IN THE SUPREME COURT OF FLORIDA

CASE NO. **84,113**

JAMES WALKER

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

ANSWER BRIEF OF APPELLEE AND INITIAL BRIEF OF CROSS-APPELLANT

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STATEMENT OF THE CASE AND FACTS

James Walker was charged by indictment with two counts of first degree murder, for the murders of Joann Jones and Quinton Jones, two counts of kidnapping, and one count of burglary of a vehicle with an assault or battery. (R. 1-2; SR. 2-5).

A. Pretrial Suppression Motions and Hearing

Prior to trial, the defendant filed two suppression motions. An evidentiary hearing on the suppression motions was conducted on January 26, 1994. (T. 109-251). At that hearing, the court heard testimony from three witnesses: Sgt. Thomas Watterson (T. 116, et seq.), Detective Willie Everett (T. 174, et seq.), and Lt. Bobby Meeks (T. 221-26). The State would note that the Appellant's presentation of the suppression issue in the Statement of Case and Facts in the Initial Brief of Appellant, mixes testimony from both the pretrial suppression hearing and the guilt-phase of the ensuing trial.

The murder of the two victims had occurred on August 21,1993. On August 22,1993, Sgt. Watterson had been notified by Detective Everett that a deceased woman had been found floating in Sewell Park, in Miami. (T. 117). Watterson went to the crime scene and found that the victim, who had already been removed from the water, had had her hands bound with duct tape. (T. 118). Efforts were made to identify the victim, including a press release with "very vague" information, requesting assistance from the public. (T. 119). This press release did not refer to the manner of death. (T. 119). Shortly thereafter, a relative of the victim, Joe Clark, came forward and identified the victim as Joann Jones. (T. 120, 149). Clark further mentioned that Ms. Jones' two-year old baby was missing and that her car was missing as well. (T. 120). The police then returned to the scene of the crime, at Sewell Park, and discovered the baby's body; the baby's mouth and nose had

been covered with duct tape. (T. 121). A second press release was then issued; while it made reference to duct tape, it did not indicate where the victims had been bound or covered with the tape. (T. 121,219-20; defense exhibit B; T. 97).

On August 22, **1993,** Detective Everett met with family members of the victims. Those family members indicated that they had not heard from Ms. Jones, and they mentioned that she had been having problems with her ex-boyfriend regarding child support payments. (T. 175). The family members further advised Everett that Jones' ex-boyfriend, the defendant James Walker, had once assaulted her, and that some sexual charges had been filed, with Ms. Jones having been taken to a rape treatment center. (T. 176). These family members furnished Detective Everett with the defendant's name. (T. 176-77). Prior to the interviewing of the defendant, Everett had apprised ***Sgt.*** Watterson of the information Everett had received from the family members. (T. 122). Watterson's recollection of that information **was** the following: the victim had an ex-boyfriend with whom she had problems regarding child support and the establishing of paternity; that the ex-boyfriend had fought the child support action in court and had recently lost; that there were allegations by Ms. Jones of a sexual assault "which had gone to court and the victim had lost"; that there had been an altercation in the courthouse where Ms. Jones approached her ex-boyfriend and a verbal argument had ensued; that Ms. Jones' family did not like her ex-boyfriend, James Walker; and that the relationship between Ms. Jones and Walker was not friendly. (T. 122).

On the morning of August 24,1993, Everett received a telephone call from James Walker. (T. 176-77). Walker stated that he had some information and Everett asked him to come to the police station. (T. 177). Walker indicated that he would have to check with the judge for whom he worked (as a bailiff), and Everett stated that he (Everett) would go over and get Walker. (T. 123, 177). Everett proceeded to the courthouse where Walker worked, but Walker was no longer there,

as Walker had proceeded to the police station on his own. (T. 177). When Everett returned to the station, he found Walker there, and he went to a conference room with Walker and Sgt. Watterson, (T. 177-78).[1] The conversation between the officers and Walker started out with background information, such as Walker's name, date of birth and age; his employment as a bailiff, for eight years, on and off, (T. 124,128). Walker was asked if he wanted some refreshments, and, pursuant to Walker's request, he was given a soda. (T. 124). After getting the basic background information, Watterson advised Walker of his constitutional rights. (T. 124, 178). The rights form, admitted into evidence as Exhibit 1, was read to Walker, and Walker initialed each paragraph, indicated that he understood his rights, and signed the form. (T. 126-27; R. 273). With respect to the reading of the Miranda warnings, Watterson told the defendant, "before we speak to anybody in a murder investigation, we read them their rights." (T. 156). Although the officers felt that Walker was a suspect, they did not tell him that he was a suspect; they simply told him that they were investigating a homicide. (T. 156, 179).[2]

After the defendant was advised of his rights, he was questioned about his relationship with the victim. (T. 179). Walker stated that his relationship with Ms. Jones was fine; when asked about child support, he again stated that everything was "fine." (T. 179). Walker was then asked when he had last seen the victim and whether he had been at her apartment. (T. 179, 129). Walker

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[1] The conference room is described in both the suppression hearing and trial testimony. The room was about 25 feet long and between eight and 12 feet wide, and had no windows. (T. 124-25; T. 202; T. 1235). The room had a refrigerator, television, microwave oven and computer. (T. 1235). Once the officers entered the room with Walker, Walker chose his own seat in the room. (T. 219).

[2] Watterson's testimony at the trial reflected that they told the defendant that the officers had no idea who committed the murder and that everybody at the time was a suspect. (T. 1239). Thus, he stated that "we generally read the rights to everybody that comes in there that we believe is a possible suspect." (T. 1239-40). Everett's trial testimony again noted that the defendant was not told that he was a suspect. (T. 1363).

responded that he had last seen Ms. Jones about one week earlier, had last been in her apartment about one week earlier, when he took the baby to play in a park (T. 130), and that he had been in her car on one or two prior occasions, the last one being about one month earlier. (T. 179, 130).

Walker said that he had called Ms. Jones at about 8:00 a.m. on August 21st, suggesting that they go to a movie later in the day. (T. 129, 179-80). Ms. Jones said that she was going to a funeral that day and did not know whether she would feel like going to the movies afterwards. The defendant thus told her to "beep him," further telling her that he himself would be at the movies at about 9:00 p.m. that evening. (T. 129, 180). Walker then stated that he went to the movies, as planned, and, when Ms. Jones did not show up, he called her. (T. 129-30,180). When she said that she would not be coming, Walker left at about 9:00 p.m., and drove from the movie theater, at 163rd Street, in northern Dade County, to his sister's home in Overtown. (T. 129-30, 180). As his sister was not at home, Walker left, proceeding to his mother's home in Liberty City. (T. 130, 180). After briefly speaking to his mother, Walker proceeded to his own home, where he then went to sleep. (T. 130).

After Walker related this version of the events of the evening of August 21, 1993, the officers asked him if he would sign a consent form for the search of his car. (T. 132, 181). Walker was told that "we needed to look in the car and to examine it for any evidence." (T. 132). Watterson went through the consent form with Walker, and Walker initialed each paragraph of the form, prior to signing it; the form was admitted into evidence as Exhibit 2. (T. 132-33, 181). Walker gave Watterson the keys to his car, which was parked in front of the police station, and Watterson then gave the keys to two other officers, instructing them to conduct the search of the car. (T. 133, 181).

When Watterson reentered the conference room, he asked Walker to sign a form permitting

the officers to take fingerprints and photographs. (T. **133, 181-82).** Walker was advised that this was voluntary on his **part.** (T. **181-82).** Walker was told that "he had access to the victim's apartment and to the victim's vehicle and that we needed to get his prints, his standard prints for elimination." (T. **133-34).** Watterson explained the form to Walker and Walker then signed it; the form was admitted into evidence as Exhibit **3.** (T. **134, 182).**

Immediately after Walker finished signing the form, Watterson "told him that we also had a very good fingerprint from the duct tape we had removed from the victim." (T. **135).** At the time that Watterson made this statement, he did not know about any latent **prints.**[3] (T. **136).** One of the latent prints which had, in fact, been removed from the duct tape on Ms. Jones, did subsequently turn out **to** be a print which matched the defendant's prints. (T. **1316-17).** Upon hearing about a print from the duct tape, Walker, who had previously been very calm, became very flushed and nervous, stating that he was not sure about the form, that he had some problems with it, and that he was not sure if he should sign it. (T. **135, 138, 182-83).** Walker acted like he was in shock, and his behavior suggested to Detective Everett that he was lying. (T. **183).** The form, which Walker had previously signed, was then given back to Walker, and neither the fingerprints nor any photographs were taken. (T. 135, 182). Watterson told Walker "that's all right, we didn't want him to do anything he didn't want to do." (T. **135).**

With the knowledge of the alleged problems which existed between Walker and Ms. Jones (T. 136), and in light of Walker's reaction to the news of a print having been obtained from the duct tape, the officers now advised Walker that they did not believe him. (T. **135-36).** Watterson specifically told the defendant that the officers "knew he was not having a good relationship with

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[3] Detective Everett testified, **"we** knew that whoever had done this, a print would probably be on some tape somewhere." (T. **1366).**

his girlfriend"; that they "knew that there was [sic] problems"; that they "knew that there had been an alleged sexual assault, that he had to go to court and he had lost recently and was paying child support which he was not happy with." (T. 136). Watterson also told Walker about the incident in the courthouse where there had been a verbal altercation between "he and the Defendant [sic]." (T. 136). With respect to these matters, Walker stated that he and Ms. Jones had been working their problems out. (T. 136). Walker did not state whether the various allegations were either true or false. (T. 137).

Detective Everett then told Walker that it would be best to come forward and tell the truth. (T. 137). Everett told him "that the person who had done this had done a terrible thing." (T. 137). Watterson had a photograph of the deceased infant, after having been found in the water with duct tape, and placed the photograph in front of Walker, saying that "the person that did this did a terrible thing." (T. 138, 183-84). The officers then made comments to the effect that they did not believe Walker and that he should tell the truth. (T. 138). Walker denied any involvement (T. 138), and the officers again stated that they did not believe him, asking him "to clear his conscience." (T. 138-39). Walker then asked for another soda, which was given to him. Walker was asked to tell what really happened, and he then proceeded to relate a different version of the events of the night of August 21st. (T. 139). Walker prefaced this by saying that "I'll tell you what happened. I'll tell you the truth." (T. 184).

Walker then related that he met Ms. Jones, who had the baby with her, at the movie theater, when two armed men approached them, forcing Walker into the back seat of Jones' car, with Jones and the baby. The two armed men got in and proceeded to drive the car south on 1-95, before stopping in the vicinity of the Orange Bowl. The two men told Walker to put duct tape on Ms.

Jones and Walker put tape on her mouth and eyes. (T. **139-40,184**).[4] At the Orange Bowl, the two men told Walker to get out of the car, saying that they knew where he lived and that they would kill him if he said anything. (T. 140, 185). The abductors then drove off with the two victims and Walker did not see them again. (T. 140).

Watterson became incredulous upon hearing this story and yelled at the defendant. (T. **161).** Watterson told the defendant that Watterson did not believe him, "that he was full of shit"; "that that **was** the worse [sic] story I ever heard in all the time I ever been a police officer, that nobody was **going** to believe him." (T. 140-41). Watterson "told him God wasn't going to believe him, his co-workers wasn't going to believe him, and we certainly didn't believe him." (T. **141).** Everett also told the defendant that he was lying, that there were too many holes in the story, and that Walker must think that the officers were the dumbest. (T. 186). The officers then asked the defendant how he had gotten home and what had happened next; Walker did not explain, saying that he did not know how he got home. (T. 185, 141). The officers similarly inquired why Walker did not call the police right away, and this, too, was not explained. (T. 141).

Watterson then left the conference room for 20-30 minutes, while Everett continued questioning Walker. (T. **141, 186).** Walker stuck to his abduction story, going to the bathroom at one point and getting another soda from Everett. (T. 186). When Watterson returned, Everett advised **him** that Walker was sticking to the abduction story, and Watterson reiterated that no one was going to believe the defendant; that the story was ridiculous. (T. 141-42). Watterson then said that he wanted to get a stenographer to take down the story:

Q. What was his response to that?

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[4] This information, regarding the location of the duct tape, **had** not been given out in any press releases, and no one other than the police and perpetrator of the offenses would have known it. (T. **140, 184).**

A. He told me if he did that he wanted an attorney.

Q. And what did you say to him?

A. I told him then we won't do that.

(T. 142). According to Everett, Walker had said, "I don't want a steno in the room, I won't go on tape." (T. 186). Everett then asked Walker, "Do you still want to talk? He said yes, I do. He continued talking." (T. 186).[5] Walker made it clear that if there was no stenographer, he did not want an attorney. (T. 220).

After the conversation continued for another one or two minutes, Watterson again left the room. (T. 142). When Watterson returned, he brought Everett up to date on what had been transpiring outside the conference room, and the officers then advised Walker that he was under arrest for two counts of murder. (T. 142, 187). The conversation with Walker continued, and he was then advised that "you are not leaving this room so you may as well start telling us the truth." (T. 187). The officers reiterated that they wanted Walker to tell the truth. (T. 188). When Watterson had reentered the room, he brought Lt. Meeks, the officers' supervisor, with him. (T. 143). Watterson introduced Meeks to Walker. Meeks told Walker to tell the truth and subsequently spoke to Walker alone, as both Watterson and Everett left the conference room for a while. (T. 143, 189,222). Meeks spoke to Walker on two separate occasions that day. (T. 222). Meeks' testimony at the suppression hearing was brief and is set forth more fully in Meeks' trial testimony. In his trial testimony, Meeks explained that he initially spoke to Walker in the presence of both Everett and

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[5] Watterson's trial testimony on this point was identical. (T. 1276-77, 1300-1302). Everett, at trial stated that when Watterson told Walker about the stenographer, Walker said, "No. If you do that, I don't want to talk." (T. 1376). Watterson then said that they would not do that, (T. 1376-77). Everett also stated that the officers would not do that, and then specifically asked Walker if he still wanted to talk. (T. 1377). Walker responded affirmatively and continued talking to the officers. (T. 1377).

Watterson, telling Walker that he should tell the truth. (T. 1323). Walker responded that he did not kill Ms. Jones and Meeks told him that he was not telling the truth and that he should tell the truth to Watterson and Everett. (T. 1323). When Meeks stated that he was going to leave the room, Walker said that he wanted to speak to Meeks alone, and the others then left. (T. 1324).

Walker then stated that he did not want to hurt anyone, that he and Jones had been having problems, and that he had been trying to straighten out his problems with Jones. (T. 1324). He then reiterated the abduction story to Meeks. (T. 1326-27). Meeks told Walker that Walker was insulting his intelligence; that the story was not true. (T. 1327). Walker then said, "I didn't do it by myself. Someone there was, Two other guys that helped me." (T. 1327). He reiterated that he did not do it alone, and Meeks stated that he was leaving the room, that Everett would return, and that Walker should tell the truth to Everett. (T. 1328).

When Everett reentered the room, the defendant spoke to him, and Everett subsequently advised Meeks that Walker was still sticking to the abduction story. (T. 1328). Meeks then spoke to Walker again, telling Walker to accept responsibility; to tell Everett the truth; to get it off his chest or it would kill him; and to cooperate. (T. 1328). Meeks then left. (T. 1328-29). Everett's trial testimony similarly notes that Meeks had spoken to Walker, alone, on two separate occasions. (T. 1376-78). It was after Meeks left on the second occasion that Walker gave Everett the third version of what transpired on the night of the murders. (T. 1378-82).[6] This version was related to Everett, while Watterson was out of the room. (T. 191).

The defendant prefaced this version again by telling Everett that he would tell the truth. (T.

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[6] When Everett was questioned at the suppression hearing, he initially said that he thought Meeks and Walker spoke just once. (T. 213). However, Everett then consulted the written report which he had prepared and noted that pp. 36-38 of that report indicated that Meeks and Walker had spoken twice. (T. 213-14). Everett then clarified this matter, noting that the first time that Meeks exited, Walker still stuck to the abduction story with Everett. (T. 215).

189). Walker then told Everett that Jones had met him at the movies, that they discussed child support problems, and that they started driving around, ending up at Sewell Park. (T. 189). At the park, they got out of the car, argued and fought. (T. 190). Jones slapped Walker and he told her to stop, as the fight continued and "things got ugly." (T. 190).[7] Walker knocked Jones down and saw some duct tape by a fence. He proceeded to tape her and throw her over the fence. (T. 190). The baby fell out of Jones's hands when Walker knocked her down, and Walker taped the baby and then similarly threw the baby over the fence, (T. 190-91). Walker stated that he had acted alone. (T. 145). Walker then left in Jones's car, driving around before "ditching" the car and getting his own car from the movie theater lot. Walker then went home and went to sleep. (T. 191).

While the above narrative was in progress, Watterson reentered the room and Everett brought him up to date. (T. 191). Watterson again mentioned bringing a stenographer in and Walker reiterated that "I told you before if you do that I don't want to talk." (T. 191). In Watterson's words, the defendant stated, "If you do that, I want an attorney here." (T. 146). Both Watterson and Everett told the defendant that they would not do that. (T. 146, 191). Everett asked the defendant if he still wanted to talk, and the defendant said "yes." (T. 191). Watterson again left the room, and the defendant concluded the statement, saying that he woke up the next day and did not do anything, but that he called Jones's apartment and left a message on her answering machine. (T. 191). When Everett asked why he left the message, Walker responded that he did not think that Jones was dead. (T. 192).

In the interim, the defendant's brother, Quinton Rogers, had been brought into the station. The officers brought Rogers into the room where Walker was and told Walker that Rogers had admitted being with him. (T. 192, 147). Walker, having previously said that he acted alone, then

[7] Everett did not observe any bruises on Walker. (T. 190).

admitted that Rogers **was** with him but that Rogers had remained in the car while Walker went into the park with the two victims. (T. 147, 192).

With respect to several of the alleged improprieties which the Appellant seeks to attribute to the officers, several additional matters should be noted. The only "promise" that the officers made to Walker was that if he told the truth and cooperated, the fact that he so cooperated would be told to the prosecutor and judge. (T, 215-18, 1415, 1304). That was what Everett was referring to when he told the defendant, "let me help you out." (T. 215-16). With respect to the Appellant's focus on what is designated as the good-cop had-cop technique, Everett did not agree that the officers were resorting to **any** such "technique." (T. 204). The officers indicated that they had not set out to utilize such a technique, but that their actions may have taken on that appearance since Watterson yelled at the defendant after hearing the defendant's unbelievable abduction story. (T. 1287-89, 1401-1402, 203-205). With respect to the implication in the Brief of Appellant that the officers threatened the defendant with the prospect of the death penalty, the officers made it clear that Everett only referred to the fact that first degree murder was subject to the death penalty. (T. 215, 1304, 1415). In response to questions from defense counsel querying whether the officers would do "anything" to get the defendant to confess, the officers repeatedly responded that they were just trying to get the defendant to tell the truth, by using whatever legal means were at their disposal. (T. 1293, 1308, 1412, 206). Lastly, to the extent that the Brief of Appellant implies that there was some sort of "racial" problem between the defendant, who is black, and the officers - Watterson is white and Everett black - in the only questioning of any witness on this subject, Everett specifically denied that there **was** any racial problem between Walker and Watterson. (T. 212). Finally, the defendant did not testify at the suppression hearing. After hearing extensive legal arguments on the suppression motions (T. 228-50), the trial court denied both motions. (T. 250-51).

B. Trial Testimony

Victim Joann Jones' body was discovered in the canal on the north side of Sewell park on Sunday, August 22,1993, at approximately 8:00 am. (T. 912-13, 938). The discovery was made by a fire department officer who was in the process of putting out a brush fire in the park. (T. 912-913). The victim had last spoken to her sister at approximately 7:00 pm the night before. (T. 1012). The canal where the victim was found, is separated from the grass area of the park by a 4-5 feet high chain link fence. (T. 970). There is a muddy swale area between the water and the chain link fence. (Id.) There were no surrounding gates in the chain link fence; the fence had to be cut by the police in order to access the victim's body. (Id.) Sewell park is located within one half mile of where the defendant worked as a circuit court bailiff, (T. 1379).

Joann's body was found partially submerged in the water and partially in the muddy swale. (T. 938-1041). Her wrists were bound together, in front, with duct tape. Duct tape was also wrapped completely around her head, covering her eyes and her mouth. (T. 1041). A piece of duct tape was also found next to the victim's feet. (T. 939-40). The defendant's fingerprint was on the interior surface of the duct tape around this victim's head. (T. 1316-17).

The second victim, Joann's seventeen month old son, was discovered the next day. (T. 993, 1061). The baby's body was found approximately thirty five feet away from his mother's body, floating in water and entangled in heavy surrounding vegetation. (T. 1008, 1061). The body was bloated and decomposing. (T. 1061). The baby's head was also wrapped with duct tape, which covered his mouth and nose. (T. 1001-2,1066). The tape around the baby's head was matched to and came from the same roll of tape as that collected from the mother. (T. 1112).

The medical examiner testified that upon uncovering the tape around the mother's head, he observed a variety of cuts, bruises and swelling on her face, in addition to other upper body

extremities. (T. 1043). There were cuts between her eyebrows, under the left eye, and on the left cheek, all with bruising and swelling (T. 1046-47), in addition to small cuts on the insides of her mouth. (T. 1050). The Doctor also documented abrasions and bruising on the back of both the left and right shoulders, caused by blunt force and consistent with having been struck by a hand or stick. (T. 1050-53). All of said external injuries were inflicted while the victim was alive; bruising and swelling occur only if the victim is alive and her heart is pumping. (T. 1053).

The internal examination of Joann's body reflected bruising on the inside of the back part of her scalp, again consistent with blunt force trauma. (T. 1055). The interior back and front neck muscles also reflected bleeding and bruising, consistent with manual strangulation. (T. 1059-60). Both of the victim's eyes had petechial hemorrhage, again consistent with manual strangulation and mechanical asphyxiation. (T. 1049).

The medical examiner also saw foam coming out of the victim's nose, consistent with drowning. (T. 1043-45).[8] The foam is a mixture of water which has been breathed in, mucous and air. (T. 1071). The sinus deep inside the victim's skull also had fluid in it, in addition to petechia, again consistent with drowning. (T. 1056). There was fluid in the middle ear, also consistent with drowning. (T. 1056-7). The process of drowning involves an initial struggle and panic. (T. 1057-8). At some point the victim tries to hold her breath. Id. Carbon dioxide is thus built up, and stimulates a part of the brain to breathe again. Id. Panic and deliberate holding of the breath require conciousness. (T. 1022-8). Upon breathing, water is inhaled into the lungs. (T. 1057-8). The victim starts to gasp and choke. Id. Eventually, the lungs fill with water, and the victim gradually goes into respiratory arrest; she can't breathe. Id. Thereafter the heart is stressed and the victim

[8] The foam is also consistent with drug overdose and ruptured aneurism in the brain. (T. 1044,1070-1). However, a toxicology exam of the victim reflected that there were no drugs in her system. (T. 1044, 1079). There was no evidence of an aneurism in her brain either. (T. 1079).

dies. Id. The time for the drowning process is variable, lasting three to five minutes according to some sources. Id. (T. 1044, **1070-1).**

In light of the above, the medical examiner stated that Joann's cause of death was a combination of drowning, manual strangulation and suffocation. (T. 1060, **1077).** The baby's cause of death was mechanical asphyxia. (T. **1066).** He suffocated as he could not breathe due to obstructions on the nose and mouth area. Id.

Sgt. Watterson, Detective Everett, and Lt. Meeks again reiterated the substance of the statements that the defendant made to them. Thus, the **jury** heard about the defendant's initial denial of any involvement (T. 1245-46, 1360-61), the abduction story, in which the defendant claimed that two armed men had abducted him and the two deceased victims, coercing the defendant to tape the two victims before expelling the defendant from the car and fleeing with the two victims (T. **1273-74,** 1373-74), and the ultimate admission that the defendant had killed both victims. (T. 1378-81).

Detective Everett detailed the defendant's third and last statement **as** follows. The defendant admitted that he and Joann were having problems. (T. **15**18). The defendant called her **and** told here that he wanted to go to the movies **with** her. Id. He asked her to bring the baby with her. Id. The movies were located at the 163rd Street Mall, approximately **10** to **15** miles away from the crime scene at Sewell **park.** (T. 1378-9). When the victims arrived, the defendant sat in their car and had a discussion with Joann about the child **support.** (T. **1378-9).**

The defendant then suggested that **they** go **for** a drive. (T. **1379).** They arrived at Sewell's **park** about twenty minutes later, at approximately 10 to 10:30 pm. (T. **1379).** The defendant and Joann got out **of** the car, arguing. (T. **1380).** Joann then **got** the baby out of the car. Id. **They** were **arguing** about child **support.** Id. The defendant wanted Joann to call the court and have the child

support payments lowered. Id. They walked down into the park, at which point, according to the defendant, they began to fight. Id. The defendant stated that he grabbed Joann, choked her and knocked her down near the fence along the water. (T. 1381). The defendant stated that he then saw some duct tape laying by the fence, Id. He picked up the tape and put it around Joann's eyes and mouth, Id. He then picked her up and threw her over the fence into the water. Id. The defendant then picked up the baby, put tape around his mouth and threw the baby into the water. Id. He then drove the victim's car back to the 163rd Street Mall, retrieved his own, "ditched" the victims' car, drove home and went to sleep. Id. The defendant although initially having stated that he had done it alone, later admitted that his brother, Quinton Rogers, was with him in the car. He stated that Rogers remained in the car when the defendant and the victim went in to the park. (T. 1283-5, 1384-5).

The physical evidence contradicted some of the above version of the location and timing of the fight and binding the victims with duct tape. Joann's car had last been seen the day before, and also hours before the murders, by Joann's brother-in-law and her sister, respectively, (T. 980-82, 1010-1). There were no signs of any interior damage or disarray at said times. Id. Upon recovery of the car at the 163rd street mall, however, the police discovered evidence of a struggle inside. (T. 857). The left rear door's window was protruding out from the window frame. (T. 952). The interior of the car was in disarray, with a lot of scattered items about the floor and seats of the vehicle. Id. Tapes, shades, litter, clothing, the victim's check book and miscellaneous papers were scattered about. (T. 959). The rear seatcovers were torn. (T. 958). The dash board area reflected heavy scratching. Id. The air conditioning unit's front face plate was found on the front passenger floor; The radio knobs were broken and on the floor; the ashtray was found under the driver's seat, and, the lighter was on the rear seat. (T. 957-9).

There was blood on both seat covers of the vehicle, blood on the rear upper and lower portions of the vehicle, on the interior of the left rear door, on the interior window of this door, and on the ceiling of the vehicle. (T. 958). The police also found strips of duct tape inside the car. (T. 960). A strip of duct tape with blood and hair was found under the front passenger seat. (T. 961). Another strip of duct tape containing hair was under the seat in the left rear side of the vehicle. Id.

The defendant's wife, Vanessa Walker, testified about the defendant's behavior at or about the date of the murders. During the year prior to the murders, Mrs. Walker had seen the defendant carrying a bag in the trunk of his car which had contained paternity papers and duct tape. (T. 1210). Mrs. Walker was not sure about the exact time of seeing the bag. (T. 1226-28). However, the final hearing and child support/paternity order were in June and July 1993, respectively, one to two months prior to the murders. (T. 1187, 1205). Mrs. Walker had never seen the defendant use duct tape for anything throughout their marriage. (T. 1211). During the week of the murders, Mrs. Walker had also seen the defendant carrying a second bag, the contents of which included rubber gloves (not the household kind); she had never seen the defendant use rubber gloves in the three years that she had known him. (T. 1211). During the week leading up to the murders, Mrs. Walker had seen the defendant and his brothers, whispering on several occasions, including the date of the murders. (T. 1212-13). Mrs. Walker described this as unusual behavior for the defendant. (T. 1212-13).

On August 21, 1993, the date of the murders, the defendant and his brother, Quinton, who resided with them, left the Walkers' residence at about 7:30 p.m.; the defendant and Quinton returned around 12:30 a.m. (T. 1214). Immediately upon returning, Quinton washed his hands in the kitchen; Mrs. Walker heard running water. (T. 1214). The defendant then went and took a shower, something which he did not normally do at that hour, especially since he had taken one

prior to leaving the house. (T. 1215). Mrs. Walker then heard the defendant call his mother. "He told his mom not to worry about what he did; that they weren't up to any mischief." (T. 1215). Mrs. Walker overheard the defendant tell his mother that they had been trying to find his sister, and that is why they had picked up their other brother, Willie, from her house. (T. 1215). The next day, when Mrs. Walker awoke, the defendant was washing his and his brother's clothing; a matter which Mrs. Walker deemed unusual since she had washed all of the clothing the prior day. (T. 1261).

Subsequent to the defendant's arrest, Mrs. Walker visited and asked the defendant if he had committed the murders. "He said, no, but that he didn't even plan it. Someone else suggested it to him." (T. 1217). The defendant added "[t]hat there were two other people involved." (T. 1217). Mrs. Walker asked if he had been there and the defendant said, "Yes. That he was watching." (T. 1217-18).

During the course of the investigation, the police obtained blood and saliva samples from the defendant and his brothers (T. 966-67), as well as from Ms. Jones. The various blood stains found throughout the victim's car were thus subjected to further analysis. Victor Alpizar, with the serology section of the Metro Dade Police Department, did forensic testing on the blood samples. (T. 1089). He related how the apparent blood stains on various parts of the vehicle, primarily the interior compartments, were tested and proved positive for the presence of blood. (T. 1090-98). A 15" strip of duct tape, which had been found in the vehicle, also tested positive for the presence of blood. (T. 1093). Most of the samples were retained and transferred to Dr. Kahn, for DNA testing, although some of the samples were too small to be of use for such further testing. (T. 1090-98). Cigarette butts which had been found in the vehicle were not tested for blood, but were transmitted to Dr. Kahn for DNA testing. (T. 1091). Blood and tissue scrapings recovered from under victim Joann Jones' fingernails were also submitted for testing. (T. 1142).

Dr. Kahn testified as to the nature of the DNA tests performed and their results. Kahn had obtained DNA standards from the two victims, the defendant and his two brothers. (T. 1137-38). He used the PCR testing method, which he described as the best method, given the time constraints - an impending trial date - which he had to deal with. (T. 1139). Kahn performed tests on a piece of a gray seat cover from the car (T. 1129-30), blood scrapings on the piece of tape from the car (T. 1141-42), the victim's fingernail scrapings (T. 1142), and cigarette filter paper found in the ashtray of the victim's car. (T. 1142-43). The DNA type found on the cigarette filter paper matched that of the defendant, James Walker, and his brother, Willy Rogers. (T. 1143). Kahn explained that the defendant's DNA type, referred to as 1.1, 1.2, would be found in 12% of the black population, 6% of the Caucasian population, and 4.8% of the Hispanic population. (T. 1146-47). The other items tested by Kahn reflected a DNA type which matched that of Ms. Jones, and designated as 4.4. (T. 1130-42). This DNA type would be found in 11.9% of the black population, 9.9% of the Caucasian population, and 16.7% of the Hispanic population. (T. 1147). Scrapings from under the victim's fingernails matched the victim's own DNA type (T. 1142, 1148).

Upon questioning about differences in PCR testing and an alternative testing method, RFLP testing, Kahn acknowledged that RFLP testing can yield more information, and while it can produce frequency rates such as 1 in 13,000,000, it can also produce rates, at the other end of the spectrum, such as 1 in 16. (T. 1151). He explained that he did not have sufficient time for RFLP testing in the instant case, that such testing, in any event, could not possibly have been done on the cigarette butts, but that it would have been possible to use such testing on the filter paper. (T. 1153).

The jury also heard testimony about the hostile relationship which had existed between the defendant and Ms. Jones, arising out of the child support disputes and Jones's refusal to have the abortion which the defendant wanted her to have. Much of this evidence was the subject of pretrial

motions in limine. (T. 257-97, 820-875; R. 100-14). Additionally, the trial court's rulings on several of these matters were revisited when these evidentiary matters arose again during the trial. (T. 1129-31). The pertinent legal arguments and the court's rulings thereon, will be addressed, where relevant, in the ensuing argument sections of this brief.

Detective Gary Cunningham, of the North Miami Police Department, had spoken to Joann Jones on July 20, 1991. (T. 1180). As a result of that conversation, Cunningham spoke to the defendant herein two days later. (T. 1180). The conversation with the defendant related to his relationship with Jones. (T. 1181). The defendant had told Cunningham that he was willing to pay for Jones to have an abortion at that time. (T. 1181). The defendant further told Cunningham that he had told Jones that "if she insisted to mess up his life or ruin his life, she knew that he could make her life miserable." (T. 1181).

Sylvia Brown, an assistant state attorney in Dade County, testified about the child support enforcement action in which she represented Ms. Jones. (T. 1185, et seq.). A child support complaint had been filed in April, 1992, about one month after the baby victim had been born; the final hearing occurred on June 25, 1993, about two months prior to the murders. (T. 1187). Both Jones and the defendant were present at that hearing. (T. 1188). Brown was present during court discussions regarding child support, and she observed that the defendant was not pleased about having to pay the amount of support that he had been ordered to pay by the court. (T. 1203). The defendant continuously told the court that he could not afford to pay the sum that he had been ordered to pay. An income-deduction order, directed to the defendant's employer was introduced as Exhibit 97, and the support order was introduced as Exhibit 98. (T. 1205-1206; R. 270-71). The last page of the support order, from the June 20, 1993 hearing, was signed by the hearing officer on July 2, 1993, and signed by the Circuit Court Judge on July 19, 1993. (T. 1205). The order made

a final determination of paternity (T. 1205), and awarded support in the sum of $164.06, biweekly, until the child reached age 18, plus an additional $5.25 biweekly, as a clerk's fee; plus $20 per week as arrearages, effective from July 2, 1993. (T. 1206). This provided for a total of $189 biweekly, in accordance with Florida's child support guidelines, commencing July 2, 1993. (T. 1206). Attorney Brown further noted that the defendant objected to the child's name being changed to his surname of Walker. (T. 1207).

The prosecution also wished to present evidence that approximately one month prior to the murders, when the child support order was becoming final, the defendant had a conversation with defense attorney, Don Westfield.[9] (T. 848-51; R. 288-90). Mr. Westfield at the time was defending a murder case in which the female victim, in a strikingly similar fashion, had been bound with duct tape around her hands and over her mouth and eyes, before being thrown over a bridge and into a body of water. Id. The defendant, during a break, had gone to the court room where the case was being tried, and asked Westfield about the manner of killing. Id. Westfield described how the victim's hands were bound in front, and the eyes and mouth covered, all with duct tape, leaving her nose open, and how she had suffered because she was still alaive and able to breathe when thrown into the water. Id. The prosecution argued that said evidence reflected premeditation and intent. (T. 856). The trial court however, precluded presentation of said evidence. (T. 863). The presentation of said evidence is the subject of the State's cross-appeal.

At the conclusion of the guilt phase, the defendant was found guilty, as charged, on all five

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[9] The defendant had initially approached Mr. Westfield as the latter was leaving the court house and told Westfield that Judge Siegel was looking for him because he had missed a case on calendar that day. (R. 286-7). The next day, Westfield checked the calendar and could not see any cases for which he should have appeared. (R. 288). Westfield asked the defendant that if in fact there was something on the calendar or if Judge Siegel needed to see him to come and get Westfield from Judge Chavies's courtroom. Id.

counts: two counts of first degree murder; two counts of kidnaping; and one count of burglary of a vehicle with an assault or battery. (T. **1553).**

C. Penalty Phase

The prosecution's penalty phase case consisted of brief testimony from Dr. Williams, the medical examiner who performed the two autopsies, reiterating the process of drowning and again observing that it generally takes from three to five minutes. (T. **1713-14).** , The doctor could not say whether the baby drowned, but could not rule it out. (T. 1718). The prosecutor again requested to present Mr. Westfield's testimony for establishing the HAC and **CCP** aggravators. (T. **1641-2).** The request was again denied, (T. **1668).** The prosecutor renewed its request after the defense, in its cross examination of the medical examiner suggested that the victims may have been accidentally smothered in the car, (T, 1737-8). The request was denied. (T. 1739).

The defendant's penalty phase case consisted of a combination of psychologists and family members. Dr. Jethro Toomer, a clinical psychologist, expressed the opinion that the defendant suffered from a personality disorder, based on what Toomer described as a history of family dysfunction that led to maladapted forms of behavior later on; symptoms included manic depression and paranoia, (T. **1784,1787,1789).** Toomer based his opinions on what he described as a pattern of abuse and abandonment, and a lack of stability in the defendant's environment, in terms of situations that would foster appropriate growth and development over time. (T. **1763).** Toomer did not provide specific factual details regarding any alleged abuse. Toomer's opinion regarding "abandonment" and lack of stability related to what Toomer described **as** the defendant having been raised for many years by his stepmother, instead of his natural mother, and that the defendant did not learn of this until his pre-teen years. (T. **1764).** Toomer's opinions were also predicated, in part, on what Toomer described as the fact that the defendant was often sick as a child, suffering from

"malnutrition." (T. 1764-65). Toomer did not have any medical records regarding any such "malnutrition." As will be seen later, the reference to "malnutrition" came from the defendant's relatives, who noted that the defendant's natural mother left the defendant with the defendant's father, when the defendant was about 1½ years old, and that, at that time the defendant was unable to hold down solid food. (T. 1827-28). The grandmother and aunt referred to this as "malnutrition," but there was never any medical diagnosis adduced at trial as to any such malnutrition. (T. 1826-27, 2025).

Toomer had also administered several tests. The first, the Carlson Psychological Survey, is a measure of personality functioning which compares the tested person to other individuals who have committed crimes or are charged with having committed them. (T. 1765-66). This test presents a series of questions which call for subjective responses from the tested person. (T. 1767-68). Thus, if the defendant lies on the responses, the test results will be affected. (T. 1914-15). The Bender-Gestalt tests required the defendant to duplicate or draw symbols which he was shown on cards. (T. 1774). Based on what Toomer referred to as "rotation," the shifting of the position of the symbols drawn, Toomer found indicia of some degree of oppositional behavior and lifelong dysfunction. (T. 1779-80) Based on "closure" problems, regarding the alignment and adjoining of two or more pieces of a design, Toomer felt that there was a high level of anxiety, self-doubt, and problems with interpersonal relationships. (T. 1779-80). As to the level of anxiety, it was noted that this testing occurred after the defendant was arrested for murder and was awaiting a trial with the possibility of imposition of the death penalty. (T. 1959). While this test indicated, to Toomer, the possibility of organic brain damage, Toomer was not qualified to make the determination of the existence of any such damage and could only refer the defendant to another doctor for further examination. (T. 1766, 1781).

The MMPI test, which was also administered by Toomer, is a personality inventory, consisting of hundreds of questions, which once again rely on the truthfulness of the person taking the test. (T. **1766, 1782, 1945-51).** The "lie scale" of this test, a score of **74,** indicated the possibility of conscious distortion on the part of the defendant. (T. 1949-51). The subjective nature of the MMPI **and** Carlson tests was highly significant, as one of the profiles from the MMPI indicated that the defendant manipulated others for his own ends. (T. **1952).** The MMPI included scale ranges between 50 and **60,** and Toomer acknowledged that many clinical psychologists consider the scores significant only when they exceed 65. (T. **1954-55).** Seven of the 10 scales placed the defendant in a normal range (T. **1964-65);** of three elevated scores, only one was over **66.** (T. **1963).** The three scales which were "elevated" included the depression scale, the psychotic deviant scale, and the paranoid scale, (T. 1959).

Although Toomer did not administer an IQ test, he found that the defendant was of normal intelligence, with no communication problems. (T. **1940,1966).** This was **an** assessment which was ultimately corroborated by virtually every person who came into substantial contact with the defendant. (T. **1852,2046-47, 1814).**

With respect to statutory mitigating factors, Toomer believed that the defendant acted under extreme emotional disturbance. (T. **1791).** Dr. Toomer views the word "extreme," in the context of **this** statutory factor, **as** meaning "any mental condition affecting decision making." (T. **1976).** Toomer believed that the defendant was able to conform his conduct to the requirements **of** law, for the purposes of that statutory mitigating factor, and therefore found it inapplicable. (T. **1792-93).** Although Toomer did not believe that this statutory mitigating factor existed within a degree of reasonable psychological certainty, as a "personal" matter - as opposed to a professional opinion - Toomer believed that the factor existed. (T. 1982-83).

Ronald Birdman, a clinical psychologist, had previously treated the defendant, five years prior to the murders. (T. **1809).** He had substantial contact, **22** sessions, with the defendant. (T. **1810).** He had not performed any tests, as none were necessary. (T. **1809).** He diagnosed the defendant as having a paranoid personality disorder, which meant that the defendant was, interpersonally very sensitive; that he tended to misperceive motives and behavior of others; **that** he frequently felt mistreated and misunderstood by others. (T. **1810).** The defendant had advised Birdman that he was mistrustful of everyone, especially women, and that he blamed one of his ex-wives for his problems. (T. **1812).** This personality disorder was not uncommon, and Birdman did not observe any indicia of brain damage, (T. **1814).** Birdman, like Toomer, concluded that the defendant's intelligence was average or slightly above average, based upon his interviews and interactions with the defendant. (T. **1814).** The defendant was not out of touch with reality, and did not suffer from any major mental illness. (T. **1815).**

Dr. Leonard Haber, a psychologist, had seen the defendant in July, **1988,** pursuant to the request of a Dade County judge. (T. **2016). He** found the defendant to be impulsive, irritable, unhappy, with few friends and no family support system. (T. **20177).** The defendant indicated a history of acting impulsively. (T. **2017).** Haber did not treat the defendant, and referred him to Dr. Birdman. (T. **2017).** Haber conducted only a brief interview of the defendant, during which the defendant reported a history of child abuse and asked if he could kill his parents and go free because they caused him a lot of pain. (T. **2018-19).** Haber viewed this **as** purely a rhetorical question. (T. **2020).**

Dr. **Hyman** Eisenstein, a clinical psychologist in the field of neuropsychology was the final psychological witness. (T. **2049-50).** He did a neuropsychological evaluation in January, **1994,** and used **the** MMPI test results which Toomer had obtained. (T. **2052-53).** Eisenstein also administered

an IQ test, and the defendant's overall score was 76, which Eisenstein placed in the borderline range. (T. 2054). He noted that this was just four (4) points below the low the average range. (T. 2096). The defendant is neither retarded nor "stupid". (T. 2096-7). He placed the defendant's reading level at a fourth grade level, an indicia of "mild mental retardation," but he stated that that did not mean that the defendant was mentally retarded. (T. 2061-62).

Eisenstein had administered, inter alia, some dexterity tests, such as finger tapping, placing pegs in holes and a "grip" test, all while the defendant was taking medication which caused drowsiness. (T. **2083-88).** Other tests administered by Eisenstein examined language and vocabulary. (T. 2062). Eisenstein, had also used Toomer's MMPI results. (T. 2072). Eisenstein agreed that only scores over **66** were clinically significant. (T. 2100-2101). Eisenstein also concurred that the lie scale score of 74 significantly questioned whether the profile from the MMPI was valid. (T. 2101).

Eisenstein stated that the defendant was compromised in terms of his ability to make judgments or decisions; the defendant was fine in a structured environment, but his ability to act rationally and logically declined rapidly outside such an environment. (T. 2087-88). Eisenstein's conclusion was that the defendant suffered from a borderline personality disorder, marked by volatility, difficulty in controlling emotional output, difficulty dealing with emotional frustrations and anger levels, difficulty in dealing with stress, difficulty in dealing with other individuals and in communicating with them. (T. 2073). "Borderline" means that the disorder is not static and, at any point, may have different features. (T. 2073). Such a person has **poor** decision making skills. (T. 2074). The defendant was not psychotic. (T. 2073). Based upon the foregoing, Eisenstein stated that the defendant was under extreme emotional distress at the time of the offense and that he was unable to conform his conduct to the requirements of the law at the time of the offense. (T.

2075-76).

Eisenstein had never testified for the **State** in any adult case; he had provided penalty phase evidence for the defense in six other cases. (T. 2079). Eisenstein's tests were performed several months after the murder, at a time when the defendant was obviously under the stress **of** an impending capital trial. Eisenstein never questioned the defendant about the events on the day **of** the murder. (T. **21** 11). Eisenstein expressed the opinion that, to a certain degree, all criminal behavior involves poor decision making skills. (T. **2108).** Insofar as Toomer, **as** previously noted, described the defendant as manipulative of others for his own ends, it must also be noted that Eisenstein expressly told the defendant why he was testing the defendant and that he was doing **so** pursuant to the request of the defendant's attorneys. (T. **2080-81).**

The remainder of the defense case consisted of testimony from several family members: Betty London (the defendant's paternal aunt); Cora Walker (the defendant's paternal grandmother); Betty Phinaze (the defendant's cousin, related by **way** of his stepmother); and Sanford Samuels (the defendant's cousin). Through these witnesses, a chronological story of the defendant's childhood **and** early adult years emerged. It should be noted that the defendant was thirty-three years of age at the time of the instant crimes.

The defendant's father and mother were not married. After the defendant was born, he lived with his natural mother, Dorothy Rogers,[10] until he was about 1½ or 2 years old. (T. **1826-28,2025, 2036).** At that time, Rogers left the defendant with the defendant's father's family, on the occasion of a party, and did not return to pick him up. (T. **1826,2025).** According to Betty London, at that time the defendant was sick, he could not eat solid food. (T. **1827).** She described this as

[10] **Rogers** was the mother of the defendant's two stepbrothers, the codefendants Quinton Rogers and Willie Rogers.

"malnutrition," as did the defendant's grandmother. (T. 2025). No medical records regarding any "malnutrition" were ever presented.

Thereafter, the defendant lived with his father and stepmother, whom the father had married by then, until the father and stepmother separated and divorced. (T. **1828, 2025-26, 2161-62).** Various witnesses placed the defendant's age at the time of the separation or divorce at anywhere between **13** and **15.** Id. After the separation of the father and stepmother, the defendant's grandmother moved in with the defendant and his father, and the three of them continued living together until sometime around the defendant's last year of high school or high school graduation. (T. **1828-29,,2026-29,2170-71).** At that time, the defendant's father remarried and moved from the home in Carol City (Dade County) to Fort Lauderdale, taking the defendant with him. (T. 2170-**71, 1835,2028-29).**

After high school graduation, the defendant went into the military for several years. (T. **1836-38,2029,2174-75).** According to Sanford Samuels, the defendant's cousin, the father's new wife had a daughter who smoked marijuana and the defendant told Samuels about drinking and smoking at this time. (T. **2172).**

When the defendant returned from the military, now in his 20's, he found that his father had somehow gotten rid of his stereo system, and misappropriated "allotment" checks which the defendant had sent home; the father **did** not have **a** place for the defendant to stay. (T. **2174-75, 1838-39).** The defendant thus lived with Betty London for a while, ultimately moving out on his own. He then entered into two short marriages, which preceded his marriage to Vanessa Walker and his affair with **Ms.** Jones. (T. 1839-43). The defendant initially got a job working for a security firm, before becoming a bailiff in the court system, a job which he held for the better part of eight years. (T. **1841).**

Throughout the years that the defendant lived with his father and stepmother, or father and grandmother, the defendant remained very close with his grandmother, Ms. London and her family, including cousin Sanford Samuels. (T. **1832,1851,2029).** Those family members provided a close family, and the defendant, at that time, went to church and school regularly, graduating from high school. Id. The closeness with those family members continued until shortly before the defendant's graduation from high school, when the father moved to Fort Lauderdale, and instructed the defendant to cease his contacts with the other family members. (T. 1835). The father, at that time, had had a falling out with other family members. (T. 2171).

The father was described by the family members as abusive, beating the defendant with a belt when he misbehaved or did not do his chores. (T. 2**161,1833).** Betty Phinaze, who lived with the defendant, his father, and stepmother, referred to one "severe" beating, when the defendant set a closet on fire, and "little" beatings at other times. (T. **2036-37).** Several family members referred to "verbal" abuse by the father, without giving that much definition, other than to say that he used to "talk rough" to the defendant (T. 2027), or that he was not friendly and would "fuss a lot." (T. **2036).**

The family members routinely concurred that the defendant was very intelligent and communicated well. **(T. 1852, 1854, 2046-47).** Cousin Samuels, who related much about the defendant's earlier life, when they were very close, had not been **as** close with the defendant in the time period leading **up** to the murders. Samuels did not know that the defendant had a child, or any problems, with **Ms.** Jones. (T. **2191-92). As** to many of the incidents which Samuels related regarding the defendant's youth, Samuels acknowledged that he did not have **any** personal knowledge of most of those matters which he described. (T. 2193-95).

At the conclusion of the penalty phase proceedings, the **jury** recommended that the sentence

of death be imposed, by a vote of 7-5. (T. 2293; R. 436-37). The judge imposed the sentence of death on both counts of murder. (R. 575, et seq.). The written sentencing order found the existence of the following aggravating factors: (1) the defendant was previously convicted of another capital felony or felony involving a threat of violence to the person; (2) the murders were committed for pecuniary gain; (3) the murders were especially heinous, atrocious and cruel; and, (4) the murders were committed in a cold, calculated and premeditated manner. This last factor was treated as being merged with the pecuniary gain factor. (R, 577-79). As to statutory mitigating factors, the court found that the defendant had no significant history of prior criminal activity. (R. 580). The court found that the evidence did not establish that the defendant was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The court, noting that the prosecution had not produced expert witnesses of its own, accepted the factor that defendant was under the influence of extreme mental or emotional disturbance. (T. 580). As to nonstatutory factors, the court considered the defendant's "unfortunate" childhood, finding that it did not mitigate the murders, and mental status, finding that this factor did exist. (R. 581-82). The trial court concluded that, "the aggravating circumstances not only outweigh the mitigating circumstances, they overwhelm them." (R. 583).

SUMMARY OF ARGUMENT

I. Evidence regarding the defendant's asking Ms. Jones to abort the baby was directly relevant to the motive for the murders - the desire to have no support obligations; the desire not to have the defendant's life "messed up." This theme permeates the defendant's relationship with Ms. Jones from the inception of the pregnancy through the time of the murders.

II. The motion to suppress statements were properly denied. The defendant made it clear that he desired counsel only if his statement was transcribed. As that was not done, he did not

want counsel, and questioning properly continued. To whatever extent any ambiguity may have existed, the officers clarified it before proceeding with further substantive questioning. Furthermore, the defendant's statements were clearly voluntary and were not the product of improper tactics by the officers. The defendant's arrest and post-mest statements were further predicated upon probable cause for that arrest, based upon the clearly incriminating statements which the defendant had made, coupled with knowledge of the hostile relationship between the defendant and Ms. Jones.

III. The reference to the victim having accused Walker of a sexual battery occurred during the questioning of the defendant and served as a basis for his ultimate confession. As such, it was relevant and was not admitted to establish bad character. In any event, the judge struck the testimony and gave a curative instruction which was adequate to cure any possible error.

IV. The DNA evidence was relevant and admissible.

V. Contrary to the Appellant's arguments, the State did not interject future dangerousness into this case. Prosecutorial questioning was in response to matters raised by the defense expert witness. The question complained of was never answered, and a curative instruction was never requested. Final jury instructions and closing arguments made it clear that aggravating circumstances were limited and did not include future dangerousness. In a related argument, the defense was able to argue any perceived significance of parole ineligibility for two murder convictions; there was no error in refusing to specially instruct the jury on that matter.

VI. Where evidence of drowning was admitted without objection during the guilt phase, there cannot be any reversible error in the jury hearing the same evidence in the penalty phase. Contrary to the Appellant's argument, there was substantial evidence from which the jury could conclude that Ms. Jones was conscious when she was thrown into the water, and, as drowning was

one of three causes of death, such evidence was relevant.

VII. Virtually all of the claims regarding prosecutorial comments are not preserved for appellate review. **As** to the golden rule argument, while one such claim was preserved, the prosecutor, in having to prove HAC, was focusing on the pain and suffering of the victim, and his comment was not ***so*** egregious as to cause reversal.

VIII. - XII. The Appellant's multiple arguments regarding **jury** instructions on mitigating **and** aggravating factors, and attacks on the constitutionality of the death penalty statute, have been repeatedly rejected in many prior decisions of this Court.

XIII. The findings regarding **CCP, HAC** and pecuniary gain are all supported by the evidence. The statutory mitigating factor of inability to conform one's conduct to the law, was properly rejected, where one **of** the defense experts specifically stated that the factor was not established, and the factor was contrary to the factual evidence presented. The defendant's childhood background and other nonstatutory factors were properly evaluated by the trial court.

XIV. In a cross-appeal, the State asserts that the trial court erroneously precluded evidence that the defendant, weeks prior to these murders, learned **of** the unique duct-tape method of killing during a conversation with **an** attorney who was defending a highly similar murder prosecution, and that the trial court erred in merging the pecuniary gain and **CCP** factors.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO ADDUCE EVIDENCE THAT THE DEFENDANT ASKED MS. JONES TO HAVE AN ABORTION, WHERE SUCH EVIDENCE WAS DIRECTLY RELEVANT TO THE MOTIVE FOR THE MURDERS COMMITTED BY THE DEFENDANT.

A long chain of events, over a two year period leading up to the murders, established a clear motive for the murders - the defendant's dissatisfaction with Ms. Jones' decision to have the baby, which he wanted aborted, and which decision resulted in the child support obligations which the defendant was seeking to avoid. In July, 1991, as a result of an altercation between the defendant and Jones, Detective Cunningham spoke to the defendant, and the defendant indicated his willingness to pay for Jones to have an abortion. Defendant further told Cunningham that he had told Jones that "if she insisted to mess up his life or ruin his life, she knew that he could make her life miserable," (T. 1181). Approximately nine months later, in April, 1992, shortly after the baby was born, the paternity/child support proceedings commenced, and, as indicated by the prosecutor who handled those proceedings, the defendant demonstrated his displeasure about having to pay child support and take responsibility for the child, (T. 1188, 1203). A few weeks after the child support order was signed, the defendant committed the murders. (T. 1205). Furthermore, in the defendant's ultimate confession to Detective Everett, the defendant explicitly admitted that when he drove to the park with Ms. Jones, he and Jones were arguing about child support. (T. 1380). Under such circumstances, the fact that the defendant had expressed his desire for Ms. Jones to have an abortion was highly relevant to the murders and was properly admitted into evidence.

"To be relevant, and, therefore, admissible, evidence must prove or tend to prove a fact in

issue." Stano v. State, **473 So,** 2d **1282, 1285** (Fla. **1985). See also, s. 90.401,** Florida Statutes. Evidence of the motive for a crime is relevant, even though proof of such a motive is not essential for obtaining a conviction. Craig v. State, **510 *So,*** 2d **857, 863** (Fla. **1987). A** trial judge has great latitude in determining relevancy and such determinations will not be disturbed absent an abuse of discretion. See, e.g., Gaskin v. State, **591 So,** 2d **917,920** (Fla. **1991).** No such abuse of discretion exists in the instant case, as the desired abortion clearly related to the motive for the murders and was **part** of a long chain of interrelated conduct on the part of the defendant. Not only does the desired abortion relate to the motive for the murders, but it is also significant, in the context of the other evidence, in demonstrating both the premeditation required for first degree murder, and the heightened premeditation required for the cold, calculated and premeditated aggravating factor at the penalty phase. The strongly established, long-term motive, serves to distinguish the instant case **from** non-premeditated domestic disputes which arise out of a momentary loss **of** control during a spontaneous argument.

This Court has dealt with one recent case in which a similar relevancy question was addressed. In Esty v. State, **642 So.** 2d **1074, 1076-78** (Fla. 1994), a case in which the defendant murdered his former girlfriend, who was 15 years old and pregnant, the prosecution presented testimony that **(a)** the girlfriend was pregnant; (b) the girlfriend and the defendant had sexual intercourse approximately one month before the murder; and c) five months before the murder, the defendant told a friend that he hated the girlfiiend and asked the friend to get her pregnant in order to spite her. Although the defendant's relevancy claims **as** to these matters had not been preserved for appellate review, this Court alternatively found that "even assuming that a proper objection had been made, we find this testimony relevant to show **Esty's** motivation in killing Ramsey." 642 **So.** 2d at **1078. So** too, the desired abortion and the defendant's dissatisfaction with Jones' decision

to have the baby, with the concomitant child support obligations, were relevant to show the motivation for the murders herein.

The Appellant has relied heavily on a decision from the Third District Court of Appeal, Wilkins v. State, **607 *So.*** 2d 500 (Fla. 3d DCA 1992). In that case, involving convictions for attempted murder and aggravated child abuse, no facts are given. There is no indication from the opinion that the defendant's desire for his wife to have an abortion was in any way related to the motive for the attempted murder and child abuse. Thus, the Third District's decision, holding that evidence that the defendant and his wife considered having an abortion of the baby-victim was irrelevant, is in no way inconsistent with the foregoing arguments that a desired, but rejected, abortion may be relevant to a motive for murder. Indeed, the Third District's decision indicates that the evidence adduced showed that both the defendant therein and his wife had considered having the abortion; there is no indication in Wilkins that there was **any** conflict between them on that decision. The evidence in Wilkins was being used solely for the purpose of implying that because an abortion was considered, the defendant must have hated the child he subsequently abused. While such a tenuous inference does not reasonably ensue, the connection in the instant case, between the rejected abortion, child support obligations, and murders, is quite clear.

The remaining cases upon which the Appellant relies similarly **do** not involve situations in which the desired but rejected abortion is **part** of the motive for the murders." The Appellant's

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[11] See, e.g., Garcia v. Providence Medical Center, **806** P. 2d **766** (Wash. App. 1991) (in medical malpractice action, where child died due to asphyxiation after pregnancy, plaintiffs prior abortions had no relevancy ***to*** claim for emotional damage); Davila v. Bodelson, 704 P. **2d** 1119 (N. Mex. App. 1985) (in medical malpractice action related to birth defects during pregnancy **and** delivery, evidence **of** plaintiffs prior abortions was relevant and properly admitted where doctor claimed that plaintiff failed to disclose prior abortions and such disclosure would have caused doctor to use different medication); Billett v. State, **877** S.W. 2d 913 (Ark. 1994) (in murder prosecution, evidence of prosecution's main witness's multiple abortions was unnecessary to show hostile relationship between defendant and that witness, as the hostility **was** otherwise established clearly;

argument seems to imply that a reference to a desired, but rejected abortion, is always going to be unduly prejudicial, and that it will always outweigh whatever relevancy the rejected abortion has. Such reasoning would compel the absurd conclusion that in cases where a doctor performing abortions is murdered, because of a defendant's belief in the immorality of abortions, then the focal point of the motive for the murder could not be presented to the jury. When the reference to the abortion relates to the motive for the murder, its importance to the case is obvious, and its probative value cannot be deemed to be outweighed by prejudice. See generally, State v. McClain, 525 So. 2d 420 (Fla. 1988) (balancing of probative value and prejudice rests within discretion of trial court). Assuming, arguendo, that the mention of abortion was error, the State submits that same was harmless beyond a reasonable doubt, in light of the overwhelming evidence of guilt herein.

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the abortions in question were totally unrelated to the cause or motive for the murder); People v. Cornes, 399 N.E.2d 1346 (Ill. App. 1980) (in rape case, defendant sought to use fact that victim confided in him, as to her pregnancy from another person and subsequent abortion, to show that the two of them had close relationship and that there own sexual relationship was therefore consensual; such evidence had little probative value, close friendship was otherwise established, and purpose was solely to arouse emotions); People v. Brown, 599 N.Y.S.2d 277 (N.Y. App. 1993) (evidence of 13 year old rape victim's post-rape abortion was irrelevant to any issue in trial); Kirk v. Washington State University, 746 P. 2d 285 (Wash. 1987) (in personal injury action, where cheerleader injured elbow, evidence of her prior abortions was irrelevant to claims of mental depression, where no experts offered any evidence to establish any link between prior abortions and plaintiffs mental state); People v. Morris, 285 N.W. 2d 446 (Mich. App. 1979) (in murder prosecution, evidence of the defendant's own prior abortions should have been excluded, where the abortions were not proffered as a cause or motive for any murder; only possible relevancy related to issue of defendant's sanity, and there was no indication that psychiatrist relied on prior abortions in reaching conclusions regarding sanity); People v. Ehlert, 654 N.E. 2d 705 (Ill. App. 1995) (where defendant was accused of murdering her newborn infant, evidence of two abortions defendant had years earlier was not relevant to issue of whether defendant could distinguish a live baby from a tumor; abortions did not relate to motive for murder); Olson v. Walgreen Co., 1992 WL 322054 (Minn. App. 1992) (in medical malpractice action for pharmaceutical negligence resulting in infertility, no error in precluding defense from introducing evidence of plaintiffs prior abortions).

11.

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS.

A. The defendant's conditional reauest for counsel

After Walker gave his "abduction" story to the police officers, Sgt. Watterson then said that he wanted to get a stenographer to take down the story. (T. 141-42). The defendant "told [Watterson] if he did that he wanted an attorney," and Watterson then responded that "we won't do that." (T. 142). In Everett's words, Walker had said, "I don't want a steno in the room, I won't go on tape." (T. 186). After Watterson advised Walker that "we won't do that," Everett inquired, "Do you still want to talk? He said yes, I do. He continued talking." (T. 186). Walker made it clear to Everett that if there was no stenographer, he did not want an attorney. (T. 220). As of this point in time, Walker had not yet been advised that he was under arrest. Prior to this colloquy the officers had indicated to Walker that they did not believe his version of events. After the defendant gave his final statement to the police, his admission to the murder of the victims, Watterson again referred to bringing a stenographer in, and Walker reiterated, in Everett's words, "I told you before if you do that I don't want to talk." (T. 191). In Watterson's words, the defendant stated, "If you do that, I want an attorney here." (T. 146). Both officers told Walker that they would not do that, (T. 146, 191). Everett again asked the defendant if he still wanted to talk, and the defendant said "yes." (T. 191). The defendant then concluded his statement, adding that he woke up the next day and did not do anything, but that he left a message on Jones' answering machine. (T, 191).

The Appellant initially argues that this case should be governed by the standards enunciated in cases such as Long v. State, 517 So. 2d 664, 667 (Fla. 1987), as opposed to the federal constitutional standards articulated in Davis v. United States, ___ U.S. ___, 114 S.Ct. 2350, 129

L.Ed. 2d **362 (1994).** In Davis, the Supreme Court concluded that unless a person being interrogated clearly and unambiguously requests counsel, substantive interrogation may continue. In contrast, Long, a pre-Davis decision, had held that when a person who is in custody is being interrogated makes an ambiguous or equivocal request for counsel, "the only permissible further questioning would be questions attempting to clarify" the request for counsel. **517 *So.*** 2d at **667.** Only if such further clarifying questions indicate that the suspect is willing to continue the interrogation without counsel may the interrogation continue. Long specifically reflects that its holding was predicated on what was perceived to be the binding decisions of the United States Supreme Court in Miranda v. Arizona, **384 U.S. 436, 86** S.Ct. **1602, 16** L.Ed. 2d **694** (1966), Edwards v. Arizona, **451 U.S. 477,101** S.Ct. 1880, **68** L.Ed. 2d **378** (1981), and Rhode Island v. Innis, **446** U.S. **291, 100** S.Ct. 1682, 64 L.Ed. 2d 297 **(1980).** This Court did not, either in Long or any other decision, assert that the "clarification" principle was independently grounded in the Florida Constitution. **As** Long specifically asserted that the predicate for that principle consisted of United States Supreme Court decisions, and that Court has now held that no clarification is necessary under its precedents, the "clarification" doctrine can **remain** a part of Florida law only if this Court chooses to conclude that that principle is independently embodied in the Florida Constitution, See, e.g., Deck **v.** State, **653 So.** 2d **435** (Fla. **5th DCA 1995);** State v. Owen, 654 **So,** 2d **200** (Fla. 4th **DCA** 1995), review pending, State v. Owen, Supreme Court of Florida Case No. **85,781.**[12]

While the question of whether the principles of Davis or Long is one which must ultimately be decided by this Court, it is **an** academic question in the instant case, since the defendant's

[12] Owen certified to **this** Court the question of whether "the principles announced by the United States Supreme Court in ***Davis*** apply to the admissibility of confessions in Florida, in light of ***Traylor."***

confession herein is clearly admissible under either standard. After demonstrating how the confession is admissible under either doctrine, the State, in this brief, will then return to the question of whether Davis should be adhered to under the Florida Constitution.

As previously noted, under Long, after an equivocal request for counsel, the officers may only clarify an "ambiguous" request before resuming substantive questioning. In the instant case, the defendant's "request for counsel" was clearly conditioned on the prospect of stenographic transcription of his statement. As such, there was no ambiguity requiring clarification. However, even if the request was viewed as ambiguous and requiring clarification, Detective Everett made it clear that he did clarify the defendant's desire before proceeding with further questioning.

Typical of cases in which this Court has found the existence of an equivocal request for counsel are those in which the suspect stated that he "thinks" he wants to speak to counsel, implying that he is not certain if he desires to speak to counsel. See, e.g., Slawson v. State, 619 *So.* 2d 255 (Fla. 1993) (defendant's comments, on two occasions, during interrogation, asking "What about an attorney?", were viewed as being at best an equivocal request for counsel); Owen v. State, 560 So. 2d 207 (Fla. 1990) (defendant's comment, "I'd rather not talk about it," was deemed equivocal, since it was not clear whether defendant no longer wanted to talk at all or whether he merely did not want to talk about the particular question which had just been addressed to him).

In contrast to cases such as the foregoing, the defendant's reference to an attorney herein was clearly limited to the prospect of having a stenographic statement taken. When advised of the officers' desire to bring in the stenographer, the defendant then responded that if the police did that, he wanted an attorney. The condition referred to by the defendant was clear; he wanted the attorney only if the stenographer was being brought in, In the absence of the stenographer, he did not want an attorney and was perfectly willing to continue talking.

The instant case is thus highly analogous to the pre-Davis decision in Connecticut v. Barrett, **479 U.S. 523, 107** S.Ct. **828, 93** L.Ed. 2d **920 (1987).** Barrett was subjected to custodial interrogation, and stated that "he would not give a written statement unless his attorney was present but had 'no problem' talking about the incident.", and that, "he would not give the police any written statements but he had no problem in talking about the incident." **93** L.Ed. 2d at 925-6. The police did not take any "written" statements. The United States Supreme Court reversed the Connecticut Supreme Court's holding that Barrett had invoked his right to counsel by refusing to make written statements without the presence of his attorney. The Court noted, "[I]nterpretation is only required where the defendant's words, understood as ordinary people would understand **them,** are ambiguous. Here, however, Barrett made clear his intentions, and they were honored by police." **93** L.Ed.2d at **928.** The Court held:

> [W]e know of no constitutional objective that would be served by suppression in this case. It is undisputed that Barrett desired the presence of counsel before making a written statement. Had the police obtained such a statement without meeting the waiver standards of ***Edwards,*** it would clearly be inadmissible. Barrett's limited requests for counsel, however, were accompanied by affirmative announcements of his willingness to speak with the authorities. The fact that officials took the opportunity provided by Barrett to obtain an oral confession is quite consistent with the Fifth Amendment. *Miranda* gives the defendant a right to choose between speech and silence, and Barrett chose to speak.

Like Barrett, the defendant herein made it clear that he desired counsel **only** if a stenographer were brought in; the police did not bring in one, and the defendant then affirmatively expressed his desire to **talk** to the police.

Assuming, arguendo, that the defendant's comment is viewed as an equivocal request for counsel, and police questioning was thereafter limited to clarification of the defendant's desire, the officers still acted in accordance with the principles of Long. Detective Everett testified that on

both occasions, after the defendant made these comments, before proceeding with any further substantive questioning, Everett, after the defendant had been advised that the police were not going to bring in the stenographer, inquired of the defendant if he still wanted to talk to the officers. The defendant responded affirmatively. It was only after such explicit clarification and affirmative response by the defendant that substantive questioning resumed.[13] In view of the foregoing, the conduct of the officers was also fully in accordance with the pre-Davis principles of Long, and subsequent questioning was therefore proper.

Alternatively, if the case is governed by Davis, the defendant did not satisfy the requirement that a request for counsel be clear and unambiguous before questioning must cease. As the request was conditional and ambiguous, at best - if, indeed, there is any ambiguity at all - the defendant did not clearly advise the officers that he desired an attorney before any further questioning proceeded. Thus, under either the Davis or Long standards, the trial court herein properly denied the motion to suppress.

In the event that this Court (a) construes the defendant's comment as being ambiguous, and (b) believes that it is therefore necessary to resolve the question of the effect of Davis on Florida law, the State is hereby addressing that issue as well. Initially, the State asserts that the issue of whether a different standard applies under the state and federal constitutions is one which should not be addressed as it was not raised in the lower court. The portion of the defendant's suppression motion, in which it is argued that a Miranda violation existed, was predicated solely on the provisions of the federal constitution. (R. 91, paragraph 1). Likewise, the legal arguments presented

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[13] The Appellant argues that Detective Everett's credibility should be questioned by this Court. Brief of Appellant, p. 37. That is clearly the exclusive domain of the trial court, and is beyond the scope of appellate review. The State would note that the defendant herein did not offer any testimony to the contrary at either the suppression hearing or at trial.

in trial court focused solely on questions of federal constitutional law. (T. 227-251). Issues regarding whether the state constitution should be construed in a manner different from the federal constitution are issues which are not purely legal in nature. It is not merely a question of searching through case law for appropriate legal precedents. Rather, as observed by this Court in Traylor v. State, 596 So. 2d 957,962 (Fla. 1992), interpretations of the state bill of rights must focus on many factors, both legal and factual, including "the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law." Many of those factors, such as customs, traditions, attitudes, state history and external influences, are matters which might well warrant evidentiary inquiries that should appropriately be handled in trial courts before resolution by this Court. They are questions whose answers do not lie solely within the domain of law libraries. For those reasons, the State reiterates that the Appellant's current attempt to distinguish between the state and federal constitutional provisions should be deemed unpreserved. See generally, Ray v. State, 403 So. 2d 956,961 (Fla. 1981) (alleged constitutional errors which are not fundamental must be preserved for appellate review),

If the issue is addressed on the merits, the State asserts that the only reason why this Court, in pre-Davis cases, reached the result which it did was because it construed cases from the United States Supreme Court as mandating that result. As that interpretation of cases such as Edwards and Miranda is unwarranted, the entire predicate for this Court's prior conclusions, as in Long, was nonexistent. The Appellant has not directed this Court's attention to any matters of customs, traditions or attitudes within this State, that would be indicative of a differing interpretation of state constitutional law. As Article I, Section 9 of the Florida Constitution was adopted prior to Edwards

and its progeny, there is no reason to believe that the adoption of the current state constitution, in 1968, was in any way concerned with, or cognizant of, this particular issue. The sole predicate for the Appellant's argument is the contention that Florida's population is diverse, with many immigrants, many people with "language" problems, and many people who have fled "totalitarian" regimes. It could just as easily be said that Florida's population is one, which for several decades, has been rather conservative on law and order issues and desirous of construing the state constitution in a manner on par with the federal constitution. Thus, the 1982 amendment to Article 1, section 12 specifically limited the construction of the search-and-seizure clause to the manner in which the United States Supreme Court construed the Fourth Amendment. Such vague generalizations regarding customs, history, tradition and attitudes, should not be the basis for a cursory or cavalier construction of the constitutional provision at issue. Construing Florida's Declaration of Rights on the basis of any such vague generalizations would be tantamount to constitutional interpretation on the basis of mere personal preference. In any event, the majority opinion in Davis has addressed these issues and provides cogent reasoning which should suffice under either federal or state law:

> We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who-because of fear, intimidation, lack of linguistic skills, or a variety of other reasons-will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the Miranda warnings themselves. "[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process." [citation omitted].

___ U.S. ___, ___ S.Ct. ___, 129 L.Ed. 2d at 372.

B. Voluntariness of Defendant's Statements

The determination of the voluntariness of a confession is based upon the totality of the

circumstances. Travlor v. State, 595 *So.* 2d 957, 964 (Fla. 1992). Contrary to the Appellant's arguments, the facts surrounding the defendant's statements, neither individually nor in their totality, render the defendant's statements involuntary, The Appellant focuses on a series of seven factors which the Appellant believes are pertinent. These will be addressed in the sequence presented by the Appellant.

1) The Appellant first asserts that the officers deluded the defendant about his true position because they did not advise him that he was the focus of their investigation. There is no requirement that questioning officers advise a person being questioned that he is either a suspect or the focus of their investigation. The only significance of such a representation is that it may determine whether or not a person is in custody, for the purposes of requiring Miranda warnings. See generally, Stansbury v. California, 511 U.S. ___, 114 S.Ct. ___, 128 L.Ed. 2d 293 (1994).[14] At the time that the defendant called the police and told them he had some information and voluntarily came to the station, the only knowledge the police had of him was that he had a relationship with the victim and that there had been some problems between them. At that time, the police did not have any incriminating evidence as to Walker. Under such circumstances, there would be no reason to even advise him that he is a suspect or the "focus" of the investigation. Were the police to have done so, the Appellant would undoubtedly now be claiming that that warning deluded him as to his true position since they did not have any incriminating evidence as to Walker at that time.

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[14] See also, Johnson v. State, *660 So,* 2d 637,642 (Fla. 1995) ("Police are not required to disclose every possible ramification of a waiver of rights to a detainee apart from those general statements now required by *Miranda* and its progeny. Nor are police required to tell detainees what may be in their personal best interests or what decision may be the most advantageous to them personally. Under our system, law enforcement officers are representatives of the state in its efforts to maintain order, and the court may not impose upon them an obligation to effectively serve as private counselors to the accused.").

2) The Appellant next argues that the police lied to the defendant and that they insisted that they knew that he was guilty. As to insisting that he was guilty, the record reflects that it was only after the defendant conveyed his remarkable "abduction" story to the officers that they indicated to the defendant that they did not believe him. Such representations, at that time, were quite understandable. As the officers put it, the defendant was unable to explain how he got home, from the vicinity of the Orange Bowl, near downtown Miami, to his residence in Opa Locka, in northern Dade County, late at night, and without a vehicle. Nor could the defendant explain how he could have failed to call the police immediately after the mother of his child and his infant were abducted and bound, and obviously under an impending threat of either the loss of their lives or substantial harm. The defendant's story was so bizarre and so incredible that no sane person would believe it. And, after the defendant's admission that he had been at the scene of the crime and had bound the victims himself, it is thoroughly understandable that the police would take on an accusatory tone, indicating that they did not believe him.

The only "lie" to which the Appellant refers is Sgt. Watterson's representation that the police had obtained a fingerprint from the duct tape. While Watterson did not know this at the time, it is a fact which ultimately proved to be true; the defendant's fingerprint was on the tape. As noted by detective Everett, the police, at the time of interrogation, thought that they would probably find a fingerprint on some portion of the various strips of tape. In any event, this Court has observed that misrepresentations by the police regarding the facts of the case will not render a statement involuntary. See, e.g., Moore v. State, 525 So. 2d 870 (Fla. 1988); Burch v. State, 343 So. 2d 831 (Fla. 1977) (defendant falsely informed that a "pretended" polygraph examination indicated he lied when denying killing); see also, Stephenson v. State, 645 So. 2d 161 (Fla. 4th DCA 1994); State v. Moore, 530 So. 2d 349 (Fla. 2d DCA 1988); La Rocca v. State, 401 So. 2d 866 (Fla. 3d DCA

1981); Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed. 2d 684 (1969) (false assertion by officer that accused's partner in crime had confessed did not render confession involuntary).

3) The Appellant asserts that the officers showed the defendant a disgusting photograph of the deceased infant, while commenting that the person who did this did a terrible thing. No case law is presented to show that any such matter has ever been deemed improper, either in isolation or in the context of other factors. The photograph was clearly an accurate one and it reflected the actual facts of the case,

4) While one of the officers stated that God would not believe the defendant, in the context of his abduction story, this can not be viewed as an exploitation of the defendant's religious beliefs. The context in which the officer referred to God was essentially the same as asking a detainee to confess for the sake of his conscience. See, e.g., Johnson, supra, 660 So. 2d at 643 ("Except in those narrow areas already established in law, police are not forbidden to appeal to the consciences of individuals. Any other conclusion would come perilously close to saying that the very act of trying to obtain a confession violates the rights of those who otherwise have waived their rights."). The Appellant attempts to analogize the references to God to the "Christian burial technique." That, however, "is the practice of inducing a detainee to tell the location of a homicide victim's body so it can receive a proper burial service." Id. at 643, n. 1; Roman v. State, 475 So. 2d 1228 (Fla. 1985). The instant reference to God was more analogous to a general appeal to the defendant's conscience.

5) The Appellant argues that the officers engaged in emotional and manipulative "racially-charged role-playing." This is utterly unsupported by the record. Detective Everett expressly testified that there was no racial motivation involved in the questioning of the defendant. The erroneous premise of the Appellant's argument is that every time a detainee and interrogating

officer are of different races or ethnicities, it would mean that the questioning was racially motivated. As to the argument about the good-copbad-cop routine, the testimony of the officers made it clear that the questioning did not have as its purpose any such routine. (T. 204). The only reason it may have taken on any such appearance is that Sgt. Watterson, after hearing the defendant's remarkable abduction story, yelled at him and said he was insulting the intelligence of the officers. That had nothing to do with any "routine." It was a simple expression of the understandable exasperation of Watterson upon hearing the fabrication.

6) The contention that the defendant was denied an attorney, has been extensively addressed in subsection A, and is relied upon herein. The defendant never requested to consult with any family members during his questioning, As to the assertion that the defendant was not re-advised of his Miranda warnings immediately after his arrest, as this Court held in Johnson, supra, "[t]he record is clear, however, that Johnson received proper *Miranda* warnings before the overall interrogation began. There is no requirement of additional warnings during the same period of interrogation where it is clear detainees are aware of their rights, as was the case here." 660 *So.* 2d at 642. See also, Bush v. State, 461 So. 2d 936,939 (Fla. 1984)("There is no requirement that an accused be continually reminded of his rights once he has intelligently waived them.").

7) Contrary to the Appellant's argument, there were no implied threats and promises of leniency. When Detective Everett indicated that he could help the defendant out, Everett made it clear to the defendant that such help consisted solely of conveying the defendant's cooperation to the prosecutor and judge; that was the full extent of what the officer told the defendant. (T. 215-18, 1304, 1415). This Court has held that such remarks are not improper. See, e.g., Maaueira v. State, *588 So.* 2d 221 (Fla. 1991).

In view of the foregoing, it must be concluded that the totality of the circumstances support

the conclusion that the confession was voluntary. The defendant came to the station voluntarily, pursuant to his own phone call to the police, desiring to give information. The defendant was read his Miranda warnings. The defendant was known to be a court bailiff with some eight years of experience in the court system. While the Appellant asserts that the defendant's intelligence was shown to be low by one of the defense experts at the penalty phase, not only did the officers not know this at the time of questioning, but they had no reason to know this. Just as the defendant appeared fully communicative and intelligent to the questioning officers, so too, every family member to testify described the defendant as very intelligent, and two other experts similarly described the defendant as intelligent.

A conclusion that the confession herein was voluntary is fully consistent with numerous decisions from this Court. In Johnson, supra, there was conflicting evidence as to the defendant's intelligence and emotional disturbance; he was told that he failed a polygraph examination, he was told that he suffered from a serious sexual disorder, warnings were not renewed after the polygraph examination, and the police, although advising the defendant of his rights, did not advise him of all possible ramifications of a waiver of those rights. Nevertheless, the statements made were deemed voluntary. A confession was similarly deemed voluntary in Wasko v. State, 505 So. 2d 1314 (Fla. 1987), where the confession came after intensive questioning for 21 hours in a 39-hour period, during which the defendant had had no solid food. In Burch, as previously noted, the defendant was falsely advised that a "pretended" polygraph test indicated that he had lied. Additionally, the defendant therein was erroneously advised that the questioning officer determines the degree of murder with which the defendant would ultimately be charged. See also, Bruno v. State, 574 So. 2d 76 (Fla. 1991); Patterson v. State, 513 So. 2d 1257 (Fla. 1987).

In the principal case relied upon by the Appellant, Brewer v. State, 386 So. 2d 232 (Fla.

1980), the police, after threatening the defendant with the specter of the electric chair, implied that they had the power to reduce the charge to spare him of that penalty; they also implied that a confession might lead to a lesser charge and that the defendant would not necessarily be sentenced for life if he confessed; they also suggested to the defendant that he would not receive a fair trial, as one officer guaranteed the defendant that he would be convicted if he went to trial. The lower court, which determines credibility, had listened to a tape of the interrogation, and ruled that the confession should be suppressed. This Court, in Brewer, was commenting on the propriety of the trial court's suppression order, as opposed to the reverse situation in the instant case, where the presumption **of** correctness and obligation to view the facts in the light most favorable to the prevailing party operate in the contrary manner. The other primary case upon which the Appellant relies, Sawyer v. State, 561 So. 2d 278, 290-91 (Fla. 2d DCA 1990), involved a multitude of improprieties **highly** distinguishable from the facts **of** the instant case. The appellate court in that case was influenced by (1) "enforced sleeplessness;" (2) "doubtful polygraph test results;" (3) "16-hour serial team interrogation with no meaningful breaks;" **(4)** "the scenario of unabashedly leading questions;" ***(5)*** "the denial of requests to rest;" (6) "implied inducements to make a deal for favorable consideration;" (7) "the threat **of** a return to drinking;" (8) "the use of Sawyer's known blackout history to undermine his reliance on his own memory;" and **(9)** "refusal to honor his Miranda rights". Such cases as Brewer, Sawyer, and others relied upon by the Appellant are not factually similar to the instant case and are in no way inconsistent with the lower court's ruling herein.

C. Probable Cause for Arrest

As of the time of the defendant's arrest, probable cause for such arrest did exist, and the subsequent statements were therefore not tainted by any illegality. Probable cause exists if, "the

officer has reasonable grounds to believe the person has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction." Blanco v. State, 452 *So.* 2d 520, 523 (Fla. 1984). The question of probable cause is viewed from the perspective of a police officer having specialized training. Schmitt v. State, 563 *So.* 2d 1095, 1098 (Fla. 1990). It is a question of "probabilities," not certainties. Id. The emphasis is on "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." Id. As of the time of the defendant's arrest, probable cause for the arrest clearly existed. The defendant was advised that he was under arrest after he gave the police the convoluted, incredible and unbelievable "abduction" story, in which the defendant admitted that he had bound the two victims with duct tape. As of the time of the arrest, the officers knew the following: (1) The defendant had repeatedly lied to the police, Initially he denied having any knowledge of the murders. Then, he gave his remarkable abduction story, and how he was coerced into taping the victims, while he was let go, and the abductors kept the mother of his child, and the infant as well. Confronted with the threats to the lives of his girlfriend and child, the defendant did not contact the police to commence an immediate manhunt which might save them from a grisly fate. Rather, the defendant allegedly proceeded to go home and ignore everything, although he was unable to explain how he got from the Orange Bowl to his residence in Opa Locka, late at night, without any means of transportation." (2) The defendant had a motive for the murders. The officers were aware of child support problems and disputes. The officers were aware of an acrimonious relationship, in which the victim had once filed a complaint accusing the defendant of having committed a sexual

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[15] Exculpatory statements from a defendant which are both false and inconsistent with other statements, are indicative of a guilty conscience. See, e.g., Johnson v. State, 465 *So.* 2d 499, 504 (Fla. 1985); Smith v. State, 424 *So.* 2d 726 (Fla. 1983); State v. Elkin, 595 *So.* 2d 119 (Fla. 3d DCA 1992).

assault upon her, although no formal charges were subsequently filed. (3) The defendant was able to tell the police the location of the duct tape, and, although duct tape was referred to in one Miami Herald article, the precise location in which the victims had been taped was known only to the police and the perpetrator. (4) The defendant, after having been advised of a fingerprint on the duct tape, was indicating a guilty conscience, as he suddenly changed, becoming nervous, where he had previously been calm, and immediately showed concern for his previously executed consent for the taking of fingerprints. Under the totality of such circumstances, it must be concluded that probable cause for the arrest did exist.

III.

SGT. WATTERSON'S REFERENCE TO A SEXUAL ASSAULT CHARGE FILED AGAINST THE DEFENDANT WAS NOT IMPROPER.

While narrating the course of the interrogation of the defendant, Sgt. Watterson related how the officers disbelieved the abduction story and then began confronting the defendant in an accusatory manner. Not only did they advise the defendant that they did not believe him, but Watterson further told the defendant "that we had serious problems with the story that he was telling us; that I was aware of the fact that he had a sexual assault charge filed against him." (T. 1257).[16] After hearing legal argument, the court sustained an objection to this testimony, denied a motion for mistrial, and read a curative instruction to the jury. (T. 1257-70). That instruction

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[16] During arguments on pretrial motions in limine, when the prosecution sought to use Detective Cunningham's tape recording of the 199 1 conversation with the defendant, in which he was investigating Ms. Jones' sexual assault allegation, the prosecution indicated that it would be using the portion of the tape referring to the defendant's desire for Ms. Jones to have an abortion and his threats if she did not, and that the state would not be using that portion of the tape relating the sexual assault charge. (T. 848-63, 1262). The State never represented that it would not seek to introduce the portion of the interrogation of the defendant in which the interrogating officers confronted the defendant with their knowledge of the hostile relationship between the defendant and victim, including the sexual assault charges she had pursued against the defendant,

advised the jury that "no charges were ever brought against Mr. Walker for sexual battery+ And, number two, you are not to believe or assume that Mr. Walker committed any sexual battery. Disregard that last statement." (T. 1270).

Although the trial court ruled that the evidence in question was improper, there was in fact, no error in permitting the jury to hear that evidence. As such evidence was, in fact, proper evidence for the State to adduce, the fact that the jury heard such evidence, with an instruction to disregard it, cannot constitute reversible error. The evidence in question was not being offered to prove that the defendant had committed a prior sexual battery. Nor was the evidence being offered to prove that the defendant had a prior conviction for such an offense. The comment arose during the narrative of the defendant's interrogation and statements to the officers. It was only after the defendant presented his remarkable abduction story that the officers expressed their disbelief, took an accusatorial tone with the defendant, and advised the defendant of the fact that, inter alia, they were aware of a possible motive for him to commit the murders, by virtue of his hostile relationship with Ms. Jones, as evidenced by both the child support disputes and the fact that she had accused him of committing a sexual battery and had proceeded to have the police investigate that charge against him. Thus, the reference to the sexual battery charge established the context in which the defendant ultimately changed his abduction story and confessed to the murders, since the reference to the sexual assault charge came in between the second and third versions. Second, it establishes corroboration for the motive for the murders, since the hostility between the two was not just related to the child support disputes, but further related to having to respond to the informal charges made to the police. It did not matter whether the assault occurred or not; the fact that she accused him of it was, in and of itself, relevant, as it is the accusation that serves as a basis for his hostility to Jones.

In Smith v. State, 424 So. 2d 726,730 (Fla. 1983), this Court, after observing that the jury must decide the credibility of a defendant's ultimate confession, further concluded that the jury's function in that regard entitled the jury to hear various exculpatory, prior statements which the defendant had made and which the defendant had tried to keep out of evidence. Thus, the "earlier exculpatory statements, and the sequence of events showing how his story changed through the course of several interviews, were certainly relevant to this issue [the jury's evaluation of the credibility of the confession]." Id. So, too, in the instant case, the fact that the officer apprised the defendant of knowledge of the sexual battery allegation serves to assist the jury in its evaluation of the reasons why the defendant ultimately confessed and the voluntariness of that confession. Cf., Walker v. State, 544 So. 2d 1075 (Fla. 2d DCA 1989) (defendant's statement, to victim of sexual battery, that he had recently been released from prison, was properly admitted). As the evidence in question was evidence which the jury should have been permitted to hear, the fact that the state presented it, notwithstanding the trial court's subsequent striking of the evidence, could not be such as to render the trial unfair.

Furthermore, this evidence was the subject of an instruction to disregard. The curative instruction, indeed, went even further, by apprising the jury that no charges were ever brought against Mr. Walker for sexual battery. (T. 1270). Such an instruction actually gave the defendant a benefit to which he was not even entitled. While formal charges were never filed by either the police or the State Attorney's Office, Ms. Jones did, indeed, go to the police and accuse the defendant of having committed a sexual battery. (T. 848). Contrary to the Appellant's argument, the curative instruction given herein was more than sufficient to cure any error that might have existed by virtue of the foregoing testimony. In Rivers v. State, 226 So. 2d 337, 338-39 (Fla. 1969), this Court held, in a first degree murder case, that a curative instruction to disregard evidence was

sufficient to cure the error which existed when a sheriff testified that he had arrested the defendant in another state for shooting someone other than the victim in the case being tried. [17] Thus, contrary to the Appellant's argument, such instructions are sufficient. The case upon which the Appellant relies, Geralds v. State, 601 So. 2d 1157, 1161-62 (Fla. 1992), entailed an insufficient curative because the state elicited, on cross-examination of the defendant's neighbor, the fact that the defendant had eight prior convictions, when such questioning of that witness was not only totally improper, but the prosecutor subsequently informed the jury that "the defendant is a career felon." By contrast, the evidence in the instant case did not advise the jury that the defendant had committed any prior offenses, let alone that the defendant had prior convictions or was a career felon. The evidence referred only to a charge having been made against the defendant, a matter which can be cured, if necessary, much more readily than statements that a defendant has, in fact, committed multiple prior felonies.

IV.

THE TRIAL COURT DID NOT ERR IN PERMITTING THE INTRODUCTION OF DNA EVIDENCE.

The DNA evidence in the instant case established that the DNA type found on the cigarette filter matched that of the defendant and his brother, Willy Rogers. The defendant's type would be found in 12% of the black population, 6% of the Caucasian population, and 48% of the Hispanic

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[17] See also, Fields v. State, 257 So. 2d 241 (Fla. 1972) (brief testimony in rape case relating to prior offense committed by defendant was cured when objection to such testimony was sustained by trial court); Lawrence v. State, 614 So. 2d 1092 (Fla. 1993) (reference to pistol being missing from defendant's girlfriend's residence, when the pistol was of same caliber as that used in murder, was sufficiently cured by instruction to disregard); Lynch v. State 293 So. 2d 44 (Fla. 1974) (reference to nontestifying witness having identified defendant cured by instruction to disregard); Ferguson v. State, 417 So. 2d 639,642 (Fla. 1982) (reference to defendant's prior incarceration cured by instruction to disregard); Robinson v. State, 561 So. 2d 1264 (Fla. 3d DCA 1990) (same); Greer v. Miller, 483 U.S. 756,767, n.8 (1987).

population. (T. 1146-47). In the trial court, the defense objected to this testimony. The objection was not on the basis of the reliability of DNA testing itself. Rather, the objection was based on the failure of the testing, in this particular case, to produce percentages which presented a significantly greater likelihood of a match between the DNA on the filter paper and that of the defendants. (T. 821, 862, 1129-31). Thus, defense counsel argued that the objection was not as to general scientific acceptability, "but as to his inability to say to any degree of scientific certainty that this sample that he tested belongs to any of the defendants in this case. . . ." (T. 1130). The Appellant now reiterates that same objection, asserting that the evidence is irrelevant if it merely shows that the type found on the tested items is consistent with both the defendant and a large percentage of the general population.

Such arguments having been previously made, in the context of blood tests which simply established a general type of blood - A, B or 0 - which was shared by both a litigant and the tested item. As the general blood types were also shared by large percentages of the general population, relevancy attacks on such evidence were made, just like the attack currently made by the Appellant, and courts addressing that analogous issue routinely concluded that the evidence was relevant.[18]

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[18] See, e.g., People v. Lindsey, 84 Cal. App. 3d 851, 149 Cal. Rptr. 47 (Cal. App. 1978) (fact that large percentage of the population may have a particular blood type did not render evidence inadmissible); People v. Gillesnie, 24 Ill. App. 3d 567,321 N.E. 2d 398 (Ill. App. 1974) (permitting use of A, B, 0 blood-grouping tests in criminal prosecutions, even though such tests merely reflect general group shared by others); State v. Gray, 292 N.C. 270, 233 S.E. 2d 905 (N.Car. 1977) (admissibility of general blood-grouping tests in criminal case, for purpose of identifying accused as belonging to class to which guilty party belonged); State v. Walters, 145 Conn. 60,138 A. 2d 786 (Conn. 1958) (fact that blood stain on defendant's clothing matched that of victim, and that victim's blood type was possessed by 40 percent of population was deemed admissible and relevant even though not dispositive in and of itself); Commonwealth v. Statti, 166 Pa. Super. 577, 73 A. 2d 688 (Pa. App. 1950) (fact that blood type involved was shared by 45 percent of population did not render it irrelevant); People v. Young, 308 N.W. 2d 194 (Mich. App. 1981) (blood stain evidence admissible at trial even though it only included defendant in general class of possible suspects); Miller v. State, 440 So. 2d 1127 (Ala. App. 1983) (blood-grouping evidence admissible in criminal prosecution); People v. Thorin, 336 N.W. 2d 913 (Mich. App. 1983) (same holding, observing that

Florida case law has been in accordance with the foregoing principles. This Court, in Williams v. State, 143 Fla. 826,197 So. 562 (1940), held that general blood-grouping evidence was admissible in a criminal case, where the respective blood types of the defendant and victim could be identified only as types 2 and 4. This Court cited with approval an earlier case from South Dakota, State v. Damm, 62 SD. 123,252 N.W. 7, for the types of purposes that general blood-group testimony could be utilized: the blood type of the stain in question; the blood type of the accused; and the blood type of the deceased. Such evidence was viewed as "corroborative evidence for the consideration of the jury." 197 So. At 565. See also, Bowden v. State, 137 So. 2d 621 (Fla. 2d DCA 1962); Mann v. State, 420 So. 2d 578,580 (Fla. 1982)(evidence of bloodtype and enzyme recovered from defendant's truck, which was consistent with both his blood and that of the victim, was relevant and admissible).

Lastly, even if it was error to admit such testimony, any such error must be deemed harmless. Several of the cases referred to from jurisdictions other than Florida have alternatively held that while the evidence is admissible and relevant, even if its connection is deemed tenuous due to the large population sharing the same type, there is no prejudice from such evidence since it does not tell the jury that the defendant must be the perpetrator; the jury is obviously going to recognize that such evidence simply says that the defendant is one of either hundreds, thousands or millions who, without more, could have perpetrated the offense. See, e.g., State v. Mitchell, 140 Ariz. 55 1,683 P.2d 750 (Ariz. App. 1984); State v. Gray, supra.

In view of the foregoing, this Court should conclude that the evidence was properly

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the evidence has the tendency to make fact in question more or less probable than it would be without the evidence); People v. Collier, 306 So. 2d 387 (Mich. App. 1981); State v. King, 522 A.2d 455 (N.J. App. 1987) (evidence that blood on gloves matched that of defendant and 43 percent of black population was admissible). See generally, Annotation, "Admissibility, Weight, and Sufficiency of Blood-Grouping Tests in Criminal Cases," 2 ALR 4th 500 (1988 and 1995 Supp.).

admitted in accordance with Florida law, or, alternatively, that the evidence constituted harmless error. See also, Brown v. State, 443 So. 2d 194 (Fla. 3d DCA 1984) (serologist's test which showed that defendant was included in large group of general population was either admissible and relevant or harmless); Tejeda-Bermudez v. State, 427 So. 2d 1096 (Fla. 1983) (based on record, unnecessary to determine whether blood analysis evidence was relevant, as any possible error in admitting such evidence was harmless).

V.

THE STATE DID NOT IMPROPERLY INJECT FUTURE DANGEROUSNESS INTO THE PENALTY PHASE PROCEEDINGS AND THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS TO THE JURY ON PAROLE INELIGIBILITY.

A. Future Dangerousness Claim

Dr. Eisenstein testified that the defendant's personality disorder was volatile and borderline, meaning that it was not static; at any point it might have different features. (T. 2073). The doctor had also expressed the opinion that the defendant was unable to conform his conduct to the requirements of law. (T. 2076). Based upon those opinions, the prosecutor, on cross-examination, questioned the doctor regarding the significance of the defendant's ability to plan various aspects of the offense in advance. (T. 2113-14). When the doctor distinguished between abstract and concrete abilities to plan, the prosecutor queried whether the doctor thought that the defendant "may kill again." (T. 2114). Defense counsel objected immediately, and the question was never answered. At that time, after brief argument, an objection was sustained and a motion for mistrial was denied. (T. 2 114- 15). Defense counsel never requested a curative instruction. However, the jury was instructed that aggravating circumstances were limited only to those enumerated by the trial judge. Similarly, the prosecutor never argued, in closing argument, that "future

dangerousness" was a factor."

Based on the foregoing, it is clear that this issue is not properly preserved for appellate review since the defendant could have, but did not, seek a curative instruction after the court sustained the objection. Ferguson, supra; Duest v. State, 462 So. 2d 446 (Fla. 1985). That is especially true since the jury was ultimately instructed to consider only the aggravating circumstances for which the court had given instructions. (T. 2285). For similar reasons - i.e., the brevity of the question, the absence of any answer to the question, the instructions limiting the jury's consideration to enumerated aggravating circumstances, and the lack of prosecutorial argument regarding future dangerousness - any possible error should be deemed harmless.

Secondly, while the trial court sustained the objection to the question, such questioning should have been permissible in light of the doctor's prior opinions. Evidence which might, in some circumstances, be construed as relating to improper aggravating circumstances, may nevertheless be admissible if it is proffered for the purpose of negating mitigating factors relied upon by the defense. See, e.g., Cruse v. State, 588 So. 2d 983,991 (Fla. 1991) (while evidence of lack of remorse is generally inadmissible when presented by prosecution, it may be admissible to rebut testimony elicited by defense); Jones v. State, 652 So. 2d 346, 352-53 (Fla. 1995) (same). That is the situation in the instant case, since the question was directly related to the doctor's opinion regarding the volatile nature of the defendant's condition and the different features which may exist at any given time. Having advanced such an opinion on direct examination, the doctor

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[19] The Appellant asserts that the prosecutor's closing argument, that "the only thing that is certain in life is death and taxes," (T. 2255), somehow constitutes a comment on future dangerousness. Not only was there no such objection in the lower court, but the Appellant has taken that comment out of context. The prosecutor was anticipating that defense counsel would subsequently argue that the defendant could receive two consecutive life sentences, with consecutive 25-year minimum mandatories, and that such a sentence would be tantamount to a death sentence. (T. 2255). Defense counsel did, indeed, subsequently make such an argument. (T. 2258, 2282).

should be subject to cross-examination regarding the full range of features which might exist at any given time

B. Parole Ineligibility

Prior to the commencement of the penalty phase proceedings, the defendant filed a Motion to Determine Alternative to Death Sentence Prior to Penalty Phase and to Present Evidence Regarding Meaning of Life Sentence. (R. 400- 16). This motion asked the judge to determine, prior to the penalty phase proceedings, what sentence the judge would impose for both the two capital offenses - including a determination of whether the minimum mandatory portions thereof would be concurrent or consecutive - and for the noncapital offenses for which the defendant was convicted. During legal arguments on the motion, in open court, defense counsel referred only to the request that the alternative sentences for the capital offenses be determined in advance; defense counsel never verbally apprised the court that the defense was also seeking the prior determination as to the noncapital offenses, (T. 1636-40, 1662-65, 2146-47).[20] Subsequently, defense counsel proffered several proposed jury instructions which would have advised the jury of the "alternative" sentence which the judge could have imposed in the event of a life recommendation by the jury. (R. 525-27). The essence of the Appellant's argument is that parole ineligibility is a factor which the

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[20] Not only did defense counsel never undertake to verbally apprise the trial judge that the defense was also seeking a prior determination as to the sentences to be imposed for the noncapital offenses, but, the title to defense counsel's motion would not have given any such notice (R. 400), and, it is only by virtue of one sentence, buried deep within that motion, that the reader of the motion would realize that the motion was also seeking a prior determination as to the sentences to be imposed on the noncapital offenses. ("The trial curt should also sentence defendant on the collateral noncapital and instruct the jury as to those sentences."). (R. 402). Under such circumstances, in the absence of any verbal clarification by defense counsel during legal arguments, the judge would reasonably have believed, based on defense counsel's verbal presentation, that the motion was concerned solely with the question of an advance determination regarding the "alternative" sentence which the judge would impose for the two capital felonies. Thus, any claims regarding advance determinations of the noncapital sentences to be imposed should be deemed unpreserved for appellate review.

penalty phase jury needs to be aware of, and that in order to properly advise the jury of that factor, the alternative, non-death sentence, which the court would impose if the jury recommended life imprisonment, must be determined prior to the penalty phase proceedings, so that the jury can be instructed of it, The underlying predicate for all of the Appellant's arguments is that the State interjected the concept of "future dangerousness" into the penalty-phase proceedings, and the defense therefore needed to respond appropriately. No such argument was presented in the court below, and as such the claim is not preserved. Tillman, supra. Furthermore, as set forth herein, at pp. 56-57, supra, the prosecution did not interject future dangerousness into the proceedings. e single question to which the Appellant has referred was never even answered by Dr. Eisenstein. The prosecutor's closing arguments never even remotely referred to "future dangerousness." The jury was instructed that the only aggravating factors in the case were those upon which the jury was specifically instructed.

The Appellant's reliance upon Simmons v. South Carolina, ___ U.S. ___, 114 S.Ct. 2187, 129 L.Ed. 2d 133 (1994), is unwarranted. In that case, a majority of the Supreme Court of the United States agreed that in the penalty phase of a state capital trial, due process requires that the defendant be allowed to inform the capital sentencing jury, through either argument of counsel or instructions by the trial court, of his ineligibility for parole under state law, where future dangerousness is at issue. The Court noted that the due process clause does not permit the execution of a person on the basis of information which he had no opportunity to deny or explain, Simmons had established that the jury in his case may have reasonably believed that he could be released on parole if he were not executed. The prosecution further encouraged this misperception by urging a verdict of death as Simmons posed a "threat" to society if he were not executed. "In its closing argument the prosecution argued that petitioner's future dangerousness was a factor for

the jury to consider when fixing the appropriate punishment. The question for the jury, said the prosecution, was 'what to do with [petitioner] now that he is in our midst.' Id., at 110. The prosecution further argued that a verdict of death would be a response of society to someone who is a threat. Your verdict will be an act of self-defense.' Ibid." 129 L.Ed. 2d at 139. After such an interjection of future dangerousness into the case, Simmons was precluded from any mention or argument as to true meaning of the noncapital sentencing alternative, life imprisonment without parole, and, the trial judge did not provide the jury with accurate information regarding Simmons' parole ineligibility.

By contrast, in the instant case, the State never argued that future dangerousness was a factor which the jury could consider. Furthermore, defense counsel was permitted to and did argue, in closing argument, the significance of a noncapital sentence.[21] Moreover, the jury in the instant case was accurately instructed that a recommended sentence of life meant a sentence of life imprisonment "without the possibility of parole for 25 years." (R. 455,462; T. 1691, 2287, 2289). The jury was also aware that it was recommending life or death on two separate counts and that the possibility for two life sentences, each without parole for 25 years, existed. (R. 436-37). In being able to argue to the jury the possibility that the defendant might receive minimum mandatory sentences of either 25 years or 50 years, the defendant received all that he was entitled to, even if Simmons is deemed applicable in the context of a future dangerousness argument.

The State would also note that the defendant was not entitled to a pre-penalty phase

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[21] Defense counsel argued as follows: "We pride ourselves in this country in being different. We pride ourselves on not killing our mentally defective people. This is what we have here; a broken individual. Life in prison with a minimum mandatory 25, and a possibility that that could include a minimum mandatory 50. He is 33 years old, fifty/fifty that would keep him in prison until ten years after the life expectancy in normal society. That punishment is sufficient for this individual. And our statutory scheme recognizes that. You should recognize that and return a recommendation of life imprisonment." (T. 2282).

determination of an "alternative" sentence predicated on the possibility that the jury might return a life recommendation. The only requirement in Florida's statutory scheme, is that the judge pronounce sentence after the jury returns its recommendation. Indeed, as noted by the court below (T. 1636), the Appellant's argument entails the trial judge making an anticipatory pronouncement, before the court has heard the evidence and arguments adduced at the penalty phase proceedings. There is no authority for such a proposition.

With respect to the question of jury instructions regarding consecutive or concurrent life sentences if death were not imposed, this Court, in Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990), only held that the defense must be permitted to argue to the jury that the defendant could be removed from society for 50 years if he received two life sentences; there was no suggestion that the jury must be so instructed by the court. Subsequently, in Turner v. Dugger, 614 So. 2d 1075, 1080 (Fla. 1992), this Court explicitly held that there was no error in the trial courts' refusal to instruct the jury on defense counsel's argument that the defendant, if given two life sentences, could serve the rest of his natural life in prison. This Court held that (1) it was sufficient that defense counsel be permitted to present such argument; and (2) that the standard instructions for first-degree murder, which were given in the instant case, were sufficient for defense counsel's purposes.

With respect to the Appellant's contention that the judge should have pronounced sentence on the noncapital offenses prior to the penalty phase proceedings, as noted above, p. 58, supra, this claim has not been adequately preserved for appellate review as defense counsel did not adequately apprise the trial judge, in any meaningful and clear manner, that the defense was making such a request. When the judge asked for argument on the motion in question, defense counsel referred only to the first-degree murder counts, and did not alert the judge to the contention that the argument similarly pertained to the noncapital offenses. Furthermore, the judge never made any

ruling which precluded defense counsel from presenting argument as to the potential mitigating significance of the potentially lengthy prison terms which the defendant could receive for the two counts of kidnaping and one count of burglary. Although defense counsel's closing arguments only referred to the potential non-death sentences for the murder counts (T. 2258, 2282), that limitation was not imposed on counsel by the court. This Court has repeatedly held that the trial court need not instruct the jury on the penalties for noncapital crimes a defendant has been convicted of. Nixon v. State, 572 So. 2d 1336, 1345 (Fla. 1990); Gorbv v. State, 630 So. 2d 544,548 (Fla. 1994). While closing argument on such matters might be proper, see, Johnson v. State, 660 So. 2d 637,645 (Fla. 1990), specific instruction on such matter, either in general or as a mitigating factor, is not required. Furthermore, in light of the standard "catchall" jury instruction on mitigation, which was given in the instant case (T. 2287), there is no requirement that the trial judge give specific instructions as to each proposed nonstatutory mitigating factor. Walls v. State, 641 So. 2d 381,389 (Fla. 1994); Waterhouse v. State, 596 So. 2d 1009, 1017 (Fla. 1992); Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991). Thus, no further instructions were required, either in general, as to the nature of the sentencing on the other offenses, or in conjunction with any particular mitigating factor. The jury was obviously aware of those other convictions, since the same jury had returned them. Defense counsel could have argued any alleged significance of those potential sentences; no constraints were imposed by the court.

In a variation of the foregoing claims, the Appellant asserts that the jury was precluded from considering potential ineligibility for parole as mitigation. As can be seen from the foregoing, especially in light of the catchall mitigation instruction, the jury was not precluded from any such consideration. The Appellant, as noted elsewhere, hinges this argument on the notion that the prosecutor contended "that the uncertainty of such sentences actually being imposed militated in

favor of the death penalty." Brief of Appellant, p. 59. That argument, however, takes liberties with the prosecutor's argument. As previously noted, the prosecutor, in anticipation of defense counsel's argument regarding the potential consecutive life sentences for the two murders, advised the jury that "the only sentence the defendant must receive is life with a 25 year minimum mandatory. Beyond that the rest is up to the judge. And the only thing that is certain in life is death and taxes. This is not a tax case. This is not a life case. This is a death case, based upon the facts and in accordance with the law. It's not a question of rehabilitation. It's not a question of parole. It is a question of justice." (T. 2255) (emphasis added). The prosecutor's comment was a fully accurate statement of the law. Contrary to the Appellant's characterization, the prosecutor was not arguing that the uncertainty of the potential non-death sentences "militated in favor of the death sentence." Rather, the prosecutor was clearly arguing that it was the facts of the case which made the death penalty appropriate.

C. **Harmless Error Analysis**

The Appellant's final variation of this argument is that the error ensuing from the interjection of "future dangerousness" into the trial cannot be deemed harmless. Based on the State's prior arguments herein, it is again submitted that no error was committed and that future dangerousness was not so interjected into the case. The expert never answered the pending question; the prosecutor did not argue future dangerousness in closing argument; and the jury was instructed to consider only the expressly enumerated aggravating circumstances. As will be seen from the ensuing arguments herein, however, the trial court's sentencing order was based on substantial and extensive aggravating factors, which that court concluded, even after accepting mental mitigators, "not only outweigh the mitigating circumstances, they overwhelm them." (R. 583). As such, any possible error with respect to the foregoing matters must be deemed harmless.

At this point, the State would briefly note a few things, however. The Appellant's harmless error analysis essentially portrays the defendant as a low IQ person with organic brain damage and serious mental illness. Such a portrait is inaccurate. While one expert stated that the defendant's IQ was slightly below a low-average range, with a score of 76, virtually all of the other defense witnesses, including several family members and a psychologist who had interacted with defendant over a course of 22 sessions,, asserted that the defendant was above average intelligence. He communicated extremely well. He graduated from high school, went into the military service, and held a position as a court-bailiff for the better part of eight years. The aforesaid psychologist, and even defense expert, Dr. Toomer, expressly stated that the defendant did not suffer from any major mental illness. His personality disorder was not uncommon, and essentially boiled down to nothing more than difficulty in dealing with stressful situations. As to the question of organic brain damage, no medical doctor or psychiatrist ever gave any such opinion, and, as detailed in the Statement of the Case and Facts, Dr. Eisenstein's opinion was based, in large part, on the highly subjective tests which were administered by Dr. Toomer, who, while acknowledging the subjective nature of those examinations, also acknowledged that the portrait he obtained of the defendant was that of a person who manipulated others for the purpose of obtaining his own ends. As to the defendant's allegedly abusive childhood, the record reflects that the defendant had a rather stable childhood, living with his father from the age of 1% until he graduated high school and went into the military. For most of that time, the father resided with his wife, the defendant's stepmother, and, for the remainder of that time, the defendant's grandmother lived in the same residence. Throughout most of that time, the defendant's aunt, and her family, provided the defendant with a closely knit family, which provided emotional, moral and religious support. The worst that could be said of the familial relationships was that the father was not a particularly nice man and that he beat the defendant when

the defendant misbehaved, such as when the defendant set a closet on fire. Whatever significance the childhood had, it was extremely remote at the time of the murders, as the defendant was, by then, in his early thirties, and he had been out of that household since he became a young and emancipated adult, upon high school graduation, some 15 years earlier. Those matters, upon which the Appellant focuses, in the harmless error analysis, are therefore not particularly compelling, when evaluated in the context of rather overwhelming aggravating factors: (1) HAC; (2) CCP; (3) contemporaneous conviction for another violent felony - i.e., the double murder; and (4) pecuniary gain. The foregoing matters are dealt with somewhat cursorily at this point, as the various mitigating and aggravating factors will be revisited throughout the remainder of the arguments addressing the Appellant's sentencing phase claims.

VI.

TESTIMONY REGARDING DEATH BY DROWNING WAS PROPERLY ADMITTED DURING THE PENALTY PHASE PROCEEDINGS.

During the guilt-phase proceedings, Dr. Williams testified, without objection, that Ms. Jones' death was caused by a combination of drowning, manual strangulation, and smothering or suffocation, See pp. 13-14 of Statement of the Facts herein. He testified that foam in the area of the nose was suggestive of fluid in the lungs and drowning. Fluid in the sinuses was more than it should have been, and this was consistent with drowning. Other aspects of the examination were likewise consistent with drowning. The doctor also gave a detailed description of how drowning causes death, describing the initial holding of the breath, subsequent gasping for breath, the choking, the vomiting and the filling of the lungs with water, ultimately leading to respiratory arrest. The deliberate holding of breath and panic involved in the process require consciousness. Death is finally caused when the heart is stressed, with irregular beats. (T. 1057-58). The doctor

reiterated that his examination led him to believe that drowning contributed to Ms. Jones' death. (T. 1058). All of the foregoing testimony regarding drowning was admitted into evidence without any objection by defense counsel. On cross-examination, during the guilt phase, the doctor agreed that he could not say with a reasonable medical certainty, based solely on his physical examination, that Ms. Jones was conscious when she was thrown into the water. She could have lost consciousness during the manual strangulation which preceded her being thrown into the water.

Dr. Williams testified again in the penalty-phase proceedings. Once again, he reiterated that the foam from the nose and fluid in the lungs were consistent with drowning. (T. 1707-1708). He again reiterated that drowning was one of the three contributory causes of death. (T. 1711). Over defense objection, the witness was permitted to again testify as to the manner in which drowning causes death. (T. 1712-14). He asserted that the victim was alive when she was thrown into the water. (T. 1716).

With respect to the Appellant's argument that the drowning evidence was inadmissible in the penalty phase proceedings, such an argument is without merit insofar as the very same jury heard exactly the same evidence about the effect of drowning during the guilt-phase proceedings. The reiteration of such testimony cannot possibly be prejudicial when the jury has already heard it, and properly so, without objection. Furthermore, the doctor reiterated at the penalty phase that drowning was one of the three contributory causes of death. While an aggravating factor must be established by proof beyond a reasonable doubt, see, Johnson v. State, 438 So. 2d 774 (Fla. 1983), it is not true that every single piece of evidence adduced at the penalty phase must be established beyond a reasonable doubt before the evidence is admissible. Thus, although the doctor could not state with certainty, based solely upon his physical examination, that the victim was conscious when she was thrown into the water, he did believe, as a professional opinion, that drowning was a cause

of death, and that the victim was alive when she was thrown in the water.

The physical examination must also be considered in conjunction with other evidence. The defendant, in his statement, had asserted that he fought with the victim, choked her, knocked her down by the fence, taped her, and threw her over the fence and into the water. (T. 1381). His own actions, of taping her, after choking her and knocking her down, but prior to throwing her into the water, are indicative of the defendant's own belief that the victim was still alive and conscious. The only reason for so taping her, when he was going to throw her into the water, would be to prevent her from screaming for help, and prevent her from extracting herself out of the water, things she would be capable of doing only if she were still conscious. Thus, both the defendant's actions and the doctor's testimony are fully consistent with the victim being conscious when she was thrown into the water. Additional evidence of consciousness after Ms. Jones was thrown into the water consisted of the fact that her own blood and tissue was recovered from underneath her fingernails, and, some of the tape had apparently been kicked off of her feet and legs. (T. 939-40, 1142, 1148). As such, evidence regarding drowning was relevant to the HAC factor in the penalty phase proceedings.

In any event, the State would further note that the prosecutor's closing argument did not emphasize drowning in conjunction with the HAC factor. (T. 1218-26). The prosecutor's argument focused on what transpired prior to the defendant's act of throwing Ms. Jones (and the infant) into the water. Similarly, the trial court's written findings on HAC, while briefly referring to drowning just once, are almost exclusively predicated upon the various acts and struggles which transpired prior to the victims being thrown into the water. (R. 578-79). As mentioned previously, the evidence had already been heard, without objection, at the guilt phase. Under such circumstances, the drowning evidence adduced at the sentencing proceedings, if deemed error, was harmless

beyond a reasonable doubt.

VII.

PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENT DID NOT CONSTITUTE REVERSIBLE ERROR AND, IN MANY OF THE ALLEGED INSTANCES, ARE UNPRESERVED FOR APPELLATE REVIEW.

A. Alleged attacks on defense counsel, witnesses and mitigation evidence

Of all the comments alluded to by the Appellant in this section of the Appellant's argument, see Brief of Appellant, pp. 66-68, only one was the subject of an objection. The prosecutor started talking generally about personal injury attorneys who use doctors who will testify about whiplash when you cannot see it, adding that doctors will say there is emotional distress when there is no other evidence of it. (T. 2250). Defense counsel objected, asserting that the comment ridiculed defense attorneys. (T. 2250). The prosecutor advised the judge that the comment was not directed against the attorneys, but against the doctors. (T. 2251). The judge "den[ied] the motion," apparently perceiving defense counsel to have moved for mistrial, even though no such motion was made. (T. 2251). The judge told the prosecutor that he was in "a serious problem," and that he should "clear it up." (T. 2251). The prosecutor proceeded to "clear it up," consistent with his arguments to the judge, by indicating to the jury that his comments had been directed towards Drs. Eisenstein and Toomer, and that these experts' opinions should be considered in light of facts shown by the evidence, as opposed to finger tapping tests. (T. 225 1-2). At no time did defense counsel ever object that the prosecutor's subsequent comments failed to adequately clear up the prior comments. As the thrust of the argument now being made on appeal is that the prosecutor's arguments, at that time, before, and after, were a relentless and improper attack on the psychological profession and its practitioners, the argument now being made is, in essence, quite different from

that having been raised in the trial court. As such, it has not been properly preserved for appellate review. See, e.g., Tillman v. State, 471 So, 2d 32, 34-35 (Fla. 1985) ("In order to be preserved for review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved,"). Moreover, as there was no motion for mistrial on such grounds nor a request for a curative, the claim is again unpreserved. Ferguson, supra; Craig; v. State, 5 10 So. 2d 857,964 (Fla. 1987) (same).

As to the remainder of the comments alluded to by the Appellant, the prosecutor had, on several occasions, minimized the significance of the experts' opinions regarding alleged brain damage, the IQ score, and the personality disorder. (T. 2240-41, 2244-47, 2233, 2054-55, 2249-50, 2229). None of these comments were objected to and, as such, any such claims are not preserved for appellate review. See, e.g., Carter v. State, 560 So. 2d 1166 (Fla. 1990) (failure to preserve claim that prosecutor improperly impugned defense counsel); Crump v. State, 622 So. 2d 963, 971-72 (Fla. 1993) (failure to preserve claim that prosecutor characterized defense as octopus clouding water to slither away); Wuornos v. State, 644 So. 2d 1012, 1018 (Fla. 1994) (failure to preserve claims regarding prosecutorial comments during penalty phase proceedings).

Furthermore, the Appellant's claim regarding a pervasive and improper attack on the expert witnesses is without merit. A prosecutor is permitted to question the testimony of expert witnesses when the arguments are based on the evidence. See, generally, Craig v. State, 5 10 So.2d 857, 865 (Fla. 1987). That is precisely what the prosecutor did in this case. Thus, with respect to Dr. Bergman, the prosecutor pointed out that Bergman found no major mental illness to exist, and further found that the defendant was not out of touch with reality, (T, 2233). As to Dr. Toomer, the prosecutor emphasized the extent to which Toomer routinely testified as a defense expert in capital

cases, (T. 2234-35). The prosecutor emphasized problems with the Carlson test, and cross-examination of Toomer had focused on those problems, (T. 2239-40). Similarly, the prosecutor focused on problems with the Bender tests, just as he had done in cross-examination of Toomer. (T. 2240). Likewise, the jury was advised of problems with the MMPI, including the dispute of the experts over the significant score which indicates a problem, the fact that the defendant's scores did not indicate a problem under a scale rejected by Toomer, but accepted by others, and the fact that the experts found the profile to be questionable, while acknowledging that the defendant was manipulative. (T. 2241-42, 2245-46) As to Dr. Eisenstein, the prosecutor again focused on the extent to which he has routinely testified as a defense witness. (T. 2243). As to the IQ score, when the prosecutor minimized it, that was done in the context of the evidence: the defendant was a high school graduate, who was honorably discharged from the army and had worked for years as a bailiff. (T. 2245). Numerous witnesses had testified that the defendant was either very intelligent, or of average intelligence; all found that the defendant communicated very well. With respect to the opinions about organic brain damage, the prosecutor emphasized that there had been no CAT scans or MRI's, thus emphasizing the absence of testimony from any medical doctors. (T. 2247). As to the minimization of the defendant's borderline personality (T. 2249-50), Drs. Bergman and Toomer had opined that it was not a major mental illness; and, the profiles essentially reflected that the defendant had a hard time dealing with stress. As noted by Dr. Bergman, the defendant's personality disorder was not uncommon. (T. 18 14). In short, the "attack" on the experts was, from beginning to end, predicated upon the evidence which the jury had heard. Comments on evidence are proper. Craig, supra.

In sum, the instant claim is unpreserved, and, in light of the totality of the comments, any error does not warrant reversal. See, Bertolotti v. State, 476 So. 2d 130 (Fla. 1985) (multiple

improper comments by prosecutor during penalty phase did not warrant reversal, even where they were preserved for appeal).

B. Golden Rule Arguments

The Appellant next argues that approximately five distinct comments of the prosecutor, during closing argument, constituted improper Golden Rule comments. The first such comment was objected to, as a "golden rule argument," and the objection was overruled. (T. 2220). Of the remainder of the comments at issue, two were objected to, without any grounds being stated, with the objections being overruled (T. 2253, 2256), and other comments at issue were not objected to at all. (T. 2253). As to those comments for which there was either no objection, or no ground was stated for the objection, this claim is unpreserved for appellate review. See, e.g., Tillman, supra, 471 So. 2d at 34-35 (objection must be stated with sufficient specificity to apprise trial judge of nature of objection); Nixon v. State, 572 So. 2d 1336, 1340-41 (Fla. 1990) (failure to timely object to improper Golden Rule argument constituted waiver of issue for appellate purposes). The Appellant's claim thus consists of the objected to comment "can you imagine" what was going through the victims' mind when the struggle began. (T. 2220). The prosecutor had immediately emphasized the actual evidence of the sequence, length of time and the severity of the struggle by the victims, and, the injuries inflicted upon them (T. 2220-1). The prosecutor had the burden of proving HAC; evidence of the victims' unnecessary suffering during the struggle in the car, being strangled, being then taped and thrown into the water, satisfies that burden. The State agrees that the prosecutor should have asked the jury to "consider" as opposed to "imagine" the victim's suffering. However, it is respectfully submitted that the verbiage utilized does not suffice to warrant retrial of the penalty phase proceedings. See, e.g., Bertolotti, supra, 476 So. 2d at 132-34 (multiple improper prosecutorial comments, including one golden rule comment, did not warrant

reversal even though preserved for appellate review); Davis v. State, 604 So. 2d 794 (Fla. 1992); Reaves v. State, 639 So. 2d 1, 5 (Fla. 1994);. Compare, Garron v. State, 528 So. 2d 353 (Fla. 1988) (multiple improper comments, all of which were preserved for appellate review, including one golden rule comment, resulted in reversal on appeal, where case was being reversed on several other alternative grounds as well).

VIII.

THE LOWER COURT DID NOT ERR IN DECLINING TO GIVE VARIOUS DEFENSE-REQUESTED INSTRUCTIONS REGARDING MITIGATING CIRCUMSTANCES.

A. Definition of Mitigating Evidence

The trial court gave the jury the standard instructions regarding mitigating circumstances. (T. 2287-88). The Appellant asserts that the jury should have been given a more explicit instruction defining what constitutes mitigation. This claim, and similar claims, have been rejected on numerous occasions, as this Court has repeatedly found that the standard instructions on mitigation are sufficient. See. e.g., Gamble v. State, 659 So. 2d 242, 246 (Fla. 1995) (rejecting claim that standard instructions failed to adequately define mitigating circumstances); Ferrell v. State, 653 So. 2d 367, 370 (Fla. 1995) (same); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988) (standard instruction on mitigating circumstances is constitutionally sufficient); Walls v. State, 641 So. 2d 38 1,389 (Fla. 1994) (no error in failing to give more detailed instructions on mitigation, where the "instruction on mitigating factors has been repeatedly upheld both in this Court and in the federal courts, and we reaffirm its validity today."). The Appellant asserts that further instruction was needed in this case because of the prosecutor's closing argument, in which the prosecutor asserted that various factors asserted by the defense as mitigation did not "excuse" the murders. (T. 2229, 2245, 2249-50). The Appellant is impermissibly, and without proper preservation, attempting to

bootstrap the jury instruction claim onto a prosecutorial comment argument, when the defense, at trial, never objected to any of the comments at issue on the grounds that the prosecutor was either improperly stating the law regarding mitigation or that the prosecutor was misleading the jury with respect to mitigation The Appellant's claim, regarding the jury instructions on mitigation, when presented to the trial court, was presented solely as an abstract proposition, and was never correlated to any alleged improper prosecutorial comments regarding mitigation.

B. Mental or Emotional Disturbance/Capacity to Conform Conduct to the Law

With respect to the statutory mitigating circumstance that the offense was committed while the defendant was "under the influence of extreme mental or emotional disturbance," the defense sought to have the word "extreme" deleted. (R. 438; T. 2 154-56). Similarly, as to the circumstance that the "capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired," the defense sought to delete the word "substantially." The defense requests would have transformed the statutory mitigating factors into something which the legislature did not intend. For that reason, this Court has expressly rejected the argument which the Appellant is currently raising. See, Johnson v. State, 660 So. 2d 637,642 (Fla. 1995). Thus, this claim is without merit.

C. **Mandatory or Permissive Nature of Mitigators and Non-unanimity**

The Appellant next claims that the standard instructions should have been modified to reflect that the jury "shall" consider mitigating circumstances established by the evidence, as opposed to stating that the jury "may" consider such circumstances. This claim has not been properly preserved for appellate review. This claim was raised in paragraph "I" of the defendant's written motion regarding penalty phase instructions. (R. 47 1, 475-76). When the arguments in open court reached paragraph I, defense counsel advised the court, "Your honor, this is primarily dealt

with in our separate motion, on our separate requested instructions on mitigating circumstances." (T. 2143). The judge responded that they would therefore "get to that in just a moment." (T. 2143). Shortly thereafter, the court returned to defense counsel's specially requested instructions regarding mitigating circumstances. (T. 2154-56). That discussion was predicated on defense counsel's written request for such instructions. (R. 438). While the first sentence of that written request reflects a change from "may" to "shall," defense counsel, in open court, failed to address that request, as a multitude of other such written requests were specifically discussed in open court. (T. 2154-56). As such, defense counsel failed to secure a ruling from the trial court on this particular request, and it is therefore unpreserved for appellate review. See, e.g., Blackmon v. State, 588 So. 2d 662 (Fla. 1st DCA 1991) (failure to secure ruling constituted waiver of claim); Leretillev v. Harris, 354 So, 2d 1213, 1214 (Fla. 4th DCA), cert. denied, 359 so, 2d 12 16 (Fla. 1978); Flanagan v. State, 586 So. 2d 1085, 1092 (Fla. 1st DCA 1991). Furthermore, this claim has been rejected in cases such as Walls. supra and Ferrell, supra, in which the sufficiency of the standard instructions on mitigating circumstances has been upheld. The State would note that the standard instructions do provide that, "you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed," (T. 2288).

As to the claim that the jury should have been instructed that mitigating circumstances need not be found unanimously, nothing in the standard instructions suggested to the contrary. This issue has rejected in Waterhouse v. State, 596 So. 2d 1008, 1017 (Fla. 1992) (Florida law does not require that each juror make an individual determination as to the existence of any mitigating circumstance). See, also, Armstrong v. State, 642 So. 2d 730, 734 n. 2 (Fla. 1994) (penalty phase claim 10, alleging error in failing to instruct that mitigating evidence need not be found

unanimously, was among the numerous claims rejected by this Court).

D. Instruction on Weighing Process

The Appellant claims that the jury should have been instructed that in weighing the aggravating and mitigating factors, it should assign whatever weight it deemed appropriate to the factors. The weight to be assigned to any established factor is within the discretion of the finder of fact, and no further instruction, beyond the standard instructions, was required. Johnson 660 So. 2d at 647.

E. Nonstatutory Mitigating Circumstances

This Court has repeatedly concluded that the penalty-phase instructions need not specify the nonstatutory mitigating circumstances and that the standard instructions on nonstatutory circumstances are sufficient. This claim therefore lacks merit and there is no reason to revisit it. See, e.g., Ferrell v. State, supra, 653 So. 2d at 370; Robinson, supra, 574 So. 2d at 111; Gamble, supra, 659 So. 2d at 246 (specific instruction as to nonstatutory mental impairment mitigation which fell short of requirement for statutory mitigator not required); Carter v. State, 576 So. 2d 1291, 1293 (Fla. 1989) (standard instruction on nonstatutory mitigating factors is sufficient).

IX.

THE LOWER COURT DID NOT ERR IN REFUSING TO MODIFY THE STANDARD JURY INSTRUCTIONS REGARDING THE STATE'S BURDEN OF PROVING THAT THE DEATH PENALTY IS THE APPROPRIATE SENTENCE.

The Appellant argues that the standard jury instructions required modification because they do not require the state to prove beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances. The Appellant argues that the standard instructions create a presumption that death is appropriate when aggravating factors have been established. These

arguments have repeatedly been rejected by this Court. See, e.g., Johnson, supra, 660 So. 2d at 647; Robinson, supra, 547 So. 2d at 113, n. 6 and n. 7; Preston v. State, 53 1 So. 2d 154, 160 (Fla. 1988); Wuornos v. State, 644 So. 2d 1012, 1020 at n. 5 (Fla. 1994).

X.

THE LOWER COURT DID NOT ERR IN DECLINING TO GIVE DEFENSE REQUESTED INSTRUCTIONS REGARDING AGGRAVATING CIRCUMSTANCES.

A. HAC Aggravating Circumstance

Defense counsel requested several modifications to the standard jury instruction regarding the heinous, atrocious or cruel aggravating circumstance. The trial court declined to give the requested modifications, and gave the standard instruction, which provides definitions for the terms "heinous," "atrocious," and "cruel." (T. 2285-86; R. 453). The standard instruction which was given in the instant case is the same as that approved by this Court in Hall v. State, 614 So. 2d 473, 478 (Fla. 1993). In Hall, this Court expressly found that the version of the HAC instruction which is at issue here was sufficient to save both the instruction and the aggravator from vagueness challenges. Id. This Court has since reiterated that holding. See, e.g., Fennie v. State, 648 So. 2d 95, 98 (Fla. 1994); Johnson. supra, 660 So. 2d at 648 (Fla. 1995) (rejecting claim that HAC instruction was constitutionally infirm). Furthermore, as death by asphyxiation, under circumstances similar to those of the instant case, is heinous, atrocious or cruel under any definition of the terms, see, cases cited at pp. 86-87, infra, any conceivable error in the standard instruction would have to be deemed harmless. Johnson, supra, 660 So. 2d at 648,

B. CCP Aggravating Circumstance

When this Court, in Jackson v. State, 648 So. 2d 85 (Fla. 1994), held that the previously existing standard instruction on CCP was unconstitutionally vague, this Court set forth a new,

detailed instruction, defining the various terms, which this Court directed trial judges to use until a new standard jury instruction was adopted. 648 So. 2d at 89, n. 8. The instruction which this Court directed trial courts to use is one which this Court obviously believed resolved the vagueness problems which inhered in the prior instruction. That instruction was utilized in the instant case. (T. 2286; R. 454). That instruction defines the term "cold" as follows: "'Cold' means the murder was the product of calm and cool reflection." **648** So. 2d at 89, n. 8. (T. 2286; R. 454). The Appellant asserts that the definition of "cold" should have been amended, to add the words "and not an act prompted by emotional frenzy, panic, or a fit of rage." On December 1, 1995, this Court approved the new standard instruction on the CCP factor, Standard Jury Instructions in Criminal Cases, 20 Fla. L. Weekly S589 (Fla. Dec. 1,1995). The newly approved instruction on the CCP factor contains the identical definition of "cold" as was approved in Jackson and as was given in the instant case.[22] In view of the foregoing, the instruction which was given adequately defined the term "cold," and there was no error in failing to give the requested modification to the instruction.

C. Pecuniary Gain

The jury received the standard jury instruction on this factor, stating that "you may consider that the crime for which the defendant is to be sentenced was committed for financial gain." (T. 2285; R. 452). The Appellant claims that this instruction is vague and should have been modified to add that the jury must find, beyond a reasonable doubt "that financial gain was the primary motive for the killing and that the killing was an integral step in obtaining some sought -after

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[22] The Brief of Appellant asserts that the additional language sought by the defense herein was included in the draft of the new standard CCP instruction prepared by the Supreme Court Committee on Standard Jury Instructions in Criminal Cases. See Brief of Appellant, p. 82, n. 104. This Court's comments to the Committee's proposals do not make any reference to any proposal to add that language, and the Court's opinion expressly approves the version of the instruction which does not include that additional language.

specific gain." (R. 515-16). The Appellant predicates this argument on a series of cases in which this Court has held that the evidence was insufficient to sustain the finding of this factor. None of those cases involved any question regarding the sufficiency of the standard instruction on the factor. See, e.g., Chaky v. State, 651 So. 2d 1169, 1172 (Fla. 1995); Hill v. State, 549 So. 2d 179, 182-83 (Fla. 1989); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988); Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982). In those cases, the State did not sufficiently prove the existence of this factor, because there were interpretations of the evidence from which it could be concluded that the murder was not committed for pecuniary gain at all. Thus, in Scull, it could have been concluded that the vehicle stolen by the defendant was taken to effect his escape from the murder, and that it was not taken for any form of pecuniary gain. In Hill, the evidence was consistent with a theory that the victim's billfold could have been taken, after the killing, as an afterthought, as opposed to the killing being effected for the purpose of taking the billfold. Thus, when the Appellant refers to phrases in cases such as Scull, referring to pecuniary gain as a "primary motive," those cases do not support that proposition, as the factor was rejected because pecuniary gain was not sufficiently shown to have been a factor at all.

Contrary to the Appellant's argument, this Court has recently stated in Allen v. State, 20 Fla. L. Weekly S397, S400 (Fla. July 20, 1995), that "[t]o establish the pecuniary gain aggravating circumstance, the State must prove a pecuniary motivation for the murder," (emphasis added). It need not be the sole motivation; it need not be the primary motivation; it need only be a motivation. Likewise, in Finney v. State, 20 Fla. L. Weekly S401, S403 (Fla. July 20, 1995), this Court reiterated, "[i]n order to establish this aggravating factor, the State must prove beyond a reasonable doubt that the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain." (emphasis added). These recent cases clearly reflect that the Appellant's attempt

to limit the instruction on this factor is inconsistent with Florida law.

Assuming, arguendo, that the failure to so limit the instruction was erroneous, any error was harmless beyond a reasonable doubt, as the evidence clearly demonstrated that the defendant's desire to avoid child support obligations was the primary motive for the murders. The defendant stated that he was trying to have the victim call the court and lower the child support payments immediately prior to the murders. The defendant had not wanted any responsibility for the child. When the paternity/support proceedings commenced, the defendant indicated his displeasure at having to pay support. Within weeks of the signing of the final order of support, the defendant committed the murders. Thus, the evidence reflects that this was the motive for the offenses, from beginning to end, and this factor was thus established, beyond a reasonable doubt, under any conceivable variation of the instruction which might have otherwise been given. Cf., Johnson, supra, 660 So. 2d at 648 (failure to limit HAC instruction was deemed harmless where murder would have qualified for that factor under any definition of HAC).

D. Circumstantial Evidence Instruction

The Appellant claims that the penalty-phase jury instructions should have advised the jury that an aggravating circumstance can not be inferred from circumstantial evidence unless it is inconsistent with every reasonable hypothesis of innocence. Just as such an instruction is not required in guilt-phase jury instructions, Pietri v. State, 644 So. 2d 1347 (Fla. 1994), there is no reason to require any such instruction in penalty phases. The penalty-phase jury is instructed that each aggravating circumstance must be established beyond a reasonable doubt before it can be considered. (T. 2287-88). There was thus no error. See, Johnson, supra, 660 So, 2d at 647.

E. Nonstatutory Aggravating Factors

The Appellant sought an instruction advising the jury that nonstatutory aggravating factors

could not be considered. Such an instruction is clearly unwarranted, as the standard instruction, which is given to the jury, advises the jury that "the aggravating circumstances that you may consider are limited to any of the following that are established by the evidence." (T. 2285). Thus, the jury is clearly made aware that the only aggravating factors which it may consider are those which are being enumerated. Furthermore, defense counsel's requested instruction was misleading. The requested instruction asserted that, "The aggravating circumstances I have just listed are the only ones you may consider. You are not allowed to take into account any other facts or circumstances as a basis for recommending a sentence of death." (R. 518). The requested instruction confuses the notion of aggravating circumstances with "facts."

F. Prior Violent Felony/Felony Murder

In the court below the Appellant argued that neither the prior violent felony nor the felony murder aggravators were applicable, because they both arose from the same episode and because they were duplicative. (T. 2141). The defense immediately stated, however, "We acknowledge the Florida Supreme Court has held to the contrary", and added, "but do preserve our objection," without further argument. (II). The court thus denied the request. This Court has repeatedly held that the prior violent felony factor applies when there are contemporaneous convictions for crimes against multiple victims. See, e.g., Jones v. State, 612 So. 2d 1370 (Fla. 1992); LeCroy v. State, 533 So. 2d 750 (Fla. 1988); Lucas v. State, 376 So. 2d 1149 (Fla. 1979); Johnson v. State, 438 So. 2d 774 (Fla. 1983); Stein v. State, 632 So. 2d 1361 (Fla. 1994); Espinosa v. State, 589 So. 2d 887 (Fla. 1991); Zeigler v. State, 580 So. 2d 127 (Fla. 1991). Appellant's case was based on the contemporaneous convictions for the murders of two different victims, the factor was properly applied, and the jury was properly instructed, Likewise, the felony murder aggravator does not duplicate the above factor. The jury can be instructed that it may consider the aggravating factor

that the murders were committed during the course of other felonies - e.g., kidnaping and burglary. As the prior violent felony conviction was based on the actual murders of the two victims, and the felony murder factor was based on the other offenses, kidnaping or burglary, there is no duplication. Furthermore, as noted by the Appellant, the judge's sentencing order made it clear that the prior violent felony factor was being based solely on the contemporaneous murder convictions; the order further specified that the kidnapping and burglary were not being considered for that factor. Indeed, the sentencing order did not even find, as an aggravating factor, either separately or merged, that the murders were committed during the course of a felony. (R. 577-78). Thus, there was no factual duplication in the instant case, and, the second factor, during-the-course-of-a-felony, was not even applied in the sentencing order.

Xl.

NEITHER THE STANDARD JURY INSTRUCTIONS NOR A COMMENT BY THE PROSECUTOR VIOLATED CALDWELL v. MISSISSIPPI.

The standard jury instructions, which refer to the jury's advisory sentence, are a fully accurate statement of Florida law, and do not mislead the jury. See, e.g., Owen v. State, 560 So. 2d 207,212 (Fla. 1990); Combs v. State, 525 So. 2d 853, 857-58 (Fla. 1988); Johnson v. State, 660 So. 2d 637,647 (Fla. 1995). Likewise, the prosecutor's comment, during voir dire, which referred to the jury's advisory verdict and the "final sentence" which is passed by the court, was equally accurate as a statement of Florida law, and was in no way misleading to the jury or denigrating as to the jury's role. As such, supra, there was no violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed. 2d 231 (1985). The State would note that the Appellant's argument herein with respect to the necessity of a special instruction in light of alleged prosecutorial impropriety, was not presented in the lower court. As such it is unpreserved. Tillman, supra. The

defense, prior to the commencement of the penalty phase requested, that the trial judge instruct the jury that their recommendation was entitled to great weight. (T. 1671). There was no mention of the voir dire or complaints that the prosecutors had diluted the jury's sense of responsibility, Id. Moreover, the trial judge did, in fact, at the commencement of the penalty phase, instructed the jury that, "the law requires the court to give great weight to your recommendation. I may reject your recommendation only if I can conclude that no reasonable jury could have made that recommendation." (T. 1691-2). Thereafter, the defense requested that the "Tedder" instruction be repeated during the final penalty instructions to the jury. (T. 2137). Again, there was no mention of any impropriety by the prosecutor. Id. The trial court held, "it's not necessary to repeat it so I will deny that." Id. The defense objected "for the record." Id. The State is unaware of any authority which requires the repetition of the defense requested instruction herein. The instant claim is unpreserved and without merit.

XII.

FLORIDA'S CAPITAL SENTENCING STATUTE IS NOT UNCONSTITUTIONAL.

A. Recommended Sentence Based on Simple Majority

The Appellant argues that Florida's capital sentencing statute is unconstitutional because it permits the imposition of the death sentence based upon a simple majority vote. This argument has previously been rejected by this Court and there is no reason for revisiting it. Wuornos v. State, 644 So. 2d 1012, 1020 n. 5 (Fla. 1994); James v. State, 453 So. 2d 786, 791-92 (Fla. 1984); Alvord v. State, 322 So. 2d 533,536 (Fla. 1975); Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992); Brown v. State, 565 So. 2d 304 (Fla. 1990).

B. **Absence of Written Findings by Jury**

The Appellant next argues that Florida's sentencing scheme is constitutionally invalid because it does not require that the jurors set forth their findings as to various factors, and it does not require that the jurors be advised as to how many jurors must concur as to the applicability of any individual factor. These arguments have also been previously rejected. Wuornos v. State, 644 So. 2d 1012, 1020 n. 5 (Fla, 1994); Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed. 2d 728 (1989); Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed. 2d 384 (1988)

XIII.

THE SENTENCE OF DEATH WAS PROPERLY IMPOSED WHERE THE AGGRAVATING CIRCUMSTANCES OF HAC, CCP AND PECUNIARY GAIN WERE PROPERLY FOUND TO EXIST BY THE LOWER COURT, AND THE LOWER COURT PROPERLY EVALUATED THE MITIGATING FACTORS.

A . **Pecuniary Gain**

As noted by the Appellant, the trial judge found the defendant committed the murders to avoid paying court ordered child support, and that pecuniary gain was "the primary" motive for the killings. (R. 578). The State first notes that this factor is established when the State proves beyond a reasonable doubt "that the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain." Finney v. State, 20 Fla. L. Weekly S401, S403 (Fla. July 20, 1995) (emphasis added). See also, Allen v. State, 20 Fla. L. Weekly S397, S400 (Fla. July 20, 1995) ("the State must prove a pecuniary motivation for the murder.").[23] Nonetheless, the trial court's findings are well supported by the record. As detailed previously herein, the defendant attempted

[23] As noted previously, the cases relied upon by the Appellant, for the proposition that this factor must be the "primary" motive for the murder, all involved situations where reasonable views of the evidence, which had been wholly circumstantial, permitted the conclusion that pecuniary gain was not a motive for the murder at all. See, p.78, supra.

to induce Ms. Jones to get an abortion, threatening her, in the event that she chose to have the baby and "mess up" his life. When the baby was born and Ms. Jones sought child support payments, the defendant refused, and, the victim sought court ordered child support. Within weeks of the final order of child support the defendant murdered both the child and the mother. In his confession, the defendant stated that when he and Ms. Jones were at the park, he was trying to have her call the court and get the support payments reduced. The pecuniary motive permeates the case from beginning to end, and this factor was clearly established. The evidence does not even remotely suggest any other motive for the murders. While the Appellant raises the phantom specter of support obligations serving as a pecuniary gain aggravating factor in every "domestic" murder, that is clearly not so. It is not every defendant who threatens the prospective mother of his child in the event that she fails to get the abortion which he desires. It is not every defendant who commits the murders within weeks of the finality of the support order which had been aggressively contested. It is not every defendant who confesses that he and the victim were arguing about child support prior to the murders.

B. HAC

The lower court made the following findings in support of the conclusion that the murders were especially heinous, atrocious and cruel:

> The victims in this case are the defendant's 17 month old son and the child's mother. They were abducted from a shopping center where Joann Jones, the mother, thought she was going to attend a movie with the defendant, and to allow the defendant to visit with the child. Instead, she was abducted by the defendant and his brothers, and transported some miles away. Each victim was bound in duct tape, including their heads. As a result, they died; the child by asphyxiation (suffocation) and the mother from a combination of asphyxiation and drowning. Each died while gasping for breath, unable to do anything about it. Several minutes are needed to die by asphyxiation. Joann Jones undoubtedly knew what was occurring.

> She was restrained by duct tape binding her hands and feet while she was transported many miles by car from the shopping center to park, and then carried or marched several hundred yards [sic] through the park to the canal into which she and the child were dumped. She struggled mightily. The horror to each victim is unimaginable, especially Joann Jones, who must have contemplated her own as well as the child's death. The manner in which these murders were committed and the suffering of the victims is sufficient to set them apart from the norm of homicides. This aggravator has been proved beyond a reasonable doubt.

(R. 578-79).

The Appellant's primary argument is that this factor was not established because there was no certainty as to whether Ms. Jones was still conscious when she was thrown into the water. That argument is simply a red herring, as it shifts away the above focus on what transpired prior to the throwing of the victims into the water. Regardless of whether death was by strangulation, suffocation or drowning, this factor has been established. As noted above the victim struggled with the defendant for a prolonged time prior to her murder. The car ride from the movie theater to the park took approximately twenty minutes. The interior of the car showed the signs of a horrific struggle, as there were blood stains all over the car, the interior of the car was in a state of complete disarray, and Ms. Jones had numerous abrasions and contusions all over her body. The victim had struggled against being bound with duct tape; there were strips of duct tape with blood and hair in the car in addition to evidence of the victim's own blood and tissue underneath her fingernails. According to the defendant's own statement, they were fighting inside the park, and he subsequently started choking her near the fence along the water where she was thrown in. The victim also undoubtedly had to contemplate that her infant child was going to suffer the same fate as she was. The fear and emotional strain preceding a victim's death may be considered as contributing to the heinous nature of the capital felony. Adams v. State, 412 So. 2d 850, 857 (Fla.

1982). The combination of strangulation, drowning and beating establishes this factor. Arbalaez v State, 626 So. 2d 167, 176-77 (Fla. 1993). Moreover, "it is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." Tompkins v. State, 502 So. 2d 415,421 (Fla. 1986). As aptly stated by this Court in Adams. supra, "[a] frightened eight-year old girl being strangled by an adult man should certainly be described as heinous, atrocious, and cruel." See also, Holton v. State, 573 So. 2d 284,292 (Fla. 1990) (victim strangled by pieces of nylon cloth); Capehart v. State, 583 So. 2d 1009, 1015 (Fla. 1991) (cause of death was asphyxiation due to smothering). While the Appellant has claimed that Ms. Jones was unconscious when she was thrown into the water, there has never been any similar claim that either of the victims was unconscious when they were strangled or smothered. Thus, the mere acts of strangulation and/or smothering, when committed on conscious victims, are, in and of themselves, presumed to satisfy the requirements of the HAC factor. Adam. supra; Holton; supra: Capehart, supra.[24] To whatever extent Ms. Jones was alive and conscious when thrown into the water, that would simply be surplusage as to a factor which was already established. However, there was considerable evidence from which the consciousness of Ms. Jones while drowning could reasonably be inferred. The medical examiner concluded that she was still alive when thrown into the water, by virtue of the foam in the nose and the fluid in the sinuses. The defendant, by finding it necessary to throw her into the water, obviously believed that she was still alive and conscious. The only reason for binding her with tape in the manner that he did, when he was going to throw her into the

[24] See also, Hitchcock v. State, 578 So. 2d 685,693 (Fla. 1990) ("As Hitchcock concedes in his brief, '[s]trangulations are nearly per se heinous.'"); Carroll v. State, 636 So. 2d 13 16, 13 19-20 (Fla. 1994) (death by asphyxia); Doyle v. State 460 So. 2d 353, 357 (Fla. 1984) (death by strangulation occurring over a period of up to five 'minutes).

water, would be to prevent her screaming for help and prevent her from extracting herself out of the water; things she would be capable of doing only if she were still conscious. Additionally, as some of the duct tape was found by Ms. Jones' legs, having been loosened, it could further be concluded that she was conscious while drowning and trying to extricate herself. In sum, under any combination of the causes of deaths of the two victims, this factor has been established.

c. CCP.

The trial judge made the following findings with respect to this aggravator:

> The homicide was committed in a cold. calculated and premeditated manner without any pretense of moral or legal justification.
>
> Stung by the entry of an order of court requiring the defendant to pay child support for Quinton (both past and future), the defendant carefully, calmly and with reflection planned these murders. The killing of the victims was not only consciously decided and formed before the killing, but was well thought out and planned. The duct tape was brought to the shopping center. Joann Jones was enticed to come to a place where she could be abducted. The assistance of the defendant's brothers was enlisted, because it was obvious that the defendant could not commit these murders alone. The bodies were taken to a remote place to be killed and disposed of. The heightened premeditation required to support this aggravator is apparent.
>
> Not a shred of pretense of moral or legal justification exists for these murders. Quite the contrary, the motive of the defendant in killing his child and the child's mother was to rid himself of the obligation to pay child support ordered by a court.
>
> Ridding oneself of child support by killing his child is cold-blooded and immoral to the highest degree, and this aggravator has been proven beyond any reasonable doubt. (R. 579).

The above findings are fully consistent with the decisions of this Court upholding the CCP factor. See, e.g., Arbelaez, supra, 626 So. 2d at 177 (defendant planned to drown girlfriend's child to get back at her for terminating her relationship with him); Cruse v. State, 588 So. 2d 983 (Fla. 1991) (advance procurement of weapons and ample time for reflection, notwithstanding contemporaneous

fmding that defendant acted under extreme mental or emotional disturbance); Fotopoulos v. State, 68 So. 2d 792 (Fla. 1992) (luring of the victim, who was blackmailing defendant, and the carefully "staged" manner of inflicting death); Koon v. State, 5 13 So. 2d 1253 (Fla. 1987) (luring of victim from home, coupled with advance procurement of murder weapon, supported CCP fmding); Turner v. State, 530 So. 2d 45 (Fla. 1988) rior threats to kill wife and woman who seduced defendant's wife away, coupled with clear planning of murders); Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990) (prior threats plus advance procurement of murder weapon); Brown v. State, 565 So. 2d 304 (Fla. 1990) (advance procurement of both burglary tools and murder weapon).

The Appellant initially contends that the trial court's findings of an advance, careful plan are not supported by the record. The Appellant suggests the trial court based its findings on "extra-record matters, including the self-serving statements of the co-defendants," See Brief of Appellant, p. 94, n. 127. The above findings are, however, firmly rooted in the instant record.

The defendant was seen carrying duct tape and non-household rubber gloves, items which his wife testified he did not normally utilize, at least a week prior to the murders. Having procured these items in advance, he then lured the victims to where they could be abducted, having enlisted the help of his two brothers. First, through a series of telephone calls, the defendant had asked Ms. Jones to go to the movies with him and induced her to meet him at the movie theaters; he had specifically asked her to bring the baby, When Ms. Jones had arrived at the movie theaters, by his own admission, the defendant, instead of going to the movies, suggested going for a drive. The victims were driven, in their own car, to a dark, isolated park, adjacent to a canal, some 10 to 15 miles away.

The defendant also admitted, to his wife and Lt. Meeks, "[t]hat there were two other people involved" (T. 12 17), "[t]wo other guys that helped me," (T. 1327). The defendant and his brother

Quinton had been whispering to each other, which they did not usually do, during the week prior to the murders. (T. 1212-13). The defendant was seen leaving his house with brother Quinton, shortly prior to meeting with the victims, The defendant himself admitted, "Quinton was with me when we went and got her from the movie theater. But when we got to the park he sat in the car." (T. 1385). The defendant and Quinton were then seen returning back home together. The defendant's other brother, Willie, was also present in the car, as established by the DNA evidence on the cigarette filter paper later found in the victims' car.[25] Moreover, the defendant, immediately after the murders, was overheard stating that he and Quinton had earlier picked up Willie from their mother's house. (T. 1215).

The Appellant's argument, that the State's evidence did not exclude the "reasonable hypothesis" that the killings were "not the product of heightened premeditation but occurred after a heated argument,"[26] and fight inside the park, per the defendant's confession, is devoid of merit in light of the above evidence,

The Appellant's further claim of "impulsivity," and that the killings were not "cold," but the "product of the defendant's paranoid perceptions of reality and agitated mental state following his wife's discovery that he had an illegitimate child with Joann Jones and was having child support deducted from his pay,"[27] has no record support. There was no expert testimony nor any factual evidence of any agitated mental state related to the defendant's wife. Indeed, the latter testified that she had known about the affair with Joanne Jones two (2) years prior to the murders. (T. 1221). She

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[25]Although the DNA was consistent with that of both the defendant and Willie, the defendant's wife testified that the defendant did not smoke. (T. 1218).

[26]See Brief of Appellant, p. 94.

[27]See Brief of Appellant, p. 94.

had also "accepted the paternity at the time." (T. 1220). Apparently, paternity suits against the defendant were not unusual, (T. 1222). Likewise, the defendant's own mental experts stated he was not out of touch with reality. There was no evidence of any psychosis or delusions. The expert testimony as to extreme emotional distress was not correlated with the defendant's particular behavior on a particular occasion. Dr. Eisenstein, for example, stated that he was not aware of the defendant's advance planning; he did not even ask the defendant about the day of the murders. (T. 2110-11). Instead, the doctor noted, "What I am saying is that his overall decision making skills is poor and that manifests itself clearly on that day [of the murders] as well as every other day of his life." (T. 2108). Likewise, Dr. Toomer stated that his opinion of "extreme" emotional distress, meant any mental condition affecting decision making ability. (T. 1976). The Appellant's reliance upon Spencer v. State, 645 So. 2d 377 (Fla. 1994); Richardson v. State, 604 So. 2d 1107 (Fla. 1992); Santos v. State, 591 So. 2d 160,163 (Fla. 1991); Herzog v. State, 439 So. 2d 1372, 1380 (Fla. 1983); and Douglas v. State, 575 So. 2d 165 (Fla. 1991), is thus unwarranted as all of said cases involved either defendants who were out of touch with reality, or situations where there was no "calm and cool reflection, only mad acts prompted by wild emotion." As previously noted, this case does not involve a defendant who is in any way out of touch with reality; the evidence demonstrates calm and cool reflection over a substantial period of time; and, the only "emotion" involved was the desire not to pay $4,000 in arrearages and support until the child victim reached the age of 18.

Assuming, arguendo, that this factor is found to be invalid, the State submits that the Westfield evidence, subject of the state's cross appeal and which was erroneously precluded, should be considered in establishing this factor. In any event, based upon a comparison of the remaining aggravating factors and the mitigating factors, it must be concluded that the trial court would have imposed the same sentence even in the absence of this factor, and that any erroneous finding of this

factor must be deemed harmless beyond a reasonable doubt. The trial court "merged" the CCP and pecuniary gain factors, and, even without considering the felony-murder aggravator, concluded, "the aggravating circumstances not only outweigh the mitigating circumstances, they overwhelm them." (R. 583). See, Robinson, supra: Holton. supra; Rogers v. State, 5 11 So. 2d 526 (Fla. 1987).

D. Mitigating Circumstances

1. Standard of Proof

When the judge found that the lack of substantial criminal history mitigating factor existed, he observed that the factor "has been proven by clear and convincing evidence." (R. 580). Based on this, the Appellant argues that the judge was applying an erroneous standard when he did not accept other mitigating factors, even though there was no reference to that standard in the evaluation of other mitigation accepted by the trial judge. Such reasoning has been previously rejected by this Court. See, Henry v. State, 613 So. 2d 429, 432-33 (Fla. 1992) Henry argued that the trial judge applied "too stringent a standard" in considering mitigating evidence, as the trial judge had stated that some mitigation had been established "beyond a reasonable doubt." Id. This Court held:

> "We disagree. Instead, the complained of language appears to reflect only the trial judge's articulation that more than enough evidence supported the mitigators he found. The judge correctly instructed the jury that mitigating circumstances, unlike aggravating circumstances, do not have to be established beyond a reasonable doubt. We will not assume, as Henry does, that the judge did not follow the instructions he gave to the jury. Therefore, we find no error in the judge's consideration of the mitigating evidence."

Id. In the instant case, not only was the complained of language not utilized in evaluating any other factor, but the trial judge is also presumed to follow the correct instruction which he gave to the jury. (T. 2288). There was thus no error.

2. substantial Impairment

The Appellant argues that the lower court erred in failing to find that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. While Dr. Eisenstein expressed his professional opinion that this factor existed, the evidence on this factor was not unrebutted. First, Dr. Eistenstein's opinion was not based on the events of the murder itself, as he acknowledged that he did not even consider them. Furthermore, Dr. Toomer, the defendant's other primary expert witness, testified that he did not believe this factor had been established within a degree of reasonable psychological certainty, and he stated that the factor was therefore inapplicable. (T. 1792-93, 1982-83). As the factor was clearly contradicted by the defendant's own expert testimony, the trial court acted within its discretion in finding that the factor did not exist. See, Johnson, supra, 660 So. 2d at 646-47 (contradictory evidence regarding mitigating factor supports trial court's conclusion to find that factor does not exist). Furthermore, opinion testimony is "not necessarily binding even if uncontroverted." Walls, 64 1 So. 2d at 390-9 1. "A debatable link between fact and opinion relevant to a mitigating factor, usually means, at most, that a question exists for judge and jury to resolve." Id. The trial judge in rejecting this mitigator, also relied upon the facts of the instant case:

> The reasons this mitigator is rejected is because the facts belie its existence. When the defendant first spoke to the police, he denied committing these murders. Then, he blamed someone else, the so-called abductors, who made him wrap Joann Jones with duct tape. He laundered away blood stains on clothing, and made an excuse to his mother for one brother's whereabouts. His ability to make decisions may have been impaired, but his conduct demonstrates rather than negates an ability to understand the criminality of defendant's actions.

(R. 580-1). The above uncontroverted facts are competent and substantial evidence supporting the trial judge's rejection of the instant mitigator. There was thus no error. Walls. supra.

3. Abusive Childhood Evidence

Based upon the evidence presented in the lower court, the judge acted within his discretion in finding that the defendant's "unfortunate" childhood background did not have any mitigating value. (R. 581). Although the defendant's natural mother left him when he was about 1 ½ years old, the defendant had a relatively stable childhood. He lived with his father, continuously, until he graduated from high school and entered the military. While the father was portrayed as a stern disciplinarian who beat the defendant when he misbehaved, there was no evidence suggesting that any of the beatings were physically excessive or that they caused any physical injuries. It is evident from the record herein that the father clearly furnished material support for the defendant, as the defendant always had a childhood home with the father, and the defendant, both in the years before and after the stepmother, continued to proceed through school until he graduated. Throughout most of those years, the defendant's stepmother resided in the residence as well. While the defendant's cousin portrayed her as drinking and wearing lingerie in the defendant's presence, the cousin admitted that he had no personal knowledge of any of these matters and no such first-hand evidence of any such conduct was ever presented to the court. For the remainder of the defendant's years at home, his grandmother lived in the residence and, by all accounts, provided a loving relationship, with a strong moral background, including regular attendance at church. Throughout most of this time, the defendant also maintained a very close relationship with his aunt and cousins, who lived nearby and furnished a similar environment to that promoted by the grandmother. As the defendant left the family home when he was about 18, and the murders herein were committed when he was about 33, whatever connection exists between the childhood and subsequent years is but a slender, tenuous reed.

In Sochor v. State, 619 So. 2d 285, 293 (Fla. 1993), the trial court rejected nonstatuory

mitigating evidence regarding the defendant's physical abuse at the hands of his father, as well as several related matters, on the grounds that the personal history was deemed "so insignificant that it had not been established as a mitigating circumstance." This Court concurred with that assessment, stating that the decision as to "whether such family history establishes mitigating circumstances is within the trial court's discretion," and there was no abuse of discretion in such a view of the foregoing summary of the family background evidence, the same holds true in the instant case. See also, Jones v. State, 652 So. 2d 346, 351 (Fla. 1995) (evidence of childhood "abandonment" by an alcoholic mother was properly rejected by trial court, where evidence showed that relatives who raised him after his mother's departure furnished a good environment).

The State would also note that the defense experts were of the opinion that the defendant's life experiences and psychosocial history had contributed to his personality disorder/mental difficulties. The trial judge accepted and did consider the defendant's mental status in mitigation. The defendant's background was thus given mitigation value in that context. Finally, if any error exists in the lower court's assessment of the background evidence, such error would clearly be harmless, as this is the type of family background evidence which is of de minimis value at best, even when it is accepted as mitigating. See, e.g., Jones v. State, 648 So. 2d 669, 680 (Fla. 1994) (evidence of traumatic and difficult childhood properly found by trial court to be of minimal weight). The trial court in the instant case concluded that, "the aggravating circumstances not only outweigh the mitigating circumstances, they overwhelm them." (R. 583).

4. **Other Nonstatutory Mitigation**

The Appellant first asserts that the trial court failed to consider nonstatutory mitigation as to: honorable discharge from the military; gainful employment; "good qualities" testified to by family members; and service as a deacon in church. As to all of these matters except military

service, the defense failed to apprise the trial court of them in a reasonable manner, and the trial judge thus can not be faulted. Hodges v. State, 595 So. 2d 929, 934-35 (Fla. 1992) (""defendants share the burden of identifying nonstatutory mitigators, and we will not fault the trial court for not guessing which mitigators Hodges would argue on appeal."); Lucas v. State, 568 So. 2d 18 (Fla. 1990) (same). The military discharge was the only one of the factors mentioned in the closing argument to the jury. (T. 2273). In the subsequent closing arguments, after the jury's advisory verdict, presented solely to the judge, the defense did not mention any of these matters. (T. 2322-33). In a written sentencing memorandum, the defense addressed, at great length, the statutory aggravating and mitigating factors. However, when it came to nonstatutory mitigation, the defense, in a footnote, simply asserted that "[t]he non-statutory mitigating factors established at trial, and the case law supporting each of them, is set out in Defendant's Requested Instructions on Mitigating Circumstances." (R. 546, n. 5). While some of the sundry list relied upon by the defense were referred to in said requested instructions (R. 439-41), it is easy to see that from the way the defense buried the reference to the list of nonstatutory mitigation in a short footnote in the midst of a 17-page sentencing memorandum, the four items now referred to can easily be seen to have been lost in the shuffle, as a result of the manner in which the defense chose to present them. Had the defense listed the factors in the sentencing memorandum, instead of referring to previously requested jury instructions, or argued same either in front of the jury, or the judge at the final sentencing hearing, the trial court would have expressly addressed these.

Furthermore, as with general family background testimony, the factors at issue here are similarly of the sort that have little or no mitigation value. Thus, even if the trial court erred by failing to expressly address this list which the defense chose not to argue, either orally or in a sentencing memorandum, any such error on the part of the trial court should be deemed harmless.

The trial judge, after all, even without considering the valid felony-murder aggravator and having merged two other aggravators, concluded that, "the aggravating circumstances not only outweigh the mitigating circumstances, they overwhelm them." (R. 583).

The Appellant's final claim is that the trial court failed to consider that this case arose out of a domestic dispute. For the same reasons as in the foregoing paragraphs, this claim was not clearly presented to the trial court. Furthermore, it is incorrect to assert that it was not considered by the trial court, A domestic dispute is not in and of itself mitigating. The trial court accepted the defendant's mental status as both a statutory and nonstatutory mitigating factor. According to the defense psychological testimony, the factor was based upon the defendant's limited abilities to deal with stress. As the child support obligations which were at the heart of the troubled relationship were the obvious source of whatever stress the defendant suffered from, those obligations (and the relationship itself) were subsumed in the defendant's mental or emotional disturbance. Moreover, the extent of the effect of the relationship on the defendant's actions was also evaluated in the context of the CCP aggravating factor. If the relationship produced the level of emotion or rage required to negate CCP, the trial court would have rejected that factor. Instead, the trial court concluded that the relationship did not produce the "highly-charged emotional context" which the Appellant has relied upon.[28] The trial court expressly found that the defendant, "carefully, calmly

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[28] Appellant's argument that the defendant may have also "acted out of emotional turmoil created by his wife's discovery that he had fathered an illegitimate child with Joann Jones and with the defendant entertaining a paranoid belief that Joann Jones, his spurned lover, was attempting to ruin his marriage," is entirely devoid of record support. The defendant's wife testified that she had known about and "accepted" the defendant's paternity prior to the murders. (T. 1220-21). She had known of the defendant's affair with the victim two (2) years before the murders. (T. 1221). Paternity actions against the defendant were apparently not unusual. (T. 1222). There was no emotional turmoil; no unusual behavior, save the whispered plans and unusual washing patterns by the defendant, either before or after the murders.

and with reflection planned these murders." (R. 579). In sum, as seen from the foregoing, the question of whether, and to what extent, an emotionally-laden domestic dispute occurred, was properly evaluated within several distinct contexts: the mental mitigators and the CCP aggravator.

CROSS-APPEAL

XIV.

THE TRIAL COURT ERRED IN PRECLUDING EVIDENCE WHICH WAS RELEVANT TO ESTABLISH AGGRAVATING FACTORS, AND NEGATE MENTAL MITIGATORS, AND ALSO ERRED IN MERGING AGGRAVATING FACTORS.

The defendant's wife testified that she had asked him about the murder, and, the defendant had, inter alia, said, 'Someone else suggested it to him." (T. 12 17). The prosecution then proffered evidence that approximately one month prior to the murders, when the child support order was becoming final, the defendant had a conversation with a defense attorney, Don Westfield.[29] (T. 848-5 1; R. 288-90). Mr. Westfield, at the time, was defending a murder case in which the female victim, in a strikingly similar fashion, had been bound with duct tape around her hands and over her mouth and eyes, before being thrown over a bridge and into a body of water. Id. The defendant, during a break, had gone to the court room where the case was being tried, and asked Westfield about the manner of killing. Id. Westfield described how the victim's hands were bound in front, and the eyes and mouth covered, all with duct tape, leaving her nose open, and how she had suffered because she was still alive and able to breathe when thrown into the water. Id. The prosecution argued that said evidence reflected premeditation and intent. (T. 856). The trial court however, precluded

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[29] The defendant had initially approached Mr. Westfield as the latter was leaving the court house and told Westfield that Judge Siegel was looking for him because he had missed a case on calendar that day. (R. 286-7). The next day, Westfield checked the calendar and could not see any cases for which he should have appeared, (R. 288). Westfield asked the defendant that, if in fact there was something on the calendar or if Judge Siegel needed to see him, to come and get Westfield from Judge Chavies's courtroom. Id.

presentation of said evidence. (T. 863). At the penalty phase, the prosecution again requested to present Mr. Westfield's testimony for establishing the HAC and CCP aggravators. (T. 1641-2). The request was again denied. (T. 1668). The prosecution renewed its request after the defense, in its cross examination of the medical examiner, suggested that the victims may have been accidentally smothered in the car. (T. 1737-8). That request was also denied. (T. 1739).

The trial court's exclusion of this evidence was error. In conjunction with the evidence of the date of the support order and evidence of the defendant's possession of duct tape, which he had never previously used for any purpose prior to the murders, the excluded evidence demonstrated how the defendant learned of this highly unusual and similar manner of committing murder, and, how he had contemplated it for several weeks prior to the murders which he committed. This evidence was therefore corroborative of the heightened premeditated nature of the murders committed by the defendant. This evidence also refutes the Appellant's constant refrain in this Court that the murders were committed in a momentary rage derived from a contemporaneous dispute with the victim. This evidence reflects the calm, reflective and protracted manner in which the murder plans developed, It refutes the Appellant's claim herein that the defendant's emotional state was such as to interfere with and negate the existence of the CCP factor. As a heightened degree of planning can minimize the significance of such emotional state testimony, see, Cruse. supra, 588 So. 2d at 983, the testimony from attorney Westfield is clearly relevant to both the CCP factor and the emotional/mental state testimony adduced by the defense. Such testimony is additionally relevant to the HAC factor. In their conversation, Mr. Westfield fully appraised the defendant of the protracted terror and suffering of a victim who was bound the same way and thrown into water to drown, as the victims herein were. (R. 289-90). The victims can not see, can not scream, can not help themselves, and yet the nose is left open to allow drowning. This evidence is relevant to both

the defendant's intent to inflict unnecessary torture and to the victims' suffering. The State submits that its preclusion was error. See Suggs v. State, 644 So. 2d 64, 67 (Fla. 1994)(admission of a book entitled ***Deal the First Deadly*** Blow, found in the house where defendant lived, was proper. The book contained pictures of the type of wounds which matched the wounds on the victim. The evidence was relevant to show that the murder was cold, calculated and premeditated.).

The appellee further submits that the merger of the pecuniary gain and CCP aggravators herein is unwarranted. Pecuniary gain and CCP factors are, "themselves separate and distinct and not merely restatements of each other as in a murder committed during a robbery and murder for pecuniary gain, or murder committed to eliminate a witness and murder committed to hinder law enforcement." Echols v. State, 484 So, 2d 568, 575 (Fla. 1985). "The two aggravating factors are not based on the same essential feature of the crime or of the offender's character." 484 So. 2d 574. See also Fotopoulos v. State, 608 So, 2d 784, 794 (Fla. 1992)(where a murder is committed in furtherance of a plan to obtain financial gain, and is also committed in a "carefully choreographed" manner, separate findings of both the pecuniary gain and CCP aggravators are appropriate and do not constitute improper doubling. These two aggravators are not based on the "same essential feature of the crime or of the offender's character" under such circumstances.). Rutherford v. State, 545 So. 2d 853 (Fla. 1989)(advance planning to murder an elderly woman for her money supported separate findings of both CCP and pecuniary gain factors).

The Appellee thus respectfully requests that the above stated evidence and arguments be considered in response to the Appellant's claims, and that, in the event of any remand to the trial court, the latter be directed to consider same.

CONCLUSION

Based on the foregoing the judgments and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE AND INITIAL BRIEF OF CROSS-APPELLANT was furnished by mail to CHRISTINA A. SPAULDING, Assistant Public Defender, 11 th Jusidial Circuit of Florida, 1320 Northwest 14th Street, Miami, Florida 33 125 on this 9th day of February, 1996.

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