vinson obtained statements from Frank about his involvement in the crimes. (R 462-477, 660-694) Hughs talked to Frank during the execution of the search warrant and later at the sheriff's office. (R 462-477) Vinson talked to Frank at the sheriff's office and obtained a tape recorded statement. (R 660-694) Hughs told Frank that he knew about the money Frank had and asked him about his activities on that night. (R 465) Frank admitted taking the car from the car lot to use for the night. (R 466-467) After spending some time with K.C. and John Early, Frank then rode around alone. (R 468) He stopped at "Animal's" trailer. (R 468) "Animal" lived near Edward Alger's trailer. (R 468-469) Frank used an ice pick to open the door of Alger's trailer and entered, carrying a knife and a gun with him. (R 469)

Frank related the events which occurred inside the trailer to Hughs and later on tape for Don Vinson. (R 469-477, 660-694) (State's Exhibits QQ is the edited tape recording played for the jury) When Frank entered the trailer, the only light burning was inside the fish tank. (R 469) He cut a cord from a curtain and walked into the back bedroom of the trailer. (R 469, 669) Alger and Peterson were asleep. (R 469, 669) Frank pushed over a fan and turned on the light to wake them up. (R

469, 669) Edward Alger was nude except for a chain around his neck, and Peterson wore only a shirt. (R 469) Frank had Peterson tie Alger up with the cord, and Frank then took her to the living room where he tied her up with another cord and gagged her with a sock. (R 469, 669-670) Hearing Alger moving around, Frank returned to the back bedroom where Alger attacked him. (R 470, 670) During the fight, Alger bit Frank on his leg. (R 470, 671) Frank pulled his knife and cut him one time in the throat. (R 470, 671) The fight continued, Frank lost control of his knife, and he then shot Alger three times. (R 470, 672)

Frank said the following about his mental state after the shooting, "I went berserk, I went nuts, I went crazy." (R 673) He began turning the lights off and on to search around, but he said, "I was nuts and I was, I don't know where I was, I don't know what I was doing." (R 673) Frank was scared. (R 675) He went to Ann Peterson and told her that he had not wanted to hurt them. (R 674) He said, "I didn't want to do nothing to hurt y'all. I just wanted to get some things, you know, and he attacked me...." (R 674) Peterson then asked Frank if Alger was okay. (R 1230) Frank responded, "[N]o." (R 674) At that point, Peterson began fighting Frank. (R 674) They struggled. (R 674) Although he did not really remember doing so, Frank had, at some point, untied her. (R 674-675) In the struggle, he tore her shirt off. (R 674-675) Frank said he was paranoid and did not want any witnesses. (R 675) He pushed Peterson's face into a pillow and shot her twice. (R 675) Frank said she

screamed after the first shot just before he shot the second time. (R 684-685) Frank took a wallet and an oscillating fan and left the trailer. (R 471) He changed clothes, threw the identification from the wallet away, returned the car to Rodon's Auto Sales and went to Kay's Body Shop. (R 676-677)

Investigator Vinson asked Frank why he was turning the lights off and on in the trailer. (R 681) Frank said he could not explain any of his behavior that night because it was as if people in his mind were telling him to do these acts. (R 681)

> VINSON: Okay, let me take you back to the trailer a minute. Why were you turning the light on and why were you turning the light off?
>
> WALLS: I don't know what made me do the whole thing. I don't know. I mean it's just like I got people talking to me and telling me to do these things. I don't know, it's just like, I don't know what the fuck made me do it.
>
> VINSON: You're talking about in your mind people's talking to you, is that right?
>
> WALLS: Yeah. I don't know what made me do it.

(R 681) Vinson testified that at times during the interview Frank was upset and teary-eyed. (R 693-694)

Penalty Phase and Sentencing

The state presented no additional testimony during the penalty phase of the trial. (R 787) The state specifically relied upon the evidence presented during the guilt phase of the case. (R 787) Walls presented the testimony of three

mental health experts and several family friends and family members. (R 787-915)

Edward Chandler, a psychologist, testified about his evaluation of Frank in 1984. (R 789) Frank was 16 years old at the time of this examination. (R 791) Frank had been referred to Chandler for a complete psychological evaluation because of Frank's behavioral problems at school. (R 794) These problems included erratic mood swings, explosive anger, hostility and fighting with other students and teachers. (R 794) Chandler administered a battery of tests and interviewed Frank and his father. (R 789-794, 797) Walls I.Q. tested at 101 and 102 which is right in the middle of the average range. (R 795) However, earlier I.Q. testing had shown a marked differential between his verbal scores and his performance scores. (R 796) In 1980, he tested with a verbal I.Q. of 94 and a performance I.Q. of 112. (R 796) In 1982, he tested with a verbal I.Q. of 90 and a performance I.Q. of 114. (R 796) This significant variance between the verbal testing and the performance testing is an indication of brain dysfunction or damage. (R 796) Walls' MMPI score of 25 also suggested brain damage. (R 802) The test showed significant paranoid thinking, impulsiveness, difficulty dealing with authority, some grandiosity used to mask feelings of inadequacy. (R 802-804) Walls exhibited a pronounced emotional and social insecurity. (R 804) The scores on the Luria Nebraska Battery Tests for normal psychological function showed elevated scores on three of the eleven scales. (R 804) On this test, the more elevated scores, the more

likely the indication of brain damage. (R 804-805) Chandler's evaluation also found evidence supporting brain damage from Frank's background and observable behaviors during the interview. (R 797-806) Frank was born 3 weeks late, and forceps were used to during the birthing process. (R 806) Frank was blue for the initial days after his birth. (R 806) He had a history of hyperactivity. (R 806) He also had viral meningitis at age 13 or 14. (R 806) Chandler stated these were significant signs of possible brain damage. (R 806) Chandler noted that Frank frequently had a blank stare during the interview and had difficulty concentrating. (R 805) Frank occasionally stuttered and slurred his speech, another behavior suggesting brain damage. (R 805-806)

Personality testing led Chandler to some conclusions about Frank's personality and behavior. (R 807-813) Frank had the potential for a great deal of acting out behavior, significant emotional volatility, mood changes. (R 807) He also acts impulsively without thinking about the consequences for himself of others. (R 807) He exhibited paranoid thinking tendencies. (R 807-808) Chandler stated that someone who is very vulnerable or depressed would sometimes convert those feelings into anger. (R 808) Frank tended to quickly convert those types of feelings into anger in order to defend himself. (R 808) This led to an intense expression of his anger and this anger was expressed impulsively as well. (R 808) Frank's tolerance for frustration was quite low. (R 808) He also tended to externalize responsibility for his anger -- blame other people and

expect them to help him control his anger. (R 809) He had feelings of persecution. (R 809) His brain dysfunction tended to exacerbate this kind of behavior. (R 809-810) Chandler also concluded that Frank might have brief mild episodes of psychosis under stress, where he lost touch with reality. (R 812-813) Chandler's diagnosis for Frank was brain damage with significant paranoid acting out disorder. (R 813)

Regarding the mental mitigating circumstances provided for by Florida Statutes, Chandler stated that Frank was under the influence a severe mental or emotional disturbance at the time of the crime. (R 819-820) Chandler did not classify the disturbance as extreme since he used his definition of extreme to be the worse 5% of the people he sees professionally. (R 820-821) However, Chandler did conclude that Frank's difficulty was more severe then 80% to 90% of the adolescence he sees in his psychological practice. (R 820-821) As to the question of whether Frank had the ability to appreciate the criminal of his conduct, Chandler felt he was unable to render an opinion since he had examined Frank two to three years before the homicide occurred. (R 821)

Eugene Valentine, a psychiatrist, testified to his examination and contact with Walls in 1985. Frank was admitted to Gulf Coast Hospital after being referred by the HRS worker for his cumulative behaviors. (R 824) Valentine saw Frank five times a week during his hospital stay. (R 825) Frank was diagnosed with bipolar disorder and conduct disorder. (R 826) Bipolar disorder characterizes itself with a manic stage and

depressive stage. (R 826) The person either has a depressed stage of low energy, trouble concentrating, sleeping, or oversleeping, low self-esteem, feelings of inadequacy. (R 826-827) During the manic stage people have a high energy level, need very little sleep, they would talk fast and just move at an accelerated pace. (R 827) The person in a manic stage would have trouble organizing what they want to do and would jump from subject to subject. (R 827) The conduct disorder is a behavioral disorder which is a poor adaptation to one's environment. (R 828) The person will act impulsively at a whim without consideration of the effect that action. (R 828) The person may steal things, destroy property, threaten physical harm, be verbally aggressive. (R 828) An impulsive, immature, social adjustment. (R 828) Valentine prescribed lithium carbonate to stabilize Frank's mood swings. (R 828-829) Upon Frank's release from the hospital, Valentine said his prognosis was good if he continued to use the lithium and secured counseling. (R 829-830) Valentine noted that he saw Frank approximately a year later and found that he was no longer using the lithium. (R 830)

Karen Hagerott, a neuropsychologist, examined Frank in January of 1992. (R 835-839) Hagerott reviewed various school and psychological reports and obtained a history from Frank's parents. (R 839-847) She discovered that several items in Frank's history pointed toward an explanation for his psychological problems. At birth, Frank suffered a decreased oxygen supply to the brain and was purple for at least 24 hours. (R

848) He also suffered two extremely high fevers as a child which can also have a negative effect on mental functions. (R 848) He suffered from attention deficits and hyperactivity. (R 848) There was indication that Frank had used drugs and alcohol including speed, acid. (R 849) His alcohol consumption was quite heavy as a teenager. (R 849) At times he would drink a whole case of beer or a whole bottle of liquor at one time. (R 849)

Dr. Hagerott found Frank's I.Q. to be 72, the borderline mentally retarded range. (R 851, 867) His I.Q. had dropped a significant amount from the average range to the borderline mentally retarded range since he was tested by Dr. Chandler 8 to 10 years earlier. (R 855) Frank's reasoning skills and problem solving ability is poor. (R 855) He acts impulsively, compounded by his inability to focus on his tasks very well due to his attention deficit disorder. (R 855, 852-853) She also found that Frank suffered from organic brain damage resulting in significant neuropsychological deficits. (R 856) Frank's ability to function had actually deteriorated over the years. (R 856-857) She indicated that during periods of stress, Frank's functioning would be far worse. (R 857). His inability to make appropriate decisions and to think situations through before acting impulsively would be exacerbated under stress. (R 857) His mental conditions, combined with the use of drugs of alcohol, would be a compounding influence on his poor functioning. (R 857) She concluded that Frank's emotional maturity level was at the late elementary school level, a fifth grade

level. (R 859) As far as Frank's intellectual functioning, he was in the borderline mentally retarded range and functions like a twelve or thirteen-year-old, rather than his chronological age. (R 859)

Hagerott was of the opinion that Frank's learning disability went untreated. (R 860). His parent's were not involved in a treatment program to assist him in learning to compensate for his difficulties. (R 860) Frank reached teenage years with these problems ingrained and severe. (R 860) Furthermore, his parents did not follow through with many of the recommendations that were made by the school system and others. (R 860) Hagerott stated that a person with these disabilities has a high frustration level. (R 861) These problems influence the sufferers' ability to function adequately in school, their self-esteem, their ability to get along with others, and they tend to be a high risk for drug and alcohol abuse, school problems and conflicts with the law. (R 861) Based on her evaluation, Dr. Hagerott was of the opinion that Frank suffered from an extreme emotional disturbance. (R 873) Additionally, she was of the opinion that his capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired. (R 873)

Frank's parents, James and Monica Walls, testified about Frank's difficulties growing up. (R 905-928) Frank was Mrs. Walls' first child and the delivery was 22 hours long. (R 906-921) During the birthing process, Frank was deprived of oxygen and was blue for approximately 48 hours. (R 906,

921-922) As a child, Frank had some serious illnesses resulting in high fevers. (R 922) He was later diagnosed as hyperactive and placed on Ritalin. (R 908) He contracted meningitis. (R 908) Frank was enrolled in various special classes for the emotionally handicapped. (R 925) He spent one year at Camp E-Ma-Chamee, a residential program for emotionally disturbed children. (R 909, 926) For the first six months after his return, his father said that Frank's behavior improved. (R 910) However, after that time, his behavior returned to its previous level. (R 910) By this time, he had been diagnosed with bipolar personality disorder. (R 909) Monica Walls also related an incident in 1979 where Frank attempted suicide. (R 924) She found him hanging with a belt from a bathrobe. (R 924) He was unconscious when she found him. (R 924)

Frank's father said that Frank held down several jobs primarily as a dishwasher in various restaurants. (R 910) His supervisors had no complaints with his work, but Frank's temper created difficulties getting along with the other workers. (R 910).

Monica Walls testified that Frank was good with his younger brother. (R 923) His brother was physically handicapped, born with a club foot, and had various surgeries and wore a cast a great deal. (R 923) Stephan Walls, Frank's brother, testified to the help his brother gave him during the time he had to wear a brace. (R 903-904) Frank would frequently carry his brother on his back. (R 904)

Several long-time family friends testified about Frank's childhood. (R 879, 887, 890, 895) Christina Collins and her husband, Rosco Collins, were close friends with the Walls family. (R 879, 888) Christina Collins testified that she was in contact with Frank and the family almost daily for the first two years of Frank's life. (R 881) She said Frank was hyperactive and had trouble resting. (R 881-882) He was difficult to restrain. (R 882) The families moved to different locations, and the Collins did not have contact with the Walls family again until 1978. (R 883) At that time Frank was on medication during the school days. (R 884) She said Frank always needed more supervision. (R 885) Rosco Collins testified that his contact with Frank left him with the impression that he was slow about doing things and had short attention span. (R 889) He also noted that Frank became frustrated easily. (R 889)

Barbara and Claud Landry became friends with the Walls family when Frank was about 8 or 9 years old. (R 890-891, 895) The Landry's daughter was 2 years younger than Frank and Frank would sometimes study with her at her house. (R 891) Barbara Landry participated in the study sessions. (R 891) She noted that Frank was unable to comprehend the subjects and his concentration span was too short. (R 892) She did notice that when Frank was upset, he would stutter or mumble. (R 892) Frank was never disrespectful to her. (R 892) She related one incident where Frank threw a bone at her daughter and accidentally hit her with it. (R 893) She asked him why he had done

that and Frank responded that he did not know. Her daughter was about 8 years old and Frank was 10 or 12 years old at the time of the incident. (R 893) Claud Landry said he on occasion had Frank and other children together for various activities. (R 895-896) He said Frank was never disrespectful to him. (R 896)

Charles Monroe became friends with the Walls family. (R 898) Mr. Walls was selling life insurance and became acquainted with Monroe. (R 898) In November of 1985, Monroe lost his job and he and his family moved in the Walls' home for a period of time. (R 899) Monroe had close observation of Frank during that time. (R 899-900) During this time, Frank was attempting to study for his GED. (R 901) Monroe offered to help him. (R 901) He noted that Frank would lose interest in studying. (R 901) If the whole problem was given to Frank, he would become quite frustrated. (R 901) However, if Monroe went through the problems step by step, Frank sometimes was able to comprehend it. (R 901) Monroe noted that Frank's father was putting pressure on him to complete his GED. (R 901) Monroe also noted that Frank would sometimes get on the floor and play with his little brother's toys. (R 902)

SUMMARY OF ARGUMENT

1. The trial court improperly denied a defense challenge for cause to Juror Walker because her strongly held beliefs in favor of the death penalty substantially impaired her ability to fairly consider a life recommendation in this case. Defense counsel exhausted his peremptory challenges and asked for an additional one to use on Juror Walker. This request was denied and Walker served on the jury. Walls is now entitled to new a trial to correct this error.

2. During jury selection, the prosecutor used peremptory challenges to excuse black prospective jurors from service. Defense counsel objected alleging that the prosecutor was excusing black jurors solely on the basis of race. The trial court required the prosecutor to explain his reasons. His reasons for excusing two jurors were not race-neutral reason supported by the voir dire record. These challenges should not have been permitted.

3. The trial judge required the jurors to work extended hours, sometimes late into the night, thereby depriving Walls of a jury sufficiently rested to give fair consideration to his case. In fact, the court required the jury to deliberate on a verdict until 10:00 p.m. before allowing the jury to make arrangements to be sequestered. The court's emphasis on a swift completion of the trial overrode Walls' right to a fair trial and denied him due process. This court must reverse for a new trial.

4. During the penalty phase of the trial, the jury was improperly instructed on several aggravating and mitigating circumstances. The court used the standard penalty phase jury instructions for the heinous, atrocious or cruel and cold calculated and premeditated aggravating circumstances. These instructions failed to give adequate guidance concerning the limitations this Court has placed on the application of these factors. Defense counsel's proposed jury instructions would have cured this defect and they should have been given. The court also refused to give a special instruction directing the jury to consider certain mental impairments Walls suffered as nonstatutory mitigating circumstances. This left the jury with the impression that any mental impairment less than a statutory mitigating circumstance could not be considered. Furthermore, the court improperly denied a jury instruction on statutory factor of extreme duress at the time of the crime which was supported by the evidence.

5. During penalty phase, the jury asked two questions concerning the emotional disturbance mitigating circumstance. These questions asked for a definition of emotional disturbance and whether the factor referred to preexisting or present disturbances. The State and the defense agreed that the term "emotional disturbance" could not be further defined for the jury. However, there was substantial disagreement as to how the court should respond to the other part of the question. Defense counsel requested that the court advise the jury that preexisting or present mental condition could be considered in

mitigation. The court denied the request and merely reread the statutory language of the emotional disturbance mitigating factor. Since the statutory mitigating circumstance refers only to mental condition at the time of the crime, the jury was misled. Walls' mental condition at any time is a mitigating factor which the jury was required to consider.

6. The trial court considered and weighed several improper aggravating circumstances. Since this homicide was a relatively quick shooting death, the heinous, atrocious or cruel aggravating circumstance was not properly found. The homicide was not cold, calculated and premeditated since there was no prearranged plan to kill. This killing occurred during a burglary after Walls was attacked by one of the victims. Additionally, the factor of the homicide being committed during a kidnapping should not have been considered because the factor was never presented to the jury by way of argument or instruction. The avoiding arrest factor was improperly found since eliminating witnesses was not the dominant reason for the killing. Finally, the pecuniary gain aggravating factor was improperly doubled with the circumstance based on the homicide occurring during a burglary.

7. The trial judge used an erroneous burden of proof when determining if a mitigating circumstance had been established. In his sentencing order, the judge rejected a mitigating circumstance because he did not believe the mitigating factor was proved by a preponderance of the evidence. Mitigating circumstances are proven if the fact finder is "reasonably convinced

that a mitigating circumstance exists." Fla.Std.Jury Instr. (Crim) Penalty Proceedings -- Capital Cases; Campbell v. State, 571 So.2d 415, 419-420 (Fla. 1990). The preponderance of the evidence burden of proof standard was too high and may have lead the judge to improperly reject mitigating circumstances which were reasonably supported by the evidence.

8. Walls presented significant, unrefuted mitigating evidence concerning his mental condition. However, the court rejected the two statutory mental mitigating circumstances. The court's rejection of these mental mitigating circumstances was erroneous for several reasons. First, the court applied an incorrect burden of proof. Second, Dr. Hagerott's opinion that Frank qualified for these statutory mitigating factors was supported by the testimony of Dr. Chandler and Dr. Valentine, not refuted as the trial court stated in its order. And, third, the judge's reliance upon Frank's demeanor during trial was an irrelevant to the issue of the existence of these mitigating circumstances.

9. The State proved that Frank Walls killed during the commission of a felony when the victims struggled with him. He did not plan a murder. Suffering from a long history of mental and emotional impairments, Frank lost control in the stress of the circumstances. He reacted violently when confronted and attacked during the burglary. He did not commit an offense warranting his execution. Compared to other cases where death has been found inappropriate, Frank's sentence is disproportional.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING CAUSE CHALLENGES TO A PROSPECTIVE JUROR WHOSE BELIEFS IN FAVOR OF THE DEATH PENALTY RENDERED HER UNABLE TO FAIRLY CONSIDER A LIFE SENTENCE RECOMMENDATION FOR PREMEDITATED MURDER.

This Court, in Singer v. State, 109 So.2d 7 (Fla. 1959), set forth the standard to be applied when a prospective juror's competency to serve has been challenged:

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on motion of a party, or the court on its own motion.

Ibid. at 23-24; accord, Moore v. State, 525 So.2d 870 (Fla. 1988); Hill v. State, 477 So.2d 553 (Fla. 1985). A juror must unequivocally express his ability to be fair and impartial on the record. Moore v. State; Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986), rev. denied, 506 So.2d 1043 (Fla. 1987). Merely expressing an ability to to control any bias or prejudice is insufficient. Singer v. State; Leon v. State, 396 So.2d 203, 205 (Fla. 3rd DCA 1981), rev. denied, 407 So.2d 1106 (Fla. 1981). Moreover, a juror's statement that he has the appropriate state of mind and will follow the law is not determinative of the question of his competence to serve. Singer, 109 So.2d at 24; Graham v. State, 470 So.2d 97, 98 (Fla. 1st DCA 1985); Leon, 396 So.2d at 205. Finally, when a defendant exhausts his peremptory challenges, asks for additional

peremptory challenges without success and identifies a seated juror who is objectionable, the improper denial of a cause challenge compels a reversal for a new trial. Trotter v. State, 576 So.2d. 691 (Fla. 1991). Juror Walker, who actually served on the jury, should have been excused for cause. Walls complied with the requirements of Trotter and a new trial is required.

Juror Walker should have been excused for cause because her beliefs in favor of the death penalty would interfere with her ability to fairly consider a life recommendation in the case. See, O'Connell v. State, 480 So.2d 1284 (Fla. 1986); Hill v. State, 477 So.2d 553 (Fla. 1985); Thomas v. State, 403 So.2d 371 (Fla. 1981). The applicable standard is the same one used to excuse jurors who oppose the imposition of the death penalty to the degree it would impair their ability to fairly consider a death sentence. Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80, 88 (1988); Fitzpatrick v. State, 437 So.2d 1072, 1075-1076 (Fla. 1983). In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court receded from the strict standard lower courts had applied in evaluating the excusal for cause of death scrupled jurors and reinterpreted the standard originally announced in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The prior interpretation of Witherspoon had required a showing of unmistakable clarity that the juror's beliefs would cause him to automatically vote for life without considering a death sentence. In Witt, the

Supreme Court adopted language from its decision in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), and restated the standard:

> We therefore take this opportunity to clarify our decision in Witherspoon, and to reaffirm the above quoted standard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions his oath." We note that in dispensing with Witherspoon's reference to "automatic" decision making, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity."

Witt, 469 U.S. at 424, see, also, Bryant v. State, 601 So.2d 529, 532 (Fla. 1992). Therefore, the question is whether Juror Walker's beliefs in favor of the imposition of the death penalty, in a case such as this one, created a reasonable doubt about whether those beliefs would prevent or substantially impair his ability to fairly consider a life recommendation.

Questioning of Juror Walker during voir dire revealed the following:

> WILLIAMS: Miss Walker, how do you feel about the death penalty?
>
> WALKER: Well, it's rough, but, you know, if he is guilty--if you find a person guilty of the crime, I feel he deserves the same thing.
>
> WILLIAMS: In other words, you kind of go along with an eye for an eye and a tooth for a tooth?
>
> WALKER: That's right.

WILLIAMS: Well, even if you feel that way, suppose the judge gave you directions about what you should think about, what you should consider before you vote. Would you do what the judge told you, or would you always vote eye for an eye and tooth for a tooth?

WALKER: Well, I would--I mean, if he would tell me to do those things, you know, I'm supposed to do it, then I probably would, but then I would like to explain my own feelings.

WILLIAMS: All right, go ahead.

WALKER: Well, I know the Bible says thou shalt not kill, but as you know, there's a lot of killings going on, and truly, I have some kids, and if someone takes my life, my child's life just to be doing it because they can do it, I feel like they deserve the same thing that they give him.

WILLIAMS: I don't have any other questions.

WALKER: I feel like everybody loves their life, and if you take a life, I feel like you deserve one too.

(R 287-288).

* * * *

LOVELESS: Miss Walker, you'd indicated in answer to Mr. Williams' questions that you feel if a person is convicted of murder that they ought to pay with their life. Is that what you're saying, is that what you believe?

WALKER: That's the way I feel about it.

LOVELESS: If the judge were to instruct you that the law is different from that, are you going to follow your own beliefs?

WALKER: If I have to follow his instructions, that's what I do, but then I say my beliefs.

LOVELESS: Yeah, I want you to understand. I'm not quarreling with your beliefs. Your belief, for example, is different from Mr. Tanner's. I'm not going to quarrel with anybody's belief. All we want you to do is to express that belief to us, because in order to understand you and how you might react as a juror, we've got to know what those beliefs are, and I appreciate it, really. Do you understand, and this is for all of you, that what Mr. Williams touched on very briefly that first off, there's two types of murder in the state of Florida, first degree murder. It's getting late. There are two types of first degree murder in the state of Florida. The first is felony murder, and that's the killing of a person during the commission of another crime. An example I've been using is a robbery of a convenience store. The reason I'm using it is because it doesn't apply here. A person goes into a convenience store and robs the place, kills the clerk. When he went in there, he had no intent of harming anybody. He wanted to steal some money, and unfortunately, he used a gun or something like that. It doesn't make any difference. If he killed the person during the commission of that robbery, he is guilty of felony murder, first degree murder, for which there are only two possible penalties, life without the possibility of parole for a minimum of twenty-five years, and there's no guarantee he'll ever get parole or death in the electric chair. Does everyone understand that? The other type of first degree murder is premeditated murder, and basically, it means murder after consciously deciding to do so. That's not all of it, there are more instructions, and I don't want you to assume that is all the law. That premeditated murder, if a person is found guilty beyond any reasonable doubt of premeditated murder, that is also first degree murder for which there are two possible penalties like I described before. Now, does everyone understand that? Miss Walker, I'll direct this to you, and I don't mean to be picking on you. It's just that you were the one I was questioning before. Do you understand that if a person is convicted of first degree murder,

> regardless of which kind, and the State is requesting the death penalty, first the State must prove beyond any reasonable doubt at least one aggravating circumstance? If they don't prove one aggravating circumstance, the jury is supposed to recommend to the judge a life sentence? Does everyone understand that? Do all of you agree that you would follow that? Could you follow that, Miss Walker? If that's what the judge told you that the law was, could you do that?
>
> WALKER: Yes, sir.

(R 293-295).

Juror Walker's beliefs in favor of imposing the death penalty were strong. When first asked if she could set aside her beliefs and follow the judge's instructions, Walker said she "probably would." (R 287-288) Upon being asked a second time, she said, "If I have to follow his instructions, that's what I do, but then I say my beliefs." (R 293) Although she, at one point, said she could follow the judge's instructions, she also continued to voice her strongly held views. (R 293-295) Walker's responses demonstrate that her views would "prevent or substantially impair" her ability to fairly apply the capital sentencing laws in this case. Witt, 469 U.S. at 424. The trial court erred in denying Walls challenge for cause. (R 303, 305-306)

Walls exhausted his peremptory challenges. (R 305) Defense counsel requested four additional challenges, noting there were four jurors whom he had unsuccessfully challenged for cause. (R 305) The court recognized that it improperly denied an earlier cause challenge to a prospective juror, Mr.

Nachtrab, and granted the defense one additional challenge. (R 305) The court denied the request for further challenges. (R 305) Counsel then renewed its challenge for cause to Juror Walker, but the court denied the challenge. (R 305-306) Counsel used the one additional peremptory challenge on prospective Juror Sims. (R 306) Defense counsel renewed his challenge for cause to Juror Walker which the court denied. (R 307) Counsel then asked for one more peremptory challenge to use on Juror Walker. (R 307) The court denied this request. (R 307) Walker served on the jury. (R 307, 338) This satisfied the requirements outlined in Trotter. Walls is entitled to a new trial.

ISSUE II

THE PROSECUTOR'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACKS FROM THE JURY DENIED WALLS HIS RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Both the United States and Florida Constitutions prohibit the the discriminatory use of peremptory challenges when selecting a jury in a criminal case. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution forbids a prosecutor to exercise peremptory challenges solely on the basis of race. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). This Court condemned purposeful racial discrimination in the selection or exclusion of prospective jurors in State v. Neil, 457 So.2d 481 (Fla. 1984) as a violation of a defendant's right to an impartial jury under Article I, Section 16, of the Florida Constitution. The prosecutor offended these principles in using two of his peremptory chal- lenges to excuse blacks from from serving on Walls' jury. Walls, although white, has standing to assert this claim. Powers v. Ohio, 499 U.S.400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990); Kibler v. State, 546 So.2d 711 (Fla. 1989). This Court must reverse Walls case for a new trial.

JUROR PEGGY KELLY

The prosecutor used a peremptory challenge to excuse prospective juror Peggy Ann Kelly. Walls objected to the excusal,

and the court required the prosecutor to explain his reasons. (R 329-336) The sole reason given to challenge Kelly was "...she was very reluctant in her belief in the death penalty, although she said she could vote for it ..." (R 332) Defense counsel objected to the reason as not having a basis on the record based on the questioning of Kelly. (R 332-333) The court accepted the reason as race-neutral. (R 334-336) While a juror's feelings about the death penalty may constitute a race-neutral reason for using a peremptory, Green v. State, 583 So.2d 647 (Fla. 1991); Holton v. State, 573 So.2d 647 (Fla. 1990), Kelly's responses during voir dire did not establish the "reluctance" the prosecutor claimed. (R 282-283) Race-neutral reasons must be support by the record. Slappy v. State, 522 So.2d 18 (Fla. 1988). Such is not the case here. Kelly's responses about her feeling on the death penalty were as follows:

> WILLIAMS: ....Miss Kelly, if you thought the aggravating circumstances outweighed the mitigating, could you vote for the death penalty? Now, if you're against it --
>
> KELLY: I'm not against it, but I really hadn't thought about it.
>
> WILLIAMS: You're not against it?
>
> KELLY: No.
>
> WILLIAMS: How do you know you're not against it?
>
> KELLY: Because if he did something that is wrong, I think he should be punished.
>
> WILLIAMS: Now, punishment is one thing, and I'm sure you're going to hear this if you sit on this jury, that life in prison is a very serious sentence. There's no

parole for twenty-five years, but are there cases in which you say that's not enough of a punishment? If there isn't, that's fine, and if that's the say you feel, I'm not going to disagree with you. I just need to know how you feel.

KELLY: I'm not sure.

WILLIAMS: You're not sure. You could go either way on it then?

KELLY: Yes.

WILLIAMS: If you were chosen to sit on the jury, and the judge instructed you like I explained about aggravation and mitigation, those words don't mean a thing right now, but it's a way of deciding how serious this crime was in your minds, and whether this person deserves the death penalty, and if it isn't that, then it probably isn't worth anything, but it is that, and it's the law. Could you do that, could you weigh those things?

KELLY: I believe so.

WILLIAMS: Could you vote for the death penalty?

KELLY: Yes.

WILLIAMS: I'm not asking you right now because you don't know the facts and circumstances. Let's say I prove my case, and you believe it was first degree murder, and you believe there was more aggravation than mitigation. In other words, you thought the death penalty was appropriate. Would you vote that way?

KELLY: Yes.

(R 282-283). These responses do not show a reluctance to follow the law concerning imposition of a death sentence. The prosecutor's reason was not a race-neutral one supported by the record.

JUROR DARRELL GARVIN

The prosecutor gave three reasons for challenging prospective juror Darrell Garvin. (R 333) However, none of them were sufficient race-neutral reasons. First, the prosecutor said he feared Garvin might identify with Walls since they were about the same age. This has been held not to be an acceptable race-neutral reason of a challenge. Slappy v. State, 522 So.2d 18 (Fla. 1988); Wright v. State, 586 So.2d 1024 (Fla. DCA 1991). Second, the prosecutor claimed, "I personally sensed some hostility in that person." (R 333) Again, such nebulous, personal feeling about a juror a prosecutor may have will not suffice. Ibid. Finally, the prosecutor said he was concerned about Garvin's views about the death penalty. He said Garvin response was that "if there was another way out of it, he would not vote for the death penalty." (R 333) In fact, Garvin's statement that he would vote against the death penalty if there was another way around was in response to a hypothetical question about his vote if the death penalty was placed on a referendum. He never suggested that he would not vote for the death penalty in an appropriate case.

Garvin's responses on the subject of the death penalty were as follows:

> WILLIAMS: I'm sorry, Mr. Garvin, I should know that by now after all day. I'm sure you're tired of it as I am. Mr. Garvin, you heard what I said about a penalty phase if that happens. Could you base your decision on what you hear as aggravation and mitigation, or do you have some feelings about the death penalty that make you reluctant to vote for the death penalty?

GARVIN: No, I can't just walk in here and say kill him until I hear the evidence.

WILLIAMS: Well, nobody would ask you to do that, and that's not going to be the way it works. What we really want to know is, based on who you are and the family you were raised in and where you went to school and what you've read in the paper and what you've seen on television, do you have a feeling about the death penalty that makes you wonder whether it's the right thing to do or not?

GARVIN: Sometimes.

WILLIAMS: Sometimes. What makes you wonder about it?

GARVIN: Just whether they were really guilty or not.

WILLIAMS: So, you main concern is it's final, and you want to make sure the person's guilty or not.

GARVIN: Right.

WILLIAMS: Let's suppose for argument that you're convinced of guilt beyond a reasonable doubt, and then you go to the penalty phase. Would you be reluctant to vote for the death penalty then if the aggravation outweighed the mitigation? If it was worse than it was not so bad, would you vote for the death penalty?

GARVIN: Yes.

WILLIAMS: Do you believe there's a place for the death penalty in our society?

GARVIN: Yes.

WILLIAMS: If we had a chance to do away with it, and we had a referendum, would you vote for it or against it?

GARVIN: I'd vote against it if there was another way around it.

WILLIAMS: You'd vote against it. You'd rather we didn't have a death penalty then.

GARVIN: It depends on, like I said, if I felt he was really guilty.

COURT: I don't know if he understood what you meant by a referendum. I think if you'll go over that once again.

WILLIAMS: Instead of letting the Legislature decide for us whether we were going to have a death penalty or not, suppose we let the people decide. Based upon what you know and what you've hear, where you've been and everybody you've ever talked to about it and read about it in the newspapers, and you had a chance to vote whether this country or state should have a death penalty, would you be more likely to vote for or against it?

GARVIN: Probably vote for it, I'm not sure.

WILLIAMS: That's all I have, Your Honor.

LOVELESS: Mr. Garvin, I understood you to say that you would vote against it if there was a way around it, is that what you said?

GARVIN: Yes, sir.

LOVELESS: But not seeing a way around it, you would be compelled to vote for it.

GARVIN: Yes.

COURT: Mr. Loveless, I don't think he understood what he was talking about at that point was referendum. I think he meant he was talking about a trial.

LOVELESS: Is that what you thought, Mr. Garvin?

GARVIN: Before he explained it again, that's what I thought.

(R 243-246). Although Garvin may have been confused by some of the questions, he never showed a reluctance to follow the law on the death penalty issue. The prosecution did not establish a race-neutral reason for challenging Garvin.

The trial court failed to enforce the mandates of Neil and Batson. Walls now urges this Court to reverse his convictions for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN REQUIRING THE JURY TO WORK EXTENDED HOURS THROUGHOUT THE TRIAL, THEREBY DEPRIVING WALLS OF A JURY SUFFICIENTLY RESTED TO GIVE APPROPRIATE ATTENTION TO ITS DECISION MAKING DUTIES, THEREBY DEPRIVING WALLS OF A FAIR TRIAL AND HIS RIGHT TO DUE PROCESS.

The trial judge required the jurors to work extended hours thereby depriving Walls of a jury sufficiently rested to give good consideration to his case. The court's emphasis on a swift completion of the trial overrode Walls' right to a fair trial and denied him due process. This court must reverse for a new trial. See, Art. I, Sec. 9, 16, 17, Fla. Const.; Amend. V, VI, VIII, XIV, U.S. Const.

On the first day of trial, the court required that the selection of the jury be completed. As a result, jury selection was not concluded until 8:30 p.m. (R 342-343) The court required the jury to return the following morning by 8:45 a.m. (R 342) At the conclusion of the first day, trial counsel objected to the court's scheduling. (R 342-343) Counsel's concern was that the jurors would be unable to have their dinner and get to bed until close to midnight. (R 343) Counsel asked for an additional hour before commencing trial the following morning. (R 343) Counsel noted that he had anticipated using at least two days selecting the jury. The court responded,

> COURT: I didn't. My schedule was that we'd select the jury today, and we'd take the first witness in the morning at 8:30, we're moving it up 30 minutes. We're talking about 12 1/2 hours here.

> LOVELESS [Defense Counsel]: Your Honor, what I'm saying, 12 1/2 hours --
>
> COURT: I mean go home and go to bed and get 9 or 10 hours sleep.
>
> LOVELESS [Defense Counsel]: After they've already been here. Your Honor, I think it would be an imposition on the jury, it is improper and I think the court's attention to push this in an unreasonable schedule is also improper.
>
> COURT: Thank you for your concern. It will start at 9:00, gentlemen.

(R 343)

On June 17th, the third day of trial, during the morning session of court, one of the jurors, Mrs. Walker, was sleeping. (R 568) The court took a break when he noticed her nodding during the course of the medical examiner's testimony. (R 568) Defense counsel was of the opinion when there were times when she was sound asleep and may have slept through a significant portion of the testimony. (R 568) He moved for a mistrial. The trial judge stated that he did see the juror's head nodding on two or three occasions. (R 569) The court inquired of the juror. (R 569-571) Juror Walker indicated that she was nodding off, but claimed to have had a good nights rest the previous evening. (R 571) Juror Walker did state she did follow the testimony and was listening. (R 571-572) The court denied the motion for mistrial.

The testimony portion of the trial concluded on June 17th just before 4:00 in the afternoon. (R 702-703) The court immediately asked counsel to proceed to a charge conference in anticipation of final arguments and instructions to the jury.

(R 702) Defense counsel objected to continuing to press the jury at that time. (R 702) Counsel noted that the jury had been there since shortly after 8:00 in the morning and that it would not be possible to submit the case to the jury before 6:00 p.m. (R 702-703) The court overruled the objections noting that it had no problems with the jury having to deliberate three or four hours that night and then be sequestered. (R 703). Defense counsel again objected arguing that his client needed a jury that was rested to deliberate his fate. (R 704) Defense counsel was concerned about the jurors possibly making mistakes while deliberating if fatigued. (R 705) The court dismissed counsel's concerns noting that, "I don't know of anybody that's fallen asleep in here." (R 705) Defense counsel reminded the court that juror Walker had fallen asleep earlier in the day. (R 706)

After the jury charge conference, closing arguments by counsel, and jury instructions, the jury received the case for deliberation at 5:53 p.m. Just prior to submitting the case to the jury, the court gave the following instruction:

> I'm going to go let you deliberate a little while to see what's going to happen. Before it gets too late, I'll probably -- I'll send a Bailiff in to see if you want to order some sandwiches out. We'll order sandwiches for you, and of course, we'll pay for whatever you order to eat. I'll probably do that at about 7:00 or so if you run that late. We'll let you eat a sandwich and hope you continue to deliberate. If you're able to reach a verdict tonight, that's fine. If you're not, if it appears -- it starts getting 8:30 or 9:00 and it appears that you've not reached a verdict and your not likely to, then we'll start

> making some arrangements to see that you have some things to keep you overnight. I'll be checking with you through the Bailiff as to how things are going. Good luck to each of you. You are at this time excused to consider the verdict.

(R 759).

Defense counsel objected to the court's pressing the jury to deliberate that evening. (R 760) Counsel also objected to the court's instruction which tended to encourage the jury to make a hasty decision. (R 760) Counsel noted two things working to pressure the jury to make a decision, (1) the lateness of the hour, and (2) the threat of possibly being sequestered overnight. (R 760)

The jury deliberated until 10:00 p.m. (R 760) At that time, the court adjourned for the evening with intentions of reconvening at 9:00 the following morning for further deliberations. (R 760) The court advised the jury of the motel accommodations for the sequestration. (R 761) The court also noted that the jurors would have to obtain whatever items they would need to spend the night. (R 761-762) At that point, Juror Walker, the juror who had slept earlier in the day, spoke to the court and stated,

> WALKER: I'm sorry to have to say, sir, and I hope I can. I'm going to have to go home. I can't hardly walk. My foot and leg is swollen so. Can you take people off?
>
> COURT: Ma'am?
>
> WALKER: Can you take people off. Can you take a look at it. I live in Graceville.

COURT: Is there any particular medication you could get?

WALKER: I take water pills.

COURT: Ma'am?

WALKER: I take water pills.

COURT: Can we have them brought to you have someone to go pick them up and bring them --

WALKER: Ain't nobody to my house.

COURT: Ma'am?

WALKER: Ain't nobody to my house. I live by myself.

COURT: It's not going to be possible to allow you to go home. I have two alternatives, and I hope you understand this. It's not my decision. I'm not making the rules. I'm a judge and I don't make the rules. I follow the rules, but it's my job to know what the rules are. In a situation such as this, I have two alternatives. I can keep you here until you reach a verdict, or I can sequester you, put you in a motel room, and let you get a night's sleep, and come back and begin deliberations in the morning. I do not have the option of allowing you to go to your own home at this point. That's not an option available to me.

WALKER: Well what am I going to do when I can't walk?

COURT: Well --

WALKER: I don't have clothes, medicine or anything.

COURT: Ma'am?

JUROR [Unidentified]: She doesn't have her clothes or anything.

WALKER: I don't have anything, not even medication. If I can't walk, I can't get around.

COURT: Can I have a -- I can have a deputy take a -- how far away do you live?

WALKER: In Graceville.

COURT: How far is that from here?

JUROR [Unidentified]: 23 miles from here. I don't know where she lives.

COURT: I can have a deputy take you to your home and get whatever you need and bring you back, but that's my only other option. I'm mean, I can see that we can do that, but I can't allow you to go to your own home during the course of deliberations on the verdict in this case. Will that help solve your problem?

WALKER: Oh, yes, that would solve -- I mean, taking me home, but I be here tomorrow and can't stand up, that still wouldn't help any.

(R 762-764).

The jury was sequestered and returned to continue deliberations at 9:00 the following morning. (R 770) The jury returned with a question at 10:25 a.m. (R 770-774) After receiving an answer to the question, the jury recommenced deliberations at 10:42 a.m. and returned a verdict at 11:10 a.m. (R 776) The trial judge allowed the jury to break for lunch and then commenced the penalty phase of the trial at 1:00 p.m. on the same day. (R 784) The jury heard all of the penalty phase testimony that day. (R 932) Court reconvened the following morning for arguments and instructions. (R 933)

Generally, a trial judge has considerable discretion and conducting and scheduling the trial proceedings. However, the trial judge is not free to press the jury to the point of testing their limits of attending to the testimony and proceedings.

The trial court crossed that boundary in this case and deprived Walls of a fair trial and his right to due process of law.

The Eleventh Circuit Court of Appeals in United States v. McLain, 823 F.2d 1457 (11th Cir. 1987), addressed a similar situation. The district court judge, upon realizing that the eight weeks allotted for trial was insufficient, began increasing the pace of the trial proceedings. She extending the daily court hours from 7:30 in the morning to 5:00 each evening, Monday through Thursdays. A trial week was only four days. She pressured lawyers to speed up the trial's pace and noted how much time they were using for various functions. The jury also suffered and the court took extraordinary means to keep the jury attentive. They were allowed to stand in the jury box, the jurors were provided food and coffee while seated. However, there were still complaints of jurors sleeping. One juror was eventually discharged because of sleeping. One of the defendant's lawyers also asked to withdraw as counsel citing exhaustion as a factor.

The Eleventh circuit reversed noting, "This case exemplifies the adage: `Justice which is too swift may result in a denial of the right to a fair trial.' recognizing that the trial judge has considerable discretion in the handling and scheduling of a trial, the judge in this case crossed the line and denied the defendants a fair trial." The court stated,

> A case involving a defendant a prison sentence is much more important than an overcrowded docket. Consequently, this case was deserving of more patience than

> the judge gave it, and the appellant's was prejudice by this lack of care.

823 F.2d at 1462.

The trial judge in this case, like the trial judge in McLain, pressured the jurors and the lawyers to work at too swift a pace. The extended court hours in this case, like the extended court hours in McLain, exhausted the jury, exhausted counsel, and denied Walls a fair trial.

Walls has been denied his right to due process and a fair trial which impacted not only the guilt phase of the proceedings, but the penalty phase of the proceedings as well. His rights as guaranteed under the Florida and United States Constitutions have been violated. Art. I, secs. 9, 16, 17, Fla. Const; Amend. V, VI, VIII, and XIV, U.S. Const. This court must reverse for a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN IMPROPERLY INSTRUCTING THE JURY ON VARIOUS AGGRAVATING AND MITIGATING CIRCUMSTANCES DURING THE PENALTY PHASE OF THE TRIAL.

A.

The Trial Court Erred In Instructing The Jury On The Heinous, Atrocious Or Cruel Aggravating Circumstance By Giving An Instruction Which Unconstitutionally Failed To Limit And Guide The Jury's Consideration Of The Evidence When Evaluating Whether The Circumstance Was Proved.

The defense moved to strike the standard penalty phase jury instruction on the heinous, atrocious or cruel aggravating factor and requested a substitute instruction. (R 940, 1107) Counsel argued that the standard instruction was constitutionally inadequate because it failed to inform the jury that the victim must have consciously suffered physical or mental pain for a period of time before death. (R 940, 1107-1108) Walls requested the following instruction:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. To be heinous, atrocious or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually, consciously suffered such pain for a substantial period of time before death.

(R 1108) The trial court denied the motion and refused to give the requested instruction. (R 937, 940-942) Counsel reserved these objections at the close of the court's instructions to the jury. (R 1015)

The jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. The trial court followed the standard jury instruction and instructed on the aggravating circumstances provided for in Section 921.141(5)(h) Florida Statutes as follows:

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

(R 1011-1012) The instructions given were unconstitutionally vague because they failed to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Amends. VIII, XIV U.S. Const.; Art. I, Secs. 9, 16 & 17, Fla. Const.; Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). Walls recognizes that this Court has approved as constitutional the current standard jury instruction on the heinous, atrocious or cruel aggravating circumstance in Hall v. State, 614 So.2d 473 (Fla. 1993). However, he urges this Court to reconsider the issue in this case.

The United States Supreme Court recently held Florida's previous heinous, atrocious or cruel standard penalty phase

jury instruction unconstitutional in Espinosa v. Florida. This Court had consistently held that Maynard v. Cartwright, which held HAC instructions similar to Florida's unconstitutionally vague, did not apply to Florida since the jury was not the sentencing authority. Smalley v. State, 546 So.2d 720 (Fla. 1989). However, the Espinosa Court rejected that reasoning since Florida's jury recommendation is an integral part of the sentencing process and neither of the two-part sentencing authority is constitutionally permitted to weigh invalid aggravating circumstances. Although the instruction given in this case included definitions of the terms "heinous, atrocious or cruel" (R 1011-1012) where the instruction in Espinosa did not, the instruction as given, nevertheless, suffers the same constitutional flaw. The jury was not given adequate guidance on the legal standard to be applied when evaluating whether this aggravating factor applied.

In Shell v. Mississippi, the state court instructed the jury on Mississippi's heinous, atrocious or cruel aggravating circumstance using the same definitions for the terms as the trial judge used in this case. The Mississippi court told the jury the same definitions of "heinous", "atrocious" and "cruel" as the trial judge told Wall's jury. 112 L.Ed.2d at 4, Marshall, J., concurring. The Supreme Court remanded to the trial court stating, "Although the trial court in this case used a limiting instruction to define the `especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." 112 L.Ed.2d at 4. Since the definitions

employed here are precisely the same as the ones used in Shell, the instructions to Wall's jury were likewise constitutionally inadequate. This Court recently held that the mere inclusion of the definition of the words "heinous," "atrocious," or "cruel" does not cure the constitutional infirmity in the HAC instruction. Atwater v. State, Case No. 76,327 (Fla. Sept. 16, 1993).

The remaining portion of the HAC instruction used in this case reads:

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

(R 1011-1012) This addition also fails to cure the constitutional infirmities of the HAC instruction. First, the language in this portion of the instruction was taken from State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) and was approved as a constitutional limitation on HAC in Proffitt v. Florida, 428 U. S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). However, its inclusion in the instruction does not cure the vagueness and overbreadth of the whole instruction. The instruction still focuses on the meaningless definitions condemned in Shell. Proffitt never approved this limiting language in conjunction with the definitions. Sochor v. Florida, ___ U. S. ___, 112 S. Ct. 2114, 2121, 119 L. Ed. 2d 326 (1992). This limiting language also merely follows those definitions as an example of the type of crime the circumstance is intended to cover.

Instructing the jury with this language as only an example still gives the jury the discretion to follow only the first portion of the instruction which has been disapproved. Shell; Atwater. Second, assuming the 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." Actually, the wording in Dixon was different and less ambiguous since it reads: "conscienceless or pitiless crime which is unnecessarily torturous." 283 So.2d at 9. Third, the terms "conscienceless," "pitiless" and "unnecessarily torturous" are also subject to overbroad interpretation. A jury could easily conclude that any homicide which was not instantaneous would qualify for the HAC circumstance. Furthermore, this Court said in Pope v. State, 441 So.2d 1073, 1077-1078 (Fla. 1983) 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.

Proper jury instructions were critical in the penalty phase of Walls' trial. Shooting deaths rarely qualify for the HAC circumstance. E.g., Bonifay v. State, 18 Fla. L. Weekly S464 (Fla. 1993); Burns v. State, 609 So.2d 600 (Fla. 1992). Mental suffering can, under some circumstances, qualify a shooting death for the HAC factor. E.g., Rodriguez v. State, 609 So.2d 493 (Fla. 1992); Gaskin v. State, 591 So.2d 917 (Fla.

1991). However, the jury instruction as given failed to apprise the jury of the limited applicability of the HAC factor in shooting deaths. Walls was entitled to have a jury's recommendation based upon proper guidance from the court concerning the applicability of the aggravating circumstance. The jury should have received a specific instruction on HAC which advised the jury of the factual parameters necessary before HAC could be considered. The deficient instructions deprived Walls of his rights as guaranteed by the Eighth and Fourteenth Amendments and Article I Sections 9, 16 and 17 of the Florida Constitution. This Court must reverse the death sentence.

B.

The Trial Court Erred In Giving The Standard Penalty Phase Jury Instruction On The Premeditation Aggravating Circumstance Which Fails To Apprise The Jury Of The Limiting Interpretation This Court Has Given To The Circumstance.

Prior to the penalty phase trial, during the jury instruction charge conference, the defense requested special jury instructions which incorporated the limiting interpretation this Court has given to the statutory language of the premeditation aggravating circumstance provided for in Section 921.141(5)(i) Florida Statutes. (R 945-949, 977) One of the two requested instruction read,

> The phrase "cold, calculated and premeditated" refers to a higher degree of premeditation than that which is normally present in a premeditated murder. This aggravating factor applies only when the facts show a calculation before the murder

> that includes a careful plan or prearranged design to kill, or a substantial period of reflection and thought by a defendant before the murder.
>
> A heightened level of planning for a robbery, even if it does exist, does not go to prove a heightened premeditation for the murder.
>
> A pretense of moral or legal justification is any claim of justification or excuse that, although insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

(R 1113) The second requested alternative instruction read,

> The mere fact that it takes a matter of minutes to complete the killing is not proof that the killing was cold, calculated and premeditated.
>
> "Cold" means totally without emotion or passion.
> "Calculated" means that the defendant formed the decision to kill a sufficient time in advance of the killing to plan and contemplate.

(R 1110)

The court denied these requested instructions (R 977) and used the standard jury instruction to instruct the jury as follows:

> ...the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R 1012) As a result, the jury was instructed on an unconstitutionally vague aggravating circumstance in violation of the United States and Florida Constitutions. Amends. VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const.

The statutory language of the premeditation aggravating circumstance is not sufficient to inform the jury of what it must find in determining the presence or absence of this factor. It is well established that the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty "under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." Godfrey v. Georgia, 446 U.S. 420, 427, 100 S.Ct. 1759, 64 L.Ed.2d 392, 406 (1980). 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.'" Ibid., 446 U.S. at 428, 64 L.Ed.2d at 406 (footnotes omitted) "[T]he channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362, 108 S.Ct. 1853, 100 L.Ed.2d 372, 380 (1988). As a consequence, when the jury is the sentencer, "It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511, 528 (1990). Florida juries are a "constituent part" of the capital sentencing authority and must be correctly instructed on the aggravating circumstances. Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2114, 120 L.Ed.2d 854 (1992).

In Godfrey, the United State Supreme Court ruled that the death penalty could not be imposed solely on the basis of an aggravating factor providing that the offense was "outrageously or wantonly vile, horrible, and inhuman." The Court found there was "nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of a death sentence.". 446 US at 428-429, 64 L.Ed.2d at 406. Similarly, in Maynard the Court found that Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance was too vague and overbroad to sufficiently guide the sentencing jury's discretion. Moreover, the defect was not cured by the state appellate court's finding that specific facts supported the aggravating factor. 486 US at 363-364, 100 L.Ed.2d at 382. In Sochor and Espinosa, the Court held Florida's "heinous, atrocious or cruel" aggravating factor instruction likewise vague and constitutionally insufficient. The CCP factor in Florida suffers from the same fatal flaw as the instructions condemned in Godrey, Maynard, Sochor and Espinosa.

This Court has implicitly recognized that the cold, calculated, and premeditated aggravating circumstance and the standard jury instruction are too vague to guide the sentencer's determination of whether the factor applies and adopted a number of limiting constructions of the statutory circumstance. Initially, this Court determined that this circumstance applied to "those murders which are characterized as executions or contract murders, although that description is

not intended to be all-inclusive." McCray v. State, 416 So.2d 804, 807 (Fla. 1982) Second, this Court ruled that this factor requires a finding of "heightened premeditation" -- contract or execution-style murders. Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988); Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988). Third, this court has required evidence of "calculation", defined to mean "a careful plan or prearranged design." Rivera v. State, 545 So.2d 864, 865 (Fla. 1989); Rutherford v. State, 545 So.2d 853, 856 (Fla. 1989); Schafer v. State, 537 So.2d 988, 991 (Fla. 1989); Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). Sometimes this Court has equated "heightened premeditation" with "calculation" or a "plan or prearranged design,". Farinas v. State, 569 So.2d 425, 431 (Fla. 1990); Thompson v. State, 565 So.2d 1311, 1317-1318 (Fla 1990); Perry v. State, 522 So.2d 817, 820 (Fla. 1988). Fourth, this Court has defined the statutory term "pretense of moral or legal justification" to mean "any claim of justification or excuse, which, although short of a defense to murder, rebuts the otherwise cold and calculating nature of the homicide." Cruse v. State, 588 So.2d 983, 992 (Fla. 1991); Banda v. State, 536 So.2d 221, 225 (Fla. 1988).

These limiting constructions of the premeditated aggravating circumstance illustrates the factor's vagueness. If the limiting constructions save the constitutionality of statutory aggravating circumstance, they have not been used to alleviate the vagueness of the standard jury instruction. The jury is given no guidance when asked to apply this circumstance. The

jurors are never informed of the requirement of heightened premeditation, the requirement of calculation as defined to mean a careful plan or prearranged design, nor the meaning of the statutory phrase "without any pretense of moral or legal justification." As a result, the jury is left to its own devices concerning the application of this aggravating factor and may well find it applicable to any premeditated murder.

Walls is aware that this Court rejected a claim that Florida's cold, calculated and premeditated jury instruction was unconstitutionally vague in Brown v. State, 565 So.2d 304 (Fla. 1990). This Court reasoned that Maynard v. Cartwright did not apply in Florida and did not apply to the cold, calculated, and premeditated circumstance. 565 So.2d at 308, citing Smalley v. State, 546 So.2d 720 (Fla. 1989), for the proposition that Maynard does not apply in Florida. 565 So.2d at 308. The rationale in Smalley was that Maynard does not apply because the final sentencing decision in Florida is made by the trial judge, whose findings are subject to the application of a narrowing construction upon appellate review. 546 So.2d at 722. However, this rationale has been invalidated by the recent decision in Espinosa v. Florida [reversing, Espinosa v. State, 589 So.2d 887 (Fla. 1991)]. In Espinosa, this Court relied upon the Smalley rationale to reject the defendant's claim that the heinous, atrocious, or cruel jury instruction was unconstitutionally vague. 589 So.2d at 894. Reversing Espinosa, the United States Supreme Court ruled that the jury's consideration of an invalid aggravating circumstance resulted in "the

indirect weighing of an invalid factor" by the sentencing judge who was required to give "great weight" to the jury's sentencing recommendation. 120 L.Ed.2d at 859. Thus, the jury's consideration of an invalid aggravating factor under the Florida capital sentencing procedure created "the same potential for arbitrariness as the direct weighing of an invalid factor." Ibid.

The United States Supreme Court has applied Espinosa to Florida's cold, calculated and premeditated aggravating circumstance when it remanded this Court's decision in Hodges v. State, 595 So.2d 929 (Fla. 1992). Hodges v. Florida, ___ U.S. ___, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992). In Hodges, the this Court summarily rejected a claim that the standard jury instruction on the aggravating circumstance that the crime "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification" is unconstitutionally vague relying on Brown and Smalley. The United States Supreme Court has acknowledged the flaws in the CCP instruction and this Court's reasoning in Brown by its remand in Hodges.

The Florida standard jury instruction on the cold, calculated, and premeditated aggravating circumstance is too vague to guide the jury in determining its sentencing recommendation. It must be presumed that the jury relied upon an invalid aggravating circumstance. Espinosa v. Florida. It must also be presumed that the trial court gave great weight to the jury's recommendation of death. Ibid. Thus, the trial court

indirectly weighed the invalid circumstance and violated the Eighth and Fourteenth Amendments. Ibid. This Court must now reverse Walls' death sentence.

C.

The Trial Court Erred In Refusing To Give Walls' Requested Penalty Phase Jury Instructions Since The Instructions As Given Effectively Limited The Jury's Consideration Of Non-statutory Mitigating Circumstances.

The defense requested a special instruction delineating several mental impairments Walls suffered to be considered as non-statutory mitigating circumstances. (R 964) Walls concern was that the standard jury instructions would not adequately apprise the jury that these variables could be considered in mitigation. (R 964-967) Specifically, the instructions on the statutory mitigating circumstances dealing with mental impairments contains adjectives such as "extreme" or "substantial" which could lead the jury to conclude only those mental mitigating factors which rise through that threshold level are considered mitigating. Furthermore, the catch-all instruction also does not specifically apprise the jury that mental impairment which do not rise to the level of statutory mitigating circumstances can be considered. The terms "any the other aspect of the defendant's character or record" do not necessarily lead to the conclusion that mental impairments are included. This is particularly true since the statutory list refers to mental impairments and the jury might be led to be-

lieve that the catch-all instruction merely refers to matters not presented in the statutory list.

Of course, mitigating circumstances are not limited to the statutory list. See 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); Songer v. State, 365 So.2d 696 (Fla. 1978). In fact, this court has acknowledged that mental conditions which do not rise to the level of being an extreme emotional disturbance or constitute a significantly impaired capacity are valid mitigating circumstances. Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990). It is also essential that the jury be instructed in such a way so as to give effect to this mitigating evidence -- the jury must know that it can consider such evidence as non-statutory mitigating circumstances. See, Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); Eddings v. Oklahoma; Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). The Supreme Court in Penry remanded the defendant's death sentence because the standard jury instructions failed to apprise the jury that it could consider evidence of Penry's 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 abuse background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing it's "reasoned moral response" to that evidence in rendering it's sentencing deci-

> sion. Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S., at 675, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops. 3d 26; Eddings, 455 U.S. 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 U.S., at 675, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops. 3d 26.

Penry, 492 U.S. at 328, 106 L.Ed.2d at 284.

Just as in Penry, the standard jury instructions in this case did not sufficiently apprise the jury that it could consider Walls's mental state, which may not rise to the level of the statutory mitigating circumstance, as a non-statutory mitigating factor. Walls's death sentence has been unconstitutionally imposed in violation of the United States and Florida Constitutions. Art. I, secs. 9, 16, and 17, Fla. Const.; Amends. V, VI, VII, and XIV, U.S. Const. This court must now reverse Walls's death sentence.

D.

The Trial Court Erred In Refusing To Instruct The Jury On The Mitigating Circumstance Concerning A Defendant Being Under Extreme Duress At The Time Of The Offense.

Walls requested a jury instruction on the statutory mitigating circumstance provided for by Section 921.141(6)(e) Florida Statute that he acted under extreme duress at the time of the homicide. (R 957-963) The request was based on the

provocation which resulted from Alger's attack on Frank and Frank's mental condition which causes violent rages when such an outside provocation occurs. (R 958-961) The trial judge initially agreed to give the instruction, but he retracted that ruling and denied the request on the ground that the evidence did not support it. (R 961-963) There was sufficient evidence of an outside provocation which impacted with Frank's mental impairments to place him under extreme duress. The jury should have been given the instruction. Walls has been deprived his constitutional right to have the jury instructed on mitigating circumstances supported by the evidence. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII and XIV U.S. Const. Consequently, the reliability of the jury's sentencing recommendation has been tainted and the death sentence unconstitutionally imposed. Ibid.

In Toole v. State, 479 So.2d 731 (Fla. 1985), this Court defined the term "duress" as used in the statutory mitigating circumstance:

> "Duress" is often used in the vernacular to denote internal pressure, but it actually refers to external provocation such as imprisonment or the use of force or threats.

479 So.2d at 734. This Court agreed with the trial judge in Toole that there was no duress in that case because there was no evidence of external pressure at the time of the crime. However, in Fead v. State, 512 So.2d 176 (Fla. 1987), this Court approved a duress mitigating factor which did not directly involve external threats but was the product of an outside

provocation coupled with the defendant's particular mental state. There, the factor was supported because the defendant acted under extreme duress because of his obsessive jealously over his former wife taking a new lover and his alcohol use.

In this case, Frank's mental impairments rendered him unusually sensitive to impulsive rage reactions when provoked. Edward Alger's attack triggered such a reaction in Frank. Frank lost control and the homicides resulted. This was sufficient evidence of Frank being under extreme duress because of an external provocation to justify an instruction to the jury to consider the mitigating factor. The trial court's failure to so instruct the jury has tainted the sentencing process. Frank's death sentence must be reversed.

ISSUE V

THE TRIAL COURT ERRED IN ANSWERING A JURY QUESTION CONCERNING EMOTIONAL DISTURBANCE AS A MITIGATING CIRCUMSTANCE WHICH MISLED AND IMPROPERLY RESTRICTED THE JURY'S CONSIDERATION OF THAT MITIGATING FACTOR.

While deliberating during penalty phase, the jury asked two questions concerning the emotional disturbance mitigating circumstance. (R 1017-1018) The trial judge read the question for the record:

> The question is as to quote, "In the mitigating circumstances, number three, by emotional disturbance do you mean preexisting or present?" And the second part of the question says, "If possible, please give us the definition under the law of emotional disturbance."

(R 1018) As to the second part of the question, the State and the defense agreed that the term "emotional disturbance" could not be further defined for the jury and the court so instructed the jury. (R 1018-1022) However, there was substantial disagreement as to how the court should respond to the first part of the question. (R 1018-1021) Defense counsel requested that the court advise the jury that preexisting or present mental condition could be considered in mitigation. (R 1018-1021) The court denied the request and merely reread the statutory language of the emotional disturbance mitigating factor as follows:

> The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. I cannot further answer that question for you except just simply refer you to the language in the instruction.

(R 1022)

The court's response to the question mislead the jury. Walls' emotional disturbance, whether it was preexisting or present was valid mitigation to be considered. See, Campbell v. State, 571 So.2d 415, 419 (Fla. 1990); Cochran v. State, 547 So.2d 928, 932 (Fla. 1989); Brown v. State, 526 So.2d. 903, 908 (Fla. 1988). Although the statutory mitigating circumstance focuses on "extreme" disturbance at the time the crime was committed, the consideration of Walls' emotional condition is not so limited. As this court said in Brown,

> Mitigating evidence is not limited to the facts surrounding the crime but can be anything in the life of the defendant which might militate against the appropriateness of the death penalty for that defendant. [citations omitted]

526 So.2d at 908. The jury was required to determine if Walls' mental condition, either preexisting or present constituted nonstatutory mitigation. Ibid.

Even though the jury's question seem to concern the statutory mitigating circumstance, the court was required to respond in such a manner as to not mislead the jury concerning its responsibilities. The court's narrow response was not a complete answer to the question. Walls' has been deprived of his due process rights in sentencing. The jury's recommendation was tainted and the death sentence has been imposed in an unconstitutional manner. Art. Sec. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

ISSUE VI

THE TRIAL COURT ERRED IN SENTENCING WALLS TO DEATH BECAUSE IT CONSIDERED IMPROPER AGGRAVATING CIRCUMSTANCES NOT PROVEN BEYOND A REASONABLE DOUBT.

A.

The Trial Court Should Not Have Found And Considered As An Aggravating Circumstance That The Homicide Was Especially Heinous, Atrocious Or Cruel.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court defined the aggravating circumstance provided for in Section 921.141 (5)(h), Florida Statutes and said it applies to

> ...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 or pitiless crime which is unnecessarily torturous to the victim.

Ibid at 9. Later, in Cheshire v. State, 568 So.2d 908 (Fla. 1990), this Court elaborated on the definition of the HAC aggravating circumstance:

> The factor of heinous, atrocious or cruel is proper only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

568 So.2d at 912.

Finding that the homicide fit this definition of HAC, the trial court stated,

> 5. The murder was especially heinous, atrocious, or cruel.(F.S. 921.141(5)(h) (1987)). The acts of this defendant and the obvious torture and suffering of the

> victim set this crime apart from the norm of capital felonies.
>
> While sleeping in the security of her own home with her boyfriend, she was intentionally awakened by the defendant, a gun and knife-wielding stranger. She was forced at gunpoint to tie up her boyfriend, Edward, with curtain cord provided by the defendant. Ann was then taken by the defendant to the living room where she was bound and gagged. She was left to hear the violent life and death struggle between the defendant and her boyfriend. She was also there to hear the three gun shots and realize that it was the intruder who had returned to her and not Edward. Ann begged the defendant to tell her if Edward was alright; the defendant told her "No". The defendant has confessed that at that point he was verbally taunting and terrifying her. The defendant and Ann Peterson wrestled and struggled and he ripped off her only clothing, a night shirt, leaving her completely naked. He then took her to the front bedroom where he untied her. The defendant confessed that he intended to leave no witnesses. We will never know the full extent of the taunting, cruel teasing, and mental suffering inflicted upon and suffered by Ann Peterson. Instead of a swift, efficient, and "painless" killing, the defendant fired one shot into Ann Peterson's cheek and as she lay there screaming in fear and pain, and while she was curled up crying on the floor, the defendant ended her life by firing a second shot point blank into her head.
>
> To Ann Peterson, the knowledge of her own certain impending death, at the hands of this wicked intruder into the night, knowing that he had already taken the life of Edward Alger, must have brought a level of terror, panic, and utter hopelessness beyond comprehension.

(R 1165-1166)

The trial court's finding was wrong. This homicide was a nearly instantaneous shooting death, and this Court has consistently held that such killings do not qualify for the heinous,

atrocious or cruel aggravating circumstance. E.g., Brown v. State, 526 So.2d 903 (Fla. 1988); Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Lewis v. State, 377 So.2d 640 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976). Nothing about the manner of the killing suggested it was done to cause unnecessary suffering. Bonifay v. State, 18 Fla. Law Weekly S464 (Fla. 1993); Santos v. State, 591 So.2d 160 (Fla. 1991); Brown v. State, 526 So.2d at 907; Gorham v. State, 454 So.2d 556, 559 (Fla. 1984); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Multiple gunshots administered within minutes do not satisfy the requirements of this factor. See, e.g., Amoros v. State, 531 So.2d 1256, 1260 (Fla. 1988) (victim shot three times at close range within a short period of time as he tried to escape); Lewis v. State, 377 So.2d at 646, (victim shot in the chest and then several more times as he tried to flee); Bonifay v. State, 18 Fla. Law Weekly S464, (Victim shot once before defendant entered store to rob it. Victim shot twice while he was lying on the floor begging for his life). Here the gunshots were fired within moments of one another.

This is not a case where the victim suffered physically and mentally for a significant period of time before the fatal shot. See, Jackson v. State, 522 So.2d 802, 809-810 (Fla. 1988). The fact that the victim may have suffered some pain is insufficient to separate this crime apart from the norm of first degree murders resulting from a shooting death. See, Bonifay; Santos. The trial judge's conclusions that Walls

terrorized the victim before shooting her is contradicted by the evidence. Frank's confession is the only evidence of the circumstances. He said he went "crazy" after shooting Alger. (R 673) He talked to Ann Peterson and told her that he had not wanted to hurt anyone. (R 673-674) When he told her that Alger was not okay, they ended up in a fight, and he shot her, too. (R 674) There was no evidence that Frank intentionally inflicted mental suffering before the shooting. Frank's statement was as follows:

> WALLS: I was just fucking around with her. I was, was kind of telling her bullshit.
>
> VINSON: What kind of bullshit were you telling her?
>
> WALLS: Man, why did, or what did you want, I didn't even come here to hurt y'all. I didn't even want, I didn't want to do nothing to hurt y'all. I just wanted to get some things, you know, and he attacked me and I, and all this, see and I was trying to, she asked if he was okay, I said no, and we got in a fight and things just happened and I started wrestling around with her.
>
> VINSON: Was she still tied up?
>
> WALLS: I accidentally ripped her shirt off and I was struggling with her around and I was like, already to, it was like I was gonna beat the shit out of her, but I didn't, I was just struggling with her and it was, and her shirt ripped off.
>
> VINSON: All right, let me ask you something, Frank. Did you untie her before you started doing all this? Now we're still in the living room and she's still on the floor and she's still tied up. Is this correct?
>
> WALLS: I can't remember.

VINSON: You can't remember, okay.

WALLS: -- if I untied her or not before I --

VINSON: Okay, now, so you're, you went crazy for a little bit and now you've come back to your senses and what do you do? She's --

WALLS: I wasn't even in my senses for a pretty good while.

VINSON: Okay, but what do you do with her now, she's right now she's on the living room floor and it, and it, you took her shirt off or tore her shirt off?

WALLS: I just, I don't know, I threw it, I threw it in the doggone other room and she was like curled up crying like. I don't know, I guess I was paranoid and everything. I didn't want no, uh, no witnesses --

VINSON: I can understand that.

WALLS: I, all I know is just, all I know I just went out and I just pulled the trigger a couple of times right there behind her head.

(R 673-675)

This homicide was not especially heinous, atrocious or cruel. Frank was still reacting to the stress of the circumstances when he shot Ann Peterson. The two gunshots produced death nearly instantaneously, and there was no evidence of intentional infliction of mental suffering prior to death. The trial court erred in finding and considering this factor in sentencing.

B.

The Trial Court Erred In Finding And Considering As An Aggravating Circumstance That The Homicide Was Committed In A Cold, Calculated And Premeditated Manner.

The premeditation aggravating factor provided for in Section 921.141(5)(i), Florida Statutes, requires more than the premeditation element for first degree murder. See, e.g., Hill v. State, 515 So.2d 176 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Preston v. State, 444 So.2d 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981). The evidence must prove beyond a reasonable doubt that a heightened form of premeditation existed--one exhibiting a cold, calculated manner without any pretense of moral or legal justification. Ibid. "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). And, there must be "...a careful plan or prearranged design to kill...." Rogers v. State, 511 So.2d 526 (Fla. 1987). Moreover, a plan to kill cannot be inferred from a plan to commit or the commission of another felony, such as a burglary or robbery. Jackson v. State, 498 So.2d 906, 911 (Fla. 1986); Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984). However, this is precisely the basis the trial judge used to find the premeditation aggravating circumstance in this case -- Frank's commission of other burglaries before and after the homicide. (R 1166-1168)

In finding the premeditation factor, the trial judge relied on the commission of the burglaries before and after the

homicide and the efforts to conceal the crime. While this may show planned criminal behavior, it does not show a plan to kill. The judge stated his findings as follows:

> 5. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.(F.S. 921.141(5)(f)(1987)).
>
> The defendant burglarized a used car lot and took an automobile at approximately 8-8:30 p.m. on the night before the murders. He went to two bars and one "strip joint" after committing the burglary of another used car lot. As a result of the two car lot burglaries, the defendant had accumulated assorted stolen property which he took back to and stored at his own trailer. Between approximately 1:45 a.m. and 2:25 a.m., the defendant forcibly entered (using an ice pick-like instrument) the Alger/Peterson mobile home. Parked in front of the home were a minimum of two vehicles giving the clear impression that the home was at that very time occupied. He cut curtain cord immediately upon entering. He proceeded directly to the back bedroom and intentionally awakened both victims. He made no effort to conceal his identity. The property that he ultimately took was taken from the living room area, and the taking of that property did not necessitate waking and confronting the victims. He bound both victims and gagged one. He separated the victims. After killing Edward he then returned to Ann, informed her of what he had done to Edward and then proceeded to kill Ann.
>
> After the murders the defendant checked to make sure "everything was alright", i.e., making sure he left nothing to connect him with the crime. He fled in the stolen automobile which he had parked near the murder scene. He took the victim's property to his trailer. He showered and changed clothes. Then he removed Alger's personal papers from the wallet and put his own in. The wallet contents of the victim were then tossed in a garbage dumpster behind a local high school. The defendant proceeded (now approximately 3:00 a.m.) to the same "strip joint/topless bar" where he

> freely spent the victim's money on drinks and dancers.
>
> The totality of the defendant's conduct before, during and after the murders elevate his premeditation to the heightened level needed to constitute an aggravating factor.

(R 1166-1168) Contrary to the judge's finding, the requirements for the circumstance simply were not met.

There is no evidence of a plan to kill as mandated in Rogers v. State, 511 So.2d 526. At best, the evidence here shows a spontaneous, unplanned killing during the course of a burglary, after a physical confrontation with the victim. This Court has disapproved the premeditation aggravating factor in many similar circumstances. For instance, in Rogers, the factor was rejected where the defendant shot his victim three times during an attempted robbery because the victim tried to slip away from the store. The defendant said the victim "was playing hero and I shot the son of a bitch." Ibid., at 529. In Hamblen v. State, 527 So.2d 800 (Fla. 1988), the defendant shot his robbery victim in the back of the head after he became angry with her for activating a silent alarm. Noting that the defendant had no plan to kill the victim at the time he decided to rob, this Court rejected the premeditation aggravating circumstance, stating,

> Hamblen's conduct was more akin to a spontaneous act taken without reflection. While the evidence unquestionably demonstrates premeditation, we are unable to say that it meets the standard of heightened premeditation and calculation required to support this aggravating circumstance.

Ibid., at 805. In Thompson v. State, 456 So.2d 444 (Fla. 1984), the defendant shot a gas station attendant after being told there was no money on the premises. The trial court improperly found the premeditation aggravating circumstance because the defendant murdered the intended robbery victim rather than merely fleeing. Ibid., at 446. In Maxwell v. State, 443 So.2d 967 (Fla. 1984), the premeditation factor was deemed inapplicable where the defendant shot his robbery victim when the victim verbally protested handing over his gold ring. The defendant in White v. State, 446 So.2d 1031 (Fla. 1984), shot two people and attempted to shoot two others during the robbery of a small store. One of the victims died from a bullet wound to the back of the head. This Court again held that the heightened form of premeditation necessary for the aggravating factor was not present. Ibid., at 1037. In Cannady v. State, 427 So.2d 723 (Fla. 1983), the defendant confessed to robbing a motel, kidnapping the night auditor, driving him to a remote wooded area and shooting him. He said that he did not intend to kill and shot when the victim jumped at him. His crime did not qualify for the aggravating circumstance. Finally, in Jackson v. State, 498 So.2d 906 (Fla. 1986), the defendant shot a store owner during a robbery when the owner grabbed the codefendant. Finding no plan to kill, this Court disapproved the premeditation circumstance. Ibid., at 910-911.

No more evidence of a calculated plan to kill exists in this case. Frank Walls lost control of his anger as the result of his mental illness and the stress created when Edward Alger

attacked him. Frank killed as a spontaneous reaction during the burglary which went awry. He had no prior plan to kill the victims. Although Frank did say he did not want to leave witnesses when talking about the shooting of Ann Peterson (R 675), that did not prove a plan to eliminate witnesses. In fact, his statement is more of an after-the-fact rationalization for why he killed Peterson. His statement is much like the comment the defendant in Rogers made that he killed because the victim was "playing hero." 511 So.2d at 529. Murders committed to avoid arrest are not necessarily cold, calculated and premeditated. See, Kennedy v. State, 455 So.2d 351 (Fla. 1984). The trial judge did not specifically rely on this statement to support this factor anyway, since it cannot be used without constituting an improper doubling with the avoiding a lawful arrest factor. (R 1164)

The premeditation aggravating circumstance was not proven beyond a reasonable doubt. Walls' death sentence based in part on this improper aggravating circumstance must be reversed.

C.

The Trial Court Should Not Have Found As An Aggravating Circumstance That The Homicide Occurred During A Kidnapping Because The Jury Was Never Instructed That A Homicide During A Kidnapping Was A Potential Aggravating Circumstance.

The trial court found as an aggravating circumstance that the homicide occurred during the commission of a burglary and kidnapping. (R 1168-1169) However, the kidnapping was

improperly used to support this aggravating circumstance. First, the State never argued for use of the kidnapping in aggravation. (R 935, 992-993) Second, the jury was never instructed that a kidnapping would establish the aggravating circumstance provided for by Section 921.141(5)(d), Florida Statutes. Instructions to the jury on this aggravating circumstance were as follows:

> ... the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of burglary.

(R 1011) Walls's has been deprived of his due process rights in the sentencing by the court's use of the kidnapping as an aggravating circumstance. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

Walls is aware that this Court has previously held that the jury does not have to be instructed on the elements of the felony which a trial court may later find as an aggravating circumstance under subsection (5)(d). See, Ruffin v. State, 397 So.2d 277, 282 (Fla. 1981). However, this holding preceded the ruling in Espinosa v. Florida, 505 U.S. ___ , 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) and Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). which held that Florida is not solely a judge sentencing state and the jury is a critical part of the sentencing authority and must be appropriately instructed on the law concerning aggravating circumstances. In light of Espinosa and Sochor, Walls asks this Court to reconsider its position in Ruffin to the extent it allows the trial

judge to find aggravating circumstances which were not presented to the jury for consideration via proper instructions or arguments.

D.

The Trial Court Should Not Have Found As An Aggravating Circumstance That The Homicide Was Committed To Avoid Arrest.

Concluding that the homicide was committed to avoid arrest, the court found the offense qualified for the aggravating circumstance provided for in Section 921.141(5)(e) Florida Statutes and stated its findings as follows:

> 2. The murder was committed for the purpose of avoiding or preventing a lawful arrest [F.S. 921.141(5)(e)].
>
> The defendant, by his own admission, fully intended to eliminate Ann Peterson as a witness to the murder of Edward Alger and other crimes. The defendant confessed that she asked if Edward was "O.K." and he told her "No". He further stated that she knew what he had done to Edward. The defendant made no attempt to conceal his identity, yet took elaborate steps to avoid detection. The defendant stated, "I don't want...no witnesses".

(R 1164)

The avoiding arrest aggravating factor is not applicable in cases where the victim is not a police officer, unless the evidence proves that the only or dominate motive for the killing was to eliminate a witness. E.g., Perry v. State, 522 So.2d 817 (Fla. 1988); Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986); Bates v. State, 465 So.2d 490, 492 (Fla. 1985); Riley v. State, 366 So.2d 19, 21-22 (Fla. 1978). Evidence that

the homicide victim was the only witness to other felonies does not meet this requirement. Jackson v. State, 502 So.2d 409 (Fla. 1986); Rembert v. State, 445 So.2d 337 (Fla. 1984); Foster v. State, 436 So.2d 56 (Fla. 1983). Even the fact that the victim knew and could identify the defendant is insufficient. E.g., Perry; Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert. The sole motive of eliminating a witness must be established. This case does not meet that test because the evidence provided other reasons for the shooting death. Frank's single statement about not wanting any witnesses is not the complete explanation for the murder. The trial judge's finding is incorrect, and Frank's death sentence must be reversed.

The dominant reason for the murder in this case was Frank's mental illness. Emotionally, Frank Walls is between 10 and 13 years-old. (R 859) He has poor impulse control and suffers a rage reaction when stressed or confronted. (R 807-813, 826-830) During these reactions, he sometimes loses contact with reality -- he becomes momentarily psychotic. (R 812-813) The evidence demonstrates that Frank had one of these uncontrolled rage reactions when Alger attacked him during the burglary. His bizarre turning off and on the lights in the trailer could have been attributable to a psychotic reaction. Frank's inability to recall some details of the events indicate his mental capacity was impaired. The fact that he did not shoot Peterson until after she struggled with him shows he was not acting merely to eliminate witnesses. This struggle may have just fueled his rage reaction. Indeed, Frank said, "I was

struggling with her around and I was like, already to, it was like I was gonna beat the shit out of her, but I didn't ...." (R 674)

This Court has rejected the avoiding arrest factor in other cases where the murder was the product of the defendant's mental condition. In Perry v. State, 522 So.2d 817, the defendant killed his former next-door neighbor during an attempted robbery. Although he knew the victim, the avoiding arrest factor was inapplicable because "the defendant may have `panicked' or `blacked out' during the murder." Ibid., at 820. In Amazon v. State, 487 So.2d 8 (Fla. 1986), the defendant also killed his next-door neighbors during a burglary, robbery and sexual battery. Amazon suffered a panic reaction and stabbed the mother and her eleven year-old daughter when he saw the daughter telephoning for help. There was conflicting evidence that Amazon told a police officer that he killed to eliminate witnesses. This Court disapproved the avoiding arrest aggravating circumstance. Frank Walls also suffered from a rage reaction due to his mental illness and the stress of being confronted during the burglary. Eliminating a witness was no more the sole or dominant reason for the homicide here, than it was in Perry and Amazon. The trial court should not have found and considered this aggravating circumstance.

E.

The Trial Court Should Not Have Doubled The Aggravating Circumstances Of The Homicide Occurring During A Burglary And The Homicide Committed For Pecuniary Gain.

The trial court found as an aggravating circumstance under Section 921.141(5)(d) Florida Statutes that the homicide was committed during a burglary and a kidnapping. (R 1163-1164) Additionally, the court found that the homicide was committed for pecuniary gain and qualified for an aggravating circumstance under Section 921.141(5)(f), Florida Statutes. (R 1164) In finding the pecuniary gain circumstance, the trial court recognized the prohibition against doubling aggravating circumstances (in this instance the use of the burglary to support aggravating factors under both subsection (5)(d) and (f)). (R 1164-1165) The sentencing order states:

> The Court is aware of the prohibition against the doubling of aggravating factors (i.e., considering both the burglary and pecuniary gain). Even though burglary was the underlying felony for the first degree felony murder conviction, the murder was also committed during the commission of a kidnapping and F.S. 921.141 (5)(d) could stand on a burglary or a kidnapping. Upon consideration of the total circumstances, the fact that a burglary also occurred does not prevent the Court from considering the pecuniary gain aspect of the crime.
>
> Evidence of pecuniary gain was clear by the recovery of Edward's wallet and Edward and Ann's fan from the trailer occupied by the defendant. It was further established by the defendant's statement that he went there to get some things and had in fact taken between $200-$300 from the trailer.

(R 1164-1165)

Although the court's reasoning that the pecuniary gain factor would not be an improper doubling because a kidnapping also supported the aggravating circumstance provided for in subsection (5)(d) is correct, see, e.g., Routly v. State, 440 So.2d 1257 (Fla. 1983); Lightbourne v. State, 438 So.2d 380 (Fla. 1983), the kidnapping could not be used as an aggravating circumstance for the reasons presented in Issue VI-C, supra. Consequently, only the burglary remains to support the subsection (5)(d) circumstance. Finding and weighing the pecuniary gain circumstance is an improperly doubling. See, Maggard v. State, 399 So.2d 973 (Fla. 1981). The trial court's sentencing decision is flawed and must be reversed.

ISSUE VII

THE TRIAL COURT ERRED IN USING THE WRONG LEGAL STANDARD -- PREPONDERANCE OF THE EVIDENCE -- IN DETERMINING WHETHER A MITIGATING CIRCUMSTANCE HAD BEEN ESTABLISHED BY THE EVIDENCE.

The trial judge used an erroneous burden of proof when determining if a mitigating circumstance had been established. In his sentencing order, the judge, when rejecting a mitigating circumstance, stated: "...the Court does not believe that this mitigating factor was proved by a preponderance of the evidence." (R 1168) Mitigating circumstances are proven if the fact finder is "reasonably convinced that a mitigating circumstance exists." Fla.Std.Jury Instr. (Crim) Penalty Proceedings -- Capital Cases; Campbell v. State, 571 So.2d 415, 419-420 (Fla. 1990); see, also, Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1991)("when 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"). Here, the trial court correctly instructed the jury on this standard: "If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." (R 1013) However, when making its findings, the court erroneously applied a preponderance of the evidence standard. (R 1168) This preponderance of the evidence burden of proof standard was too high and may have lead the judge to improperly reject mitigating circumstances which were reasonably supported by the evidence. Walls has been denied due process in his sentencing proceeding and his death sentence has

been unreliably and unconstitutionally imposed. Art. I, Sec. 9, 16, 17 Fla. Const.; Amend. V, VI, VIII, XIV U.S. Const.

Walls is aware of Henry v. State, 613 So.2d 429 (Fla. 1993), where this Court rejected an argument that a trial judge used an erroneous standard of proof as to mitigating circumstances. This case is, however, distinguishable. The argument in Henry was based on a sentencing order which stated that certain mitigation had been proved beyond a reasonable doubt. The trial court in that case found that mitigating circumstances existed and noted that the evidence proved them beyond a reasonable doubt. The defense in Henry argued that if the court applied the erroneous reasonable doubt standard to mitigating circumstances, it may have improperly rejected other mitigating circumstances because the evidence did not reach beyond a reasonable doubt proof. This Court concluded that the trial court had applied the correct standard because it properly instructed the jury. Furthermore, the reference to proof beyond a reasonable doubt was deemed to be the trial court's expressing its belief that the evidence exceeded the needed proof to be considered established by the evidence. In contrast, the trial court here rejected a mitigating circumstance because proof did not meet the preponderance of the evidence standard. The trial court expressly used an incorrect standard of proof when rejecting mitigating circumstances.

Walls death sentence has been unreliably and unconstitutionally imposed because the sentencing judge applied a burden

of proof to mitigating circumstance evidence which was too stringent. The death sentence must be reversed.

ISSUE VIII

THE TRIAL COURT ERRED IN FAILING TO FIND AND WEIGH AS A STATUTORY MITIGATING CIRCUMSTANCE WALLS' EXTREME EMOTIONAL DISTURBANCE AND SUBSTANTIALLY IMPAIRED MENTAL CAPACITIES AT THE TIME OF THE OFFENSE.

Walls presented significant mitigating evidence concerning his mental condition. However, the court rejected the two statutory mental mitigating circumstances. (R 1168-1169) Regarding the factor concerning substantially impaired capacity to appreciate the criminality of actions, Sec. 921.141(6)(f), Fla. Stat., the court merely rejected it without comment. (R 1168) As to the factor regarding extreme mental or emotional disturbance, Sec. 921.141(6)(b), Fla. Stat., the court stated:

> Although there was some testimony from one psychologist (Dr. Hagerott) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (F.S. 921.41[sic] (6)(b), the Court does not believe that this mitigating factor was proved by a preponderance of the evidence. Dr. Hagerott's evaluation consisted of approximately a four hour examination conducted five years after the event. Neither the other defense psychologist nor the defense psychiatrist who each examined the defendant and/or treated him prior to the murders and at a point in time much closer to the murders would testify that the defendant was under the influence of extreme mental or emotional disturbance. To the contrary, they testified that the defendant in fact had the capacity to appreciate the criminality of his conduct or to conform his conduct the the requirements of law.
>
> Furthermore, Dr. Valentine, defense psychiatrist, testified that the defendant had previously been diagnosed and treated for manic depression, but testified further that the defendant was no longer being treated for that diagnosis and was, to Dr. Valentine's knowledge, under no medication

> for any emotional disturbance either at the time of the murders or at the time of trial.
>
> The Court also observed that during the course of the week long trial the defendant, who at the time was taking no medication and was on trial for his life, exhibited absolutely no symptoms of emotional stress or disturbance, and appeared to remain calm and lucid at all times and participated actively with his counsel during the jury selection process and the trial of the case.

(R 1168-1169)

The court's rejection of these mental mitigating circumstances is erroneous for several reasons. First, the court applied an incorrect burden of proof. (See, Issue VII, supra.) Second, Dr. Hagerott's opinion that Frank qualified for these statutory mitigating factors was supported by the testimony of Dr. Chandler and Dr. Valentine, not refuted as the trial court stated in its order. (R 1168-1169) Third, the judge's reliance upon Frank's demeanor during trial was an irrelevant consideration.

Dr. Chandler's conclusions about Frank's mental condition were consistent with Hagerott's and in no way refuted Hagerott's findings and opinions. He testified that Frank was under the influence of a severe mental or emotional disturbance at the time of the crime. (R 819-820) He used his own definition of "extreme," not a legal one, when he explained that he did not classify the disturbance as "extreme." Chandler explained that he reserved the "extreme" classification for the worst 5% of the people he treats. (R 820-821) Frank's mental condition was more severe than 80% to 90% of those Chandler

treated. (R 820-821) Consequently, he did not place Frank's severe mental and emotional disturbance in the "extreme" category using his definition of term. (R 820-821) However, Chandler diagnosed Frank as having brief episodes of psychosis and loss of contact with reality when under stress. (R 812-813) Chandler rendered no opinion on whether Frank's ability to appreciate the criminality of his conduct was impaired.(R 821) This contrasts with the trial judge's order which stated that Chandler rendered an opinion that Frank had the capacity to appreciate the criminality of this conduct. (R 1168-1169)

Dr. Valentine testified about his treatment of Frank some time before the crime but he was not asked to render any opinion on the issue of statutory mitigating circumstances. (R 824-830) Again, this contrasts with the judge's statement in the sentencing order that Valentine rendered an opinion that Frank did not qualify for the statutory mitigating circumstances. (R 1168-1169) Valentine prescribed lithium to help stabilize Frank's mood swings. (R 828-830) Frank stopped taking the medication. (R 830) Valentine stated that without the medication Frank's unstable mood swings would reappear. (R 830) The trial court noted in the sentencing order that Frank was not taking the medication at the time of the crime or being treated. (R 1169) Instead of recognizing that Frank's impairments would exacerbate without treatment, the court suggested that Frank was not suffering from an emotional disturbance and no longer needed treatment at that time. (R 1169) Valentine's

testimony, like Chandler's tended to support, not refute, Hagerott's opinion.

Finally, the trial court's reliance on Frank's appearance in court was irrelevant and improper. (R 1169) A criminal defendant's courtroom demeanor is not probative of the sentencing phase issue of his mental state at the time of the crime. Frank's competency to stand trial was no longer an issue. Moreover, the trial judge is not a mental health expert capable of making a sophisticated mental evaluation on the basis of a defendant's appearance in court.

Dr. Hagerott's opinion that Frank qualified for the statutory mitigating circumstances was not refuted and the trial court was required to find that the circumstances were established. Nibert v. State, 574 So.2d 1059 (Fla. 1990); Campbell v. State, 571 So.2d 415 (Fla. 1990); Rogers v. State, 511 So.2d 526 (Fla. 1987). The trial judge's misinterpretation of the expert's testimony and failure to include these statutory circumstances in the sentencing equation renders Frank's death sentence unconstitutional. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VIII, XIV U.S. Const. This Court must reverse the death sentence.

ISSUE IX

THE TRIAL COURT ERRED IN SENTENCING WALLS TO DEATH, BECAUSE THE ULTIMATE PENALTY IS DISPROPORTIONAL TO THE CRIME COMMITTED.

The State proved that Frank Walls killed during the commission of a felony when the victims struggled with him. He did not plan a murder. Suffering from a long history of mental and emotional impairments, Frank lost control in the stress of the circumstances. He reacted violently when confronted and attacked during the burglary. He did not commit an offense warranting his execution. Compared to other cases where death has been found inappropriate, Frank's sentence is disproportional.

This Court has recognized the mitigating quality of crimes committed impulsively while the perpetrator suffers from a mental disorder rendering him temporarily out of control. E.g., Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Amazon v. State, 487 So.2d 8 (Fla. 1986); Miller v. State, 373 So.2d 882 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976). In Holsworth, the defendant, like Walls, had a personality disorder with schizoid characteristics. While committing a residential burglary, Holsworth attacked a mother and her daughter with a knife. The mother broke Holsworth's knife, but he obtained another from the kitchen and continued his attack. Both victims received multiple stab wounds. The daughter died. Although the jury recommended life, the trial judge found no mitigating circumstances and imposed death.

However, this Court reduced the sentence to life, citing Holsworth's drug usage, his mental impairment, his abuse as a child and his potential for productivity in prison. In Amazon, the defendant's mental condition and crime was also similar to Walls'. Amazon, like Walls, was nineteen years old with the emotional development of a thirteen-year-old, he was raised in a negative family setting and had a history of drug abuse. There was inconclusive evidence that Amazon had ingested drugs on the night of the murders. Amazon burglarized his next-door neighbor's house, committed a robbery and sexual battery. During the crimes Amazon lost control and administered multiple stab wounds to his robbery and sexual battery victim and her eleven-year-old daughter, who was telephoning for help for her mother. He allegedly told a detective that he killed to eliminate witnesses. The trial court found no mitigating circumstances. Reversing the death sentence, this Court said, "In light of these mitigating circumstances, one may see how the aggravating circumstances carry less weight and could be outweighed by the mitigating factors." 487 So.2d at 13. Finally, in Fitzpatrick, the defendant took hostages in an unsuccessful robbery plan and shot a deputy who was trying to apprehend him. Fitzpatrick had a history of emotional disturbance. This Court held his death sentence was disproportionate, noting that "Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer." 527 So.2d at 812.

Frank Walls is likewise deserving of a life sentence. His crime was a product of his mental impairment, not the actions of a "heartless killer." He was drinking alcohol on the night of the murders, and he had also used drugs in the past. Like Holsworth and Amazon, Walls had a reputation for nonviolence, except for those instances directly attributable to his mental impairment. The trial judge found that Walls had no significant history of prior criminal activity. (R 1168) Additionally, the court found nonstatutory mitigating circumstances based on Frank's mental condition and his nonviolent history. (R 1169-1170) Emotionally, Frank is a child. The court found his age mitigating. (R 1169) Just as the defendants in Amazon, Holsworth and Fitzpatrick, Frank deserves to live.

Impulsive killings during the course of other felonies, even where the defendant was not suffering from an impaired mental capacity, have also been found unworthy of a death sentence. See, Proffitt v. State, 510 So.2d 896 (Fla. 1987) (defendant stabbed victim as he awoke during a burglary of his residence); Caruthers v. State, 465 So.2d 496 (Fla. 1985) (defendant shot a convenience store clerk three times during an armed robbery); Rembert v. State, 445 So.2d 337 (Fla. 1984) (defendant bludgeoned store owner during a robbery); Richardson v. State, 437 So.2d 1091 (Fla. 1983)(defendant beat victim to death during a residential burglary in order to avoid arrest). Certainly, with the added mitigation of mental impairment contributing to the crime, Frank's life must be spared.

Frank Walls' death sentence is disproportional to his crime. This Court must reverse his death sentence with directions to the trial court to impose a life sentence.

CONCLUSION

For the reasons and authorities presented in Issue I through III, Frank Walls asks this Court to reverse his convictions with directions to give him a new trial. Alternatively, for the reasons presented in Issues IV through IX, he asks that his death sentenced be reversed for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by delivery to Mr. Mark Menser, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Florida, 32301; and a copy has been mailed to appellant, Mr. Frank A. Walls, on this 8th day of October, 1993.

W. C. McLAIN