IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,113

JAMES WALKER,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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JNTRODUCTION

This is a direct appeal from judgments of conviction and sentences of death, entered following a jury trial before the Honorable Michael Salmon of the Eleventh Judicial Circuit of Florida, in and for Dade County. In this brief, the clerk's record on appeal is cited as "R.," the supplemental record as "S.R.," and the transcript of the proceedings as "T."

STATEMENT OF THE FACTS AND CASE

Appellant James Walker was indicted on September 15,1993 for two counts of premeditated first degree murder. (R. 1-2) A superseding indictment returned on January 12, 1994 added two counts of kidnapping and one count of burglary of a vehicle with an assault or battery therein. (S.R. 2-5) The case was originally assigned to the Honorable Arthur Snyder, who presided over several pre-trial proceedings, including a hearing on Mr. Walker's motion to suppress. (T. 109) The case was subsequently transferred to the Honorable Michael salmon for trial, which commenced on January 31, 1994. (T. 307; R. 22) On February 10, 1994 the case was submitted to the jury which found Mr. Walker guilty as charged on all five counts; the court thereafter adjudged him guilty. (T. 1553-54; R. 49,331-37) The penalty phase of the trial began on April 21, 1994. (T. 1654; R. 51) On April 25, 1994, by a vote of 7 to 5, the jury recommended that Mr. Walker be sentenced to death on both counts of first degree murder. (T. 2293; R. 436-37) The trial judge followed the jury's recommendation and sentenced Mr. Walker to death on May 19, 1994. (T. 234041; R. 577-84)

Guilt/Innocence Phase

On August 22,1993, Miami firefighters responding to a reported brush fire found the body of an unidentified African-American woman near the canal in Sewell Park on South River Drive in Miami; her hands were bound with duct tape and she had duct tape over her eyes and mouth. (T. 912-13,938-39,987) The following day, August 23, Metro-Dade homicide detectives Thomas Watterson and Willie Everett issued a press release seeking help in identifying the body. (T. 119) At about 1 p.m. on August 23, in response to the press release, Joseph Clark contacted Detective Everett and subsequently identified the body at the Medical Examiner's office as that of his sister-in-law Joanne Jones. (T. 120) Mr. Clark informed the police that Ms. Jones' child and car were also missing. (T.

120) Upon returning to Sewell Park, police found the body of Quinton Jones, Ms. Jones' 17-month old son, 25-30 feet north of where her body had been found; his nose and mouth were covered with duct tape. (T. 121, 992-93, 1002-03, 1008) Mr. Clark and other members of Ms. Jones' family told the homicide detectives that Ms. Jones had been having problems with her boyfriend, James Walker, who worked as a bailiff at the Metro-Justice Building. Ms. Jones had sued Mr. Walker to establish his paternity of Quinton and to obtain child support. (T. 122, 176) Ms. Jones' family also asserted that Mr. Walker had once sexually assaulted Ms. Jones who had "gone to court" and lost. (T. 122, 176) They did not like Mr. Walker, and characterized his relationship with Ms. Jones as unfriendly. (T. 122, 175-76)

Motion to Suppress

Mr. Walker was questioned by the police on August 24, 1993 and gave three statements, the last of which was inculpatory. Defense counsel moved before trial to suppress Mr. Walker's inculpatory statement on three grounds (1) he had invoked his right to counsel during the interrogation, and the police had improperly continued questioning him without clarifying the request; (2) that under the totality of the circumstances his statements were not made voluntarily, and (3) that the third statement was the product of an unlawful arrest because the police did not have probable cause to arrest Mr. Walker for first degree murder. (T. 227-34; R. 91-92) The hearing on the motion to suppress was held on January 26, 1994 before the Honorable Arthur Snyder. (T. 109) The testimony presented at the suppression hearing established the following:

On the morning of August 24, Detectives Watterson and Everett received a phone call from Mr. Walker and asked him to come to police headquarters. (T. 123,177) Mr. Walker said he would have to ask his employer for permission to leave. (T. 123, 177) After this conversation, detectives Everett and Watterson went to the courthouse to pick up Mr. Walker. (T. 177) In the meantime, however, Mr. Walker had left for Metro-Dade police headquarter. (T. 177) When detectives Everett and Watterson returned to headquarters, they escorted Mr. Walker to a windowless interrogation room, approximately 25 feet by 10-12 feet, and proceeded to question him for at least six hours. (T. 123-25,

165,177-78,202) As they advised Mr. Walker of his *Miranda* rights, the police assured him that they were required to give *Miranda* warnings to everyone they interviewed in a homicide investigation; Mr. Walker executed a rights waiver form at 9:40 a.m.. (T. 126, 156-57, 178, 198-99; R. 273) Detectives Watterson and Everett acknowledged later that Mr. Walker was in fact their only suspect, and they did not advise him of his true status. (T. 156,198) In response to the officers' inquiries, Mr. Walker first stated that, although he had spoken *to* Ms. Jones by telephone on August 21 about *going* to the movies that evening, she had decided not to come, and he had not seen her that day. (T. 129-30, 180, 1245-46) Representing that they needed fingerprints for "elimination," the detectives then asked Mr. Walker to sign a form allowing them to take his photo and fingerprints. (T. 133-34, 181-82, 1254) As Mr. Walker finished signing the form, Detective Watterson told Mr. Walker they had either removed "his" fingerprint or "a" fingerprint from the duct tape taken from "the victim" or "the victim, Joanne," although the police at that time had not, in fact, recovered any fingerprints from the duct tape. (T. 135, 161, 182,203, 1255) Watterson and Everett both testified that lying to suspects is part of their "interview technique."[1] (T. 161, 204) According to the detectives, Mr. Walker became flushed and nervous and said he wasn't sure he should sign the form. (T. 135, 182, 1255) The police returned the form to him, and Mr. Walker stared at it, with his head down. (T. 135, 182-83)

The police told Mr. Walker they did not believe his statement; they knew he was having trouble with Joanne; there had been an alleged sexual assault; a dispute over child support; and an altercation at the courthouse. (T. 136) The detectives had not verified this information at the time of the interrogation.[2] (T. 155, 176, 195) When Mr. Walker said he and Ms. Jones had been worlung their

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[1] Detective Watterson explained at trial that he is trained in "lawful" interview techniques and commonly uses these to get witnesses and suspects "to be truthful;" falsely claiming to have evidence against the suspect is one of the methods commonly used by the police. (T. 1256)

[2] In fact, although Ms. Jones had reported an alleged sexual assault, no charges were ever filed. (T. 155) Similarly, another bailiff had erroneously reported that Mr. Walker had an argument with Ms. Jones at the court house. (T. 153-54)

problems out, (T. 136-37), Detective Watterson showed him a "disgusting," "horrible" photograph of Quinton Jones' partially decomposed body floating in the water and said "the person who did this did a terrible thing." (T. 137-38,207;R, 99) Detective Everett later explained that confronting Mr. Walker with the gruesome photo was another "interview technique." (T. 1403)

Mr. Walker continued to deny any involvement in the homicides, and Detectives Watterson and Everett continued to tell him they did not believe him and that he should "clear his conscience" and tell them what really happened. (T. 138-39) Mr. Walker then gave a second statement, in which he said that he had met Joanne and Quinton Jones at the movie theater on the evening of August 21 and that the three of them had been abducted by two assailants who forced Mr. Walker to duct tape Joanne and Quinton and then released Mr. Walker near the Orange Bowl, threatening to kill him if he told anyone. (T. 139-40, 184-85, 1272-74, 1373-74) Detective Watterson yelled at Mr. Walker that he was "full of shit" and "that was the worse *[sic]* story I ever heard in all the time I ever been a police officer." (T. 140-41, 165, 1274, 1374) Detective Watterson told Mr. Walker that "[n]obody in the world was going to believe" him; "God wasn't *going* to believe him, his co-workers wasn't [sic] *going* to believe him, and we certainly didn't believe him." (T. 141-42) The detectives had learned before the interview that Mr. Walker was a deacon in his church and testified that they both therefore invoked *God* "several times" during the interrogation. (T. 158, 163, 201, 205-06, 208, 1294) Watterson testified that they also employed the good guy - bad guy "technique." (T. 161-62) Watterson, who is white, played the belligerent role, while Everett, who is African-American like Mr. Walker, played the sympathetic role.[3] (T. 161-62, 212, 215)

Detective Watterson left Mr. Walker alone with Detective Everett for about 20-30 minutes. (T. 141) Everett continued to tell Walker he was lying. (T. 186) When Detective Watterson returned,

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[3] Detective Everett denied that he and Watterson had deliberately employed the "*good* guy, bad guy" technique, saying it had "just turned out that way" because Watterson became "upset" about the crime and yelled at Walker. (T. 204-05, 1401) Everett acknowledged that his interrogation "style" is generally to establish a rapport with the suspect. (T. 205, 1403) Everett also denied there was a "racial problem" between Mr. Walker and Detective Watterson. (T. 212)

Everett advised him that Mr. Walker would not change his story. (T. 141) Mr. Walker was then placed under arrest for two counts of first degree murder. (T. 142, 166, 187, 209) The *Miranda* warnings were not renewed. (T. 210) Mr. Walker was told "you are not leaving this room so you may as well start telling the truth." (T. 187) When Mr. Walker would not change his Statement, "something was said about if you want to stick to that story, we want to get it on tape or we want to bring in a stenographer."[4] (T. 142, 186, 1276) Mr. Walker said, "If you do that," or "If I do that," "I want an attorney." (T. 142, 186, 1276) Detective Watterson testified that the officers simply responded "okay, we won't do that" and continued the interrogation.[5] (T. 142, 1277) Detective Everett testified that, before the interrogation continued, Walker was further asked whether he wanted to continue talking and answered affirmatively.[6] (T. 186) Detective Watterson left the interview room to tell the stenographer she would not be needed and returned with Lieutenant Meeks, the commander of the homicide unit, who spoke to Mr. Walker alone for about 15 minutes.[7] (T. 142-43, 168) Lieutenant Meeks testified that Walker told him he had been abducted in Ms. Jones' car and was made to put duct tape over Joanne's and Quinton's mouths, (T. 224-25) Meeks told Walker he did not

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[4] The testimony regarding the chronology of these events was conflicting. Watterson testified on direct at the suppression hearing that Walker was arrested after the police asked for a transcribed statement (T. 142-43) but testified on cross and at trial that the arrest was first. (T. 166-67, 1276-77). Everett testified on direct at the suppression hearing that Walker was arrested "shortly after" the request for a transcribed statement (T. 186-87) but acknowledged on cross (based apparently on the police report) that Walker was arrested first (T. 209-10). Because the later testimony of both detectives places the arrest before the request for a recorded statement, it is assumed hereafter that this version is correct.

[5] He stated at trial that Mr. Walker's request for an attorney was not honored because the detectives did not want an attorney present at the interrogation. (T. 1301-02)

[6] At trial, Detective Everett testified that Mr. Walker said nothing about wanting an attorney but had said only, "if you do that I don't want to talk." (T. 1377)

[7] Meeks elaborated at trial that he told Walker it was obvious he wasn't telling the truth and that it would eat him up and kill him if he didn't tell the truth. (T. 1323) Walker denied committing the homicides, and Meeks responded that everyone in the room, including Walker, knew he had killed Ms. Jones. (T. 1323) Meeks told Walker to tell Detectives Watterson and Everett the truth. (T. 1323) Meeks testified that Walker then asked to speak to him alone. (T. 1324)

believe this story. (T. 225) Meeks testified that Walker then said he didn't do it by himself, that there were two other people with him. (T. 225, 1327) Meeks said he also told Walker there "probably was someone else with you" but "you know who they are and you are the one that planned it," and that Walker agreed.[8] (T. 225, 1327-28) Meeks did not tell Detectives Everett and Watterson, however, that Walker had confessed to him. Rather, they both testified that Meeks told them, upon emerging from the interrogation room, that Walker was sticking to the abduction story. (T. 143, 168, 215) Meeks told Walker there was no need for his family to be involved. (T. 224)

Walker ultimately asked to speak to Everett without Watterson in the room.[9] (T. 169) Detective Everett warned Walker that he was facing the death penalty and urged him "man to man, brother to brother, let me help you out." (T. 215-16) Everett said this was "part of [his] interview technique." (T. 215) Everett told Walker "over and over" that, if Walker told the truth, Everett would tell the assistant state attorney and the judge that he had cooperated.[10] (T. 216-18, 1415). Walker started to cry, and Detective Everett took his hands and told him it would be all right to cry and cried with him. (T. 215-16, 1378, 1413, 1417, 1422) Everett also characterized this as part of his "technique." (T. 216, 1412) Sometime between 1 and 2 p.m., while Everett was alone with Walker, Walker admitted to killing Joanne and Quinton Jones. (T. 189,216)

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[8] In his testimony at trial, Meeks added that Walker told him he didn't want to hurt Joanne, they had been having some problems, Joanne had taken him to court for child support and Walker wanted to talk to her to work things out, so he called Joanne to meet him at the movies. (T. 1324) Meeks also testified that Mr. Walker said he had been dating Ms. Jones for some time before he met his present wife; Ms. Jones became pregnant; Mr. Walker urged to her have an abortion; and she refused. (1325)

[9] At some point, Meeks returned to the conference room and Detective Everett said Walker was still sticking to the same story (T. 226) At trial, Meeks testified he had asked to speak to Walker again. (T. 1328) Meeks told Walker that he should be a man and take responsibility for what he had done; he told Walker to tell Detective Everett the truth, to "get it off his chest so it wouldn't kill him." (T. 1328) Meeks then left Walker alone with Detective Everett. (T. 144, 1278, 1328-29)

[10] At trial, Everett agreed that he had promised to help Walker if Walker told the truth and cooperated. (T. 1416)

According to Detective Everett, Walker said he met Ms. Jones to go to the movies at the 163rd street mall, and they decided to go for a drive to discuss their problems with child support. (T. 189, 1378-79) They drove to Sewell Park and walked by the water. (T. 189-90, 1379-80) They argued, and Ms. Jones slapped Mr. Walker, who then choked her and hocked her to the ground. (T. 190, 1380-81) She was unconscious and, finding some duct tape on the ground, Mr. Walker said he duct taped her, lifted her over the chain link fence, and put her in the water. (T. 144-45, 190, 1381) Ms. Jones had dropped Quinton when she was knocked to the ground, and Mr. Walker duct taped Quinton's mouth and also put him in the water. (T. 145, 191, 1381) Mr. Walker drove Ms. Jones' car to Overtown then back up to the 163rd street mall where he left it and drove home in his own car. (T. 191, 1381) The next day, Mr. Walker called Ms. Jones' apartment and left a message asking her to call him; Mr. Walker told Detective Everett he didn't think Joanne was dead. (T. 191-92) When Detective Watterson returned to the interrogation room, Detective Everett related to him Walker's third statement. (T. 144,1382) Detective Watterson did not hear Mr. Walker make the statement. (T. 169)

Detective Watterson proposed a second time to bring in a stenographer, and Mr. Walker again stated "if you do that, I want an attorney here." (T. 146) Detective Watterson testified that he again responded, "we won't do that then." (T. 146) Detective Everett, however, claimed they had further inquired whether Mr. Walker was willing to continue speaking to them, and he had answered affirmatively. (T. 191) Although Mr. Walker insisted he acted alone, the detectives brought Walker's brother, Quinton Rogers, who had been brought to the station for questioning, into the interrogation room, and Mr. Rogers told Mr. Walker that he had admitted being with him on the night of August 21. (T. 192) Mr. Walker then stated that his brother had been with him but had stayed in the car while he and Ms. Jones went to the park. (T. 147)

After argument by counsel, the trial judge denied the motion to suppress, ruling that the interview techniques used by the police were permissible and that Mr. Walker's statement was voluntarily given. (T. 250-51)

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Ms. Jones' red Mazda Protégé was found within a mile of the 163rd street mall in North Miami. (T. 954,1382) The left rear passenger door of the car had been damaged and the interior of the car was in disarray. (T. 956-57) There were tears in the fabric on the rear seats and small blood stains on the seat covers, the interior of the left rear door, and on the ceiling. (T. 958) Several pieces of duct tape with blood and hair on them were found in the car. (T. 960-61)

Victor Alpizar of the serology section of the Metro-Dade crime lab performed tests on the stains in Ms. Jones' car and collected samples for DNA testing. (T. 1082) Dr. Roger Kahn of the crime lab's DNA section performed polymerase chain reaction ("PCR") testing on these samples and on a cigarette filter found in the ashtray of Ms. Jones' car. (T. 1118, 1128, 1143) The DNA from the filter was found to be type 1.1, 1.2-- the type shared by Mr. Walker and his brother Willie Rogers and 12.2% of the African-American population, 6% of Caucasians and 4.8% of Hispanics. (T. 1142-43, 1146-47) Defense counsel moved both before and during trial to exclude the DNA evidence under section 90.702, Florida Statutes, because it did not clarify any issues for the jury and was of limited probative value; the motion was denied. (T. 821-22, 862, 1129-31, 1154) Dr. Kahn acknowledged that the DNA test results did not establish who smoked the cigarette or when. (T. 1149) Mr. Walker does not smoke (T. 1218), and there was no evidence presented regarding Willie Rogers' smoking habits. All of the blood stains submitted for DNA testing were found to match Joanne Jones' DNA type. (T. 1141-42) All of the duct tape found in the car and removed from Joanne and Quinton Jones was processed for fingerprints; only one piece yielded results. (T. 949, 973-74) Guillermo Martin, fingerprint technician, for the Miami Police testified that a print on the interior surface of the duct tape removed from Joanne Jones' body matched Mr. Walker's prints. (T. 1316-17) Mr. Walker's fingerprints were not found in Ms. Jones' car or apartment. (T. 1319)

Mr. Walker's wife, Vanessa Walker, testified that, in the week leading up to August 21, 1993, she had noticed James and his brother, Quinton Rogers, whispering to each other, and she thought this

was unusual.[11] (T. 1212-13) She could not hear what they were saying. (T. 1216-17) James and Quinton left the house together about 7:30 p.m. on August 21 and returned together about 12:30 a.m. (T. 1213-14) James took a shower, then called his mother. (T. 1215) Mrs. Walker overheard James tell his mother that he and Quinton had picked up Willie at her house and gone to find their sister, Linda, who had been injured in a fight with her boyfriend earlier in the day. (T. 1215-16) The following morning, Mrs. Walker noticed that James was washing his and Quinton's clothes. (T. 1216) Sometime in 1991 -- over a year before the homicides -- she had seen a roll of duct tape in a beige bag that James generally kept in the trunk of his car, (T. 1210-11) In the week leading up to August 21, 1993, she had seen a pair of rubber gloves in another bag that James carried with him. (T. 1211) The day James was arrested, Vanessa gave a roll of duct tape to the police. (T. 1223) This tape did not match the tape taken from the victims, (T. 1113-14) Vanessa had learned in 1991 that James was having an affair with Joanne Jones. (T. 1221) She learned later that James had a child with Joanne, when she looked through one of his bags and found his check stubs, reflecting the child support deductions.[12] (T. 1223) She denied being angry about it and said she had accepted it. (T. 1220) Vanessa also testified that, while he was in jail, James told her that he hadn't planned the killings, someone else had suggested it, and two other people were involved; he had only watched. (T. 1217-18)

Detective Gary Cunningham of the North Miami Police Department testified over defense objection that on July 22,1991, he interviewed Mr. Walker about a conversation between Mr. Walker and Ms. Jones a few days earlier in which Ms. Jones had announced that she was pregnant. (T. 1177, 1180-81) Taped excerpts of this interview were played for the jury over a continuing defense objection. (T. 1178,1183) On the tape, Mr. Walker said that Ms. Jones was upset and angry that Mr. Walker had married someone else. (S.R.18) He offered to pay for an abortion and told Ms. Jones,

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[11] Quinton Rogers had been living with the Walkers for about a year. (T. 1217)

[12] Mrs. Walker could have learned about the child support order only a short time before the crimes, because the order was not final until July 1993. (T. 1205)

"if you're going to mess up my life and ruin my life, I can make your life miserable like you *can* make my life miserable." (S.R.19) Mr. Walker said that Ms. Jones, who had had an abortion earlier in their relationship, did not want to have another one, but he had explained that he felt it would be best for their relationship if Ms. Jones had an abortion and that it would be "the best thing to keep our lives peaceful." (S.R.20; T. 1181-82)

Assistant state attorney Sylvia Brown of the child support enforcement division testified that she was involved in Joanne Jones' lawsuit to establish Mr. Walker's paternity of Quentin Jones and to obtain child support. (T. 1185-87) Ms. Brown was present at a hearing on June 25, 1993 with Joanne and Quinton Jones and James Walker. (T. 1187-88) Ms. Brown testified that Mr. Walker "was not pleased by having to pay the amount of support he was ordered to pay" and "continuously" told the court "he could not afford to pay that kind of money." (T. 1203-04) Mr. Walker was ordered to pay $164.06 biweekly and an additional $20 per week for back child support. (T. 1206) Ms. Brown further testified that Mr. Walker did not want the birth certificate amended to give Quinton his last name. (T. 1207)

During his trial testimony, Detective Watterson testified that he told Mr. Walker during the interrogation that he knew Mr. Walker had had a sexual assault charge filed against him. (T. 1257) Defense counsel objected that this remark violated the court's prior order excluding evidence of the uncharged sexual assault[13] and moved for a mistrial. (T. 1257) The trial judge admonished the prosecution that if he had known they intended to elicit this testimony, he would not have allowed it. (T. 1264) Although defense counsel maintained that the error could not be corrected by a curative instruction, the court denied the motion for mistrial, (T. 1268-69), and instructed the jury: "Members of the jury, I want to give you a special instruction with respect to a statement that was made by this

[13] Defense counsel had moved before trial to exclude evidence of the uncharged sexual assault, which was the subject of the North Miami police interview. (T. 279, 824) At that time, the prosecution disclaimed any intention to present evidence of the sexual assault and represented that they intended only to bring out what Mr. Walker had told Detective Cunningham about his discussion with Ms. Jones regarding an abortion; the motion was therefore denied. (T. 848, 855, 863)

witness. First, is this: No charges -- 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)

Associate Medical Examiner, Dr. Albert Wayne Williams, who performed the autopsies on Joanne and Quinton Jones testified that there was a small cut on Ms. Jones' forehead, some swelling on her right cheek and superficial scratches and abrasions on her back. (T. 1045, 1050-52) There were burst capillaries, known as petechiae, in Ms. Jones' eyes and damage to her neck muscles and the hyoid bone in her neck consistent with manual strangulation. (T. 1047-48, 1059-60, 1075-76) There was also a foamy secretion from the nose and fluid in the sinuses consistent with drowning. (T. 1042, 1044-45, 1056) In Dr. Williams' opinion, the cause of death was a combination of manual strangulation, suffocation, and drowning. (T. 1060) He could not say to a reasonable medical certainty whether Ms. Jones was conscious when she went into the water. (T. 1078, 1080) Dr. Williams found no anatomic evidence that Quinton Jones had drowned and concluded he had suffocated as a result of the duct tape over his mouth and nose. (T. 1066-67)

Over defense objection, the prosecution stressed repeatedly in closing argument that Mr. Walker had wanted Joanne Jones to have an abortion. (T. 1466-68, 1470) The audiotape regarding Mr. Walker's discussion with Ms. Jones about an abortion was the only item of evidence the jury asked to review during their deliberations. (T. 1552; R. 49-50)

As noted above, Mr. Walker was convicted as charged on all five counts of the indictment.

Penalty Phase

At the penalty phase, the prosecution recalled Vanessa Walker who testified that, during their marriage, Mr. Walker had owned a .357 magnum and that she had not seen it since the time of his arrest. (T. 1695) On cross-examination, Mrs. Walker also testified that Mr. Walker had once taken out the *gun* and threatened to shoot himself, but she had dissuaded him from doing so. (T. 1695-96)

The prosecution then recalled Dr. Williams, the associate medical examiner, who again testified that the cause of Joanne Jones' death was a combination of *drowning,* smothering, and strangulation.

(T. 1711) When the prosecutor asked Dr. Williams to describe the process of drowning, the defense objected that since Dr. Williams could not determine whether Joanne Jones had been conscious when she was put in the water, testimony regarding the experience of drowning was not relevant and would only inflame the jury. (T. 1712-13) The objection was overruled, and Dr. Williams provided a detailed description of drowning, emphasizing the struggle to avoid inhaling water and the physical reaction to the lungs filling with water. (T. 1713-16) On cross-examination, Dr. Williams testified that Ms. Jones' injuries indicated that she had been strangled; that Ms. Jones could have been rendered unconscious within a few seconds; and that the physical evidence was consistent with her having been unconscious when she drowned. (T. 1722-27, 1730-31) With respect to Quinton Jones, Dr. Williams testified that the cause of death was asphyxia -- deprivation of oxygen -- presumably as result of the duct tape placed over his nose and mouth. (T. 1717) Although Dr. Williams had testified at the guilt/innocence phase that there was no anatomic evidence that Quinton Jones had drowned (T. 1066-67), he testified at the penalty phase that he could not say whether or not Quinton had drowned. (T. 1718, 1733)

The defense presented evidence at the penalty phase that Mr. Walker's childhood was characterized by physical and psychological abuse; that he has an IQ in the borderline range; and he has a history of psychological problems caused by a combination of mental illness and organic brain damage. Mi. Walker also had no prior criminal record and had been honorably discharged from the military. (R. 428-29,431-32)

James was an illegitimate child. (T. 1823) When he was between 13 and 17 months old, his mother, Dorothy Rogers, abandoned him. (T. 1823, 1826) James was underweight and suffering from malnutrition. (T. 1827) James' father and his wife, Ann Chambers, took James in. (T. 1828) James' paternal aunt, Betty London, testified that James' father was physically abusive with James to the point that Ms. London would not allow him to discipline her children. (T. 1833-34) James had always been afraid of his father. (T. 1835) He wouldn't talk or play with other children in his father's presence but would begin to behave normally when his father wasn't around. (T. 1834-35)

Betty Ann Phinaze, Ann Chamber's niece, who lived with Ann and James' father from the age of 11, after her parents' death, also testified to the home environment she and James grew up in. (T. 2034-35) James was about two when he came to live with them and did not appear to Ms. Phinaze to be a normal two year old; he had trouble doing the "basic little things that little kids do." (T. 2035-36) Ms. Phinaze testified that James' father disciplined her so severely that Ms. Chambers' ultimately insisted that only she would discipline Betty. (T. 2036-37) Whereas Betty got punishments, James got beatings, which his father administered with belts and shoes. (T. 2037-38) Betty never saw James' father be physically affectionate with him. (T. 2043) James was so afraid of his father that he would ask Betty for things a child would ordinarily ask of his parents. (T. 2037) Ms. Phinaze didn't like the way James' father treated him but could do little to intervene since she was so young herself. (T. 2039) Ms. Phinaze stayed in her room "mostly all the time" to avoid James' father and "any problems that might happen" in the household. (T. 2039) James' father also beat Ann, once so severely that she had to go to the hospital. (T. 2040) Betty tried to help James by performing chores for him so his father wouldn't beat him and by taking James with her when she went out so he wouldn't have to be in the house alone with his father. (T. 2038-39, 2045) James was very attached to Betty and mistook her for his mother. (T. 2045) When Betty went to her senior prom in high school, James thought she was getting married and was terrified she would not return. (T. 2042) When James' father and Ann were getting divorced, James told the judge he wanted to live with Betty. (T. 2044-45).

Ms. London's son, Stan Samuels, is the same age as James and has known him since they were very young children. (T. 2162) He described James as closer than a brother. (T. 2162) Because Stan and James often spent weekends at each other's homes, Stan had an opportunity to observe James' home environment. (T. 2161) Stan recalled that James was very different in his own home than he was when he visited Stan's house; at his own home, James was introverted and in his own world. (T. 2168) As a youngster, James had bouts of depression and would lock himself in his room and stay in bed. (T. 2184) Stan characterized James' father as a "dictator," who gave James a list of chores to perform each day, and if they weren't completed when he got home, he would beat James. (T. 2162-

63) Ann would sometimes make James perform tasks for her and then tell James' father that James had failed to complete his chores because he was lazy. (T. 2164) James did not learn that Ann was not his biological mother until he was 13 or 14 years old. (T. 2165-66) Ann was also afraid of James' father. (T. 2165) They would get into verbal arguments that would become physical. (T. 2169) James was so afraid that he began sleeping with a knife under his pillow. (T. 2169) During this same period, Ann introduced James to drinking. (T. 2166,2169) When James' father was not home, Ann would drink with James and parade around in sexy lingerie. (T. 2167) Once, James responded by making an advance, and Ann reacted violently; she told James' father, who beat him. (T. 2167) Shortly before James' father and Ann separated, when tensions in the household were especially high, James became severely depressed and had a nervous breakdown that required medical attention. (T. 2172) Stan contrasted James' childhood with his own; though Stan and his siblings were disciplined and required to do chores, their family was loving and affectionate. (T. 2188-89)

After James' father and Ann separated, James' grandmother, Cora Walker, came to live with them in Carol City and remained with them for about three years." (T. 2170) During this period, James was sexually abused by a neighborhood handyman and confided only in Stan, because the taboo about anything associated with homosexuality was so strong in their family. (T. 2173) One day, while James was at church with his grandmother, his father moved out of the house without telling anyone. (T. 2170) One or two weeks later, he called and came to take James to live in Fort Lauderdale. (T. 2171) Mr. Walker believed that his mother had tried to poison him and therefore cut off all contact with his family, forbidding James to see his grandmother or his aunt's family. (T. 2184-85) James had to sneak out of the house and call his aunt collect to talk to her. (T. 1831, 1835)

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[14] Cora Walker, believed that Dorothy Rogers first contacted James during the time they were living in Carol City. Dorothy called the house and came to visit once, despite Mrs. Walker's warnings that James' father would not approve. (T. 2032-33) When Dorothy left, she tried to leave some of her children with Mrs. Walker. (T. 2032-33) Stan did not meet Mr. Walker's half-brothers, Quinton and Willy Rogers, until sometime in 1987 or 1988. (T. 2171)

After high school, James joined the army and was stationed in Tacoma, Washington and in Germany. (T. 2031) Cora Walker felt "there was something wrong with [James'] mind after he got out of the service." (T. 2031) When he returned to Miami, James changed his name back at his family's *urging.* (T. 1837,2031; R. 433) While James was overseas, he sent home to his father for safekeeping both consumer goods and his allotment checks. When he returned, however, he found that his father had appropriated everything he sent home. (T. 1838-39, 2174-75) James' father also refused to allow James to stay with him in Fort Lauderdale. (T. 1838,2175) James lived for a while with various family members and friends. (T. 1839-40, 2047, 2175) He worked as a security guard and then applied for a job as a bailiff. James was unable to complete the application himself, and Stan's brother filled out much of the information for him. (T. 2182) James had two brief and unsuccessful marriages before he married Vanessa Walker.[15] (T.184142, 2176-77) Between his second and third marriages, James was involved with a woman he *cared* for very much, but her parents did not approve and she later attempted suicide. (T. 2177) James and Vanessa had a tumultuous marriage and separated and reconciled several times. (T. 2178-79) Ms. London counseled both James and Vanessa about their marital problems and urged them to stay together. (T. 1843) Vanessa left James when he lost his job and then returned when he was reemployed, only to announce a month later that she wanted a divorce. (T.2179) Vanessa reconciled again with James when she found that she could not get the house in a divorce because they did not have enough equity in it. (T. 2179) In August of 1993, their marriage was up and down. (T. 2179) Stan was aware that James was involved with Joanne before his marriage to Vanessa and that their relationship had continued during the time Vanessa had left James. (T. 2179) Stan did not h o w that James and Joanne had had a child. (T. 2179)

[15] James' first marriage ended because James believed his in-laws were trying to run his life, and he suspected his wife was having an affair and that he had contracted a venereal disease from her. (T. 2176) James' second marriage was very brief -- about a month -- and ended when he discovered that his wife had been involved with a married man at the courthouse. (T. 2176)

James continued to have bouts of depression as an adult and, in response to stress, would become withdrawn and uncommunicative. (T. 2183) James' ability to make decisions about even the most mundane things was very bad when he was in a funk. (T. 2187) Stan noticed that James was experiencing extreme mood swings in the months before the offense. (T. 2185)

Judge Barad, for whom James worked in 1988, became sufficiently concerned with James' behavior that he personally asked a psychologist, Dr. Leonard Haber, to evaluate James. (T. 2016) During the assessment interview on July 25, 1988, James reported a history of child abuse, and his answers on an evaluative questionnaire caused Dr. Haber concern.[16] (T. 2017-18) While Dr. Haber did not reach a definitive diagnosis, he found James to be impulsive, irritable, and unhappy; he was isolated with few friends and no family support system, (T. 2016-17) In addition, James had a history of acting out impulsively and had thoughts of harming his ex-wife and possibly others. (T. 2017) Dr. Haber thought James seemed to be under control at the time but was concerned about some of his impulses and concluded that he required immediate treatment. (T. 2017-18) Dr. Haber therefore referred James to Dr. Ronald Bergman, a clinical psychologist in private practice. (T. 1807,2017)

Dr. Bergman first saw James, on Dr. Haber's referral, in August of 1988. (T. 1807-08) Dr. Bergman conducted a clinical interview with James and diagnosed him as having paranoid personality disorder. (T. 1809-10) Dr. Bergman found James to be characteristically very sensitive interpersonally; he tended to misperceive the motives and behavior of others and frequently felt mistreated and misunderstood. (T. 1810) He also tended to make mountains out of molehills and frequently found himself in interpersonal difficulties of one kind or another, (T. 1810) Dr. Bergman saw James for 22 sessions from August 1988 to mid-February 1989. (T. 1810-11) Dr. Bergman testified that James appeared extremely tense and guarded; he seemed suspicious and reported feeling distrustful of everyone, particularly women. (T. 1812) James felt others only wanted to take

[16] For example, in response to the question, "If you could get one question and get the answer what would it be?" Mr. Walker had asked, "can't I kill my parent[s] and would I go free because they caused me a lot of pain, I would feel so much better." (T. 2019) He said these feelings had begun when he was "three years old, it started growing up." (T. 2019)

advantage of him and blamed his latest ex-wife for his problems. (T. 1812) He felt overwhelmed and angry with others, and it appeared to Dr. Bergman that James was experiencing internal rage which was only slightly visible on the surface, manifesting itself as generalized agitation. (T. 1812) Although James was not psychotic when Dr. Bergman saw him, it is possible for a person with this disorder to become psychotic. (T. 1813) When James terminated the relationship with Dr. Bergman, he was not cured, and Dr. Bergman kept the file open, because he expected James would require treatment in the future. (T. 1811) Dr. Bergman noted that people with paranoid personality disorder often move in and out of therapy throughout their adult lives because the disorder continues to create difficulties, but they also resist counseling because they tend to perceive everyone else as having the problem (T. 1811)

James was also examined, at the request of defense counsel, by Dr. Jethro Toomer, a psychologist, and Dr. Hyman Eisenstein, a neuropsychologist. Dr. Toomer examined James' clinical and psychosocial histories and administered a battery of tests, including the Minnesota Multi-phasic Personality Inventory ("MMPI"), the Carlson Psychological Survey, and the Bender Gestalt test. (T. 1765-84) Dr. Toomer found that James' clinical history suggested a history of personality dysfunction, a significantly disturbed and dysfunctioning family situation, including a pattern of abuse and abandonment and the lack of a stable, nurturing environment, and maladapted behavior in attempts to cope with underlying emotional disruption. (T. 1762-63) Based on these histories and the psychological testing, Dr. Toomer concluded that James was suffering from a personality disorder with indications of both manic depression and paranoid personality disorder. (T. 1765-84, 1787) Dr. Toomer also found indications of organic impairment that required further investigation by a neuropsychologist. (T. 1784) James' abusive childhood and life-long personality disorder manifested itself in maladapted behavior -- an inability to make moral decisions and weigh consequences and alternatives, particularly in stressful situations.[17] (T. 1784, 1787, 1789, 1984)

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[17] Dr. Toomer rejected the prosecutor's suggestion that James could have been feigning mental illness or manufacturing his history of childhood abuse given his previous psychiatric history, which

In Dr. Toomer's expert opinion, James was under extreme emotional distress at the time of the offense. (T. 1791) While Dr. Toomer could not conclude to a reasonable psychological *Certainty* that James was unable to conform his conduct to the requirements of the law at the time of the offense, he believed that this mitigating circumstance was "very likely applicable," (T. 1793), because James' psychological features -- his low tolerance for stress, his maladapted behavior, suspicious nature, paranoid and manic tendencies, bipolar depression, and transient thought processes -- would interfere with his ability to conform his conduct to the requirements of the law. (T. 2010) Dr. Toomer further agreed that it was consistent with James' illness to construct a bizarre or unrealistic belief that his actions were morally justified. (T. 2011)

Dr. Eisenstein, the neuropsychologist, administered an IQ test to James and the Halstead-Reitan neuropsychological battery, which measures brain damage, (T. 2053,2055,2063) He also considered the results of the MMPI administered by Dr. Toomer. (T. 2053) Dr. Eisenstein testified that James' IQ was 76, 24 points below average and in the borderline range. (T. 2054-55) James' reading level was in the mild mental retardation range, about fourth grade level. (T. 2061) Based on the results of the Halstead-Reitan battery, Dr. Eisentstein found that James had a "profound cognitive decline;" 85 percent of his scores were within the brain impairment range. (T. 2062, 2070) Dr. Eisenstein concluded that James was "certainly compromised" in his ability to make judgments and decisions. (T. 2071) While James can function in a structured environment, where he is told what to do, his ability to make proper, rational judgments in more complex and stressful environments is compromised. (T. 2071) Dr. Eisenstein diagnosed James as suffering from borderline personality disorder, which is characterized by volatility, difficulty controlling emotional frustrations and anger and difficulty dealing with others. (T. 2073) Dr. Eisenstein explained that the combination of organic brain impairment and borderline personality disorder is worse than either alone and will yield a person

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dated back many years before the offense. (T. 1995-96) Similarly, he rejected the suggestion that James' elevated score on the so-called "lie scale" on the MMPI demonstrated that he was feigning mental illness, noting that the scale actually measures the opposite -- it detects those who are trying to present themselves as being better adjusted psychologically than they really are. (T. 2007-08)

who, under stressful circumstances, will not make rational decisions. (T. 2074-75) In Dr. Eisenstein's opinion, James was acting under extreme emotional disturbance at the time of the offense and was unable to conform his conduct to the requirements of the law. (T. 2076) His opinion was based on the chronic nature of James' mental illness, which was complicated by events in his life. (T. 2076-77) Near the conclusion of his cross-examination of Dr. Eisenstein, the prosecutor asked whether James might kill again, prompting an immediate objection by defense counsel. (T. 2114) Although the trial judge sustained defense counsel's objection that the question was improper, he denied defense counsel's motion for a mistrial. (T. 2114-15)

During his closing argument at the penalty phase, the prosecutor again emphasized over defense objection that the defendant had urged Joanne Jones to have an abortion. (T. 2211-12) On two separate occasions, over defense objection, the prosecutor urged the jurors to "imagine what must have gone through [Quinton's] little mind" during the killings. (T. 2220,2253) The prosecutor argued that personality disorders were common and dismissed the mitigating evidence of childhood abuse, mental illness and borderline intelligence with the remark, "Big Deal." (T. 2233, 2245, *2249)* He also characterized Dr. Toomer as a "hired *gun,"* (T. 2234-35), and contended that criminal defense lawyers, like "worker's comp lawyers and PI lawyers" collude with "doctors who are willing to come in to *testify* that an injury is there, when you can't see it." (T. 2250) Defense counsel objected, and the trial judge, while denying the motion for mistrial, admonished the prosecutor to "[c]lear it up." (T. 2251) The prosecutor resumed his argument, telling the jury that his comments were directed only at the experts. (T. 2251) He then characterized their opinions as "a joke." (T. 2253) Finally, the prosecutor argued that while the defense would tell the jury that Mr. Walker could receive consecutive life sentences, that decision is up to the judge, "[a]nd the only thing that is certain in life is death and taxes." (T. 2255)

The jury was instructed on five aggravating circumstance enumerated in section 921.141, Florida Statutes: (1) previous conviction of a capital felony, § 921.141(5)(b); (2) felony-murder, § 921.141(5)(d); (3) pecuniary gain, § 921.141(5)(f); (4) especially heinous, atrocious, or cruel

("HAC"), § 921.141(5)(h); and (5) cold, calculated, and premeditated ("CCP"), § 921.141(5)(i); and on four mitigating circumstances: (1) no significant history of criminal activity, § 921.141(6)(a); (2) extreme mental or emotional disturbance, § 921.141(6)(b); (3) substantial impairment of the defendant's ability to conform his conduct to the requirements of law, § 921.141(6)(b); and (4) any other aspect of the defendant's character or record and any other circumstance of the offense. As noted above, the jury recommended death as to each homicide by a vote of 7 to 5.

The trial court followed the jury's recommendation and sentenced Mr. Walker to death on both counts of capital murder.[18] In his sentencing order, the trial judge found four aggravating circumstances with respect to each victim -- (1) prior violent felony conviction; (2) pecuniary gain; (3) HAC; and (4) CCP. (R. 577-79) He merged the CCP and pecuniary gain aggravating circumstances, finding them to be supported by the same aspect of the evidence. (R. 583) In mitigation, the trial judge found the statutory mitigating circumstances of no prior criminal history and extreme emotional disturbance and the non-statutory mitigating circumstance of the defendant's "mental state." (R. 580, 582) The trial judge rejected the statutory mitigating circumstance of substantial impairment and concluded that the defendant's abusive childhood was not mitigating. (R. 580-81)

Penalty Phase Motions and Requested Instructions

The defense filed a written motion at the penalty phase asking the trial court to (1) determine whether the sentences for the murder convictions would be consecutive or concurrent and (2) to sentence Mr. Walker for his contemporaneous, noncapital convictions, so that the jury could be accurately instructed regarding the alternatives to the death penalty. (R. 400-04) After deferring the motion to the close of the evidence, the trial judge denied both the motion and the corresponding proposed instructions regarding alternative sentences.[19] (T. 1636-41, 166243,2146; R. 525-27)

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[18] The trial judge made the death sentences consecutive to each other, followed by a consecutive guidelines departure sentence of life for the three contemporaneous felony convictions. (R. 584)

[19] The trial court denied immediately the portion of the motion asking leave to present evidence that the defendant would be required to serve his entire minimum mandatory term. (T. 1663-65)

Defense counsel objected to the *pecuniary* gain, HAC, and CCP statutory aggravating circumstances and their standard jury instructions on the grounds that they are unconstitutionally vague facially and as applied and improperly relieve the state of its burden of proof; the defense requested *expanded* instructions on each aggravating circumstance; all the objections and requested instructions were denied, with the exception of the defendant's second requested instruction on CCP. (T. 2129-32, 2133-35; R. 473-75, 495-500, 507-10, 511-15) The defense renewed its objections to the standard instructions both as requested by the state and as given.[20] (T. 2151-54, 2291) The trial court also instructed the jury, over defense objection, on both the felony-murder and prior violent felony aggravating circumstances. (T. 2140-41, 2150-51; R. 473-74) The trial court refused to instruct the jury (1) on the circumstantial evidence standard with respect to aggravating circumstances, (T. 2143; R. 476, 519); (2) that aggravating circumstances must be found unanimously, beyond a reasonable doubt, (T. 2144; R. 476, 519); and (3) not to consider non-statutory aggravating circumstances, (T. 2141-42; R. 474,518).

The defense objected to several aspects of the standard instructions on the ground that they improperly restrict the jury's ability to give effect to both statutory and non-statutory mitigating circumstances and requested corresponding special instructions. (T. 2155-56; R. 475-76,478) The trial court denied the defendant's request to instruct the jury (1) on the definition of mitigating evidence, (T. 2143; R. 475,518); (2) that consideration of mitigating circumstances is mandatory, not permissive, (T. 2142; R. 438, 475-76, 519); (3) that mitigating circumstances need not be found unanimously, (T. 2144-45; R. 478,519); and (4) that the weighing process is not a numerical tallying of aggravating and mitigating circumstances, (T. 2157-58; R. 528). The trial court also denied the defendant's request to strike restrictive language from the instructions on the statutory mental mitigating

[20] The defense also objected separately, before the penalty phase, at the close of the state's penalty phase case, and at the close of all the penalty phase evidence, that the evidence was insufficient, as a matter of law, to support the pecuniary gain, HAC, and CCP aggravating circumstances. (T. 1745-46, 2151-53, 2217-18, 2220-25; R. 382-89)

circumstances, (T. 2154-56; R. 438, 476), and to instruct the jury on specific non-statutory mitigating circumstances, (T. 2156; R. 438-39,476).

The defense also objected that the standard instructions improperly place the burden of persuasion on the defense to show that the death penalty is not appropriate and requested corresponding revisions to the standard instructions, which were denied. (T. 2138-40, 2144-45; R. 472-73,475,477, 479, 517-20) The defense further objected that the standard instructions improperly diminished the jury's sense of responsibility and asked for an instruction on the weight given the jury's recommendation under the *Tedder* standard; the requested instruction was denied.[21] (T. 2137; R. 471-72) Finally, the trial court denied the defendant's motion to declare section 921.141 unconstitutional or to require a 9 to 3 majority to recommend death, (T. 2147; R. 463-65), and motion to declare section 921.141 unconstitutional or for a special penalty phase verdict form (T. 2132-33; R. 529-31).

SUMMARY OF ARGUMENT

The state was improperly permitted to present evidence that Mr. Walker had urged Ms. Jones -- two years before the murders -- to abort her pregnancy with Quinton Jones and to thereafter argue to the jury -- at both the guilt/innocence and penalty phases -- that Mr. Walker had, in effect, formed the premeditated intent to kill Quinton Jones while he was still in the womb and had killed Ms. Jones for exercising her "constitutional and god-given right" to give birth. This evidence and argument plainly suggested an improper, emotional basis for the jury's verdict at the guilt/innocence phase of the trial and constituted an improper non-statutory aggravating circumstance with respect to the penalty phase.

The trial court also erred in denying the motion to suppress the defendant's confession because (1) the police failed to clarify the defendant's ambiguous request for counsel; (2) applying the correct legal standard, the defendant's statement was not made voluntarily; and (3) the defendant's statement was the product of the his unlawful arrest for first degree murder. The trial court failed to grant the defendant's motion for mistrial when the state, in deliberate evasion of a motion in limine by the

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[21] The trial court did give the jury a *Tedder* instruction at the beginning of the penalty phase. (T. 1671, 1675-77; R. 434)

defense, elicited testimony that the defendant had previously been charged with sexual assault. Although the trial court gave a curative instruction, the instruction was inadequate to cure the prejudice to the defense. The trial court also improperly admitted irrelevant and prejudicial DNA evidence.

The defendant was denied a fundamentally fair and reliable sentencing hearing because the trial court (1) failed to grant a mistrial when the prosecutor asked a defense expert whether the defendant might kill again, thereby making Mr. Walker's future dangerousness an issue at sentencing and (2) thereafter denied the defendant's motion to determine and instruct the jury that Mr. Walker, if sentenced to life, would be required to serve consecutive sentences with a combined minimum mandatory term of 50 years, allowing the prosecution to further buttress its future dangerousness argument by arguing that Mr. Walker could be released after serving only a 25-year minimum mandatory term.

The medical examiner was improperly permitted to provide a graphic and inflammatory description of death by drowning when he could not conclude to a medical certainty that Joanne Jones was conscious when she drowned and had found no evidence that Quinton Jones drowned so that his testimony was not relevant to establish the HAC aggravating factor. During his closing argument the prosecutor improperly attacked the integrity of both defense counsel and defense witnesses and ridiculed the mitigating evidence; he was also permitted to make extended "Golden Rule" arguments, over repeated defense objection. The trial court erroneously refused to give the defendant's requested instructions on aggravating or mitigating circumstances, the weight of the jury's recommendation, or the burden of proof at the penalty phase. The court also rejected the defendant's constitutional challenges to the sentencing statute as a whole.

Finally, in his sentencing order, the trial court erroneously found the HAC, CCP, and pecuniary gain aggravating circumstances, failed to find the substantial impairment statutory mitigating circumstance; refused to consider evidence of the defendant's abusive childhood in mitigation and also failed to consider other categories of nonstatutory mitigating evidence submitted by the defense.

GUILT/INNOCENCE PHASE ISSUES

I.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE EVIDENCE THAT THE DEFENDANT HAD URGED JOANNE JONES TO HAVE AN ABORTION AND TO *ARGUE* TO THE *JURY* THAT THIS ESTABLISHED HIS INTENT TO MURDER BOTH MS. JONES AND THEIR CHILD, IN VIOLATION OF FLORIDA LAW, THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9, 17 AND 23, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

In this case, the prosecution was permitted, over repeated defense objection, to present evidence that in July of 1991, when Ms. Jones learned she was pregnant with Quinton Jones, Mr. Walker, as the putative father of the unborn child, had urged her to have an abortion. The prosecutor thereafter relied on this evidence in closing argument -- at both the guilt/innocence and penalty phases -- to contend that Mr. Walker had formed the premeditated intent to kill Quinton Jones before he was born and to kill Joanne Jones for exercising her constitutional right to give birth to the child.

First, the prosecution introduced, over defense objection,[22] a tape-recorded interview in which Mr. Walker described a conversation he had with Ms. Jones in July 1991 -- over two years before the crime -- about aborting her pregnancy with Quinton. (T. 1180-81) On the tape, Mr. Walker recounts that Ms. Jones was upset at her predicament and angry that Mr. Walker had married someone else. (S.R.18) He offered to pay for an abortion and told Ms. Jones, "if you're *going* to mess up my life and ruin my life, I can make your life miserable like you *can* make my life miserable."[23] (S.R. 19)

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[22] The defense objected that the tape was relevant only to show bad character and that its probative value was clearly outweighed by its prejudicial effect. (T. 1158,1159) Defense counsel also argued that using a prior discussion of abortion to establish a defendant's premeditated intention to kill a child was improper and inflammatory, citing *Wilkins v. State*, 607 So. 2d 500 (Fla. 3d DCA 1992) -- a case involving identical evidence presented by the same prosecutor's office. (T. 1177) The trial court overruled the objection, granting defense counsel's request to preserve the objection without renewing it before the jury. (T.1177-78)

[23] The prosecution contended that this was a threat of violence, relevant to establish Mr. Walker's motive to commit murder. Mr. Walker's remarks to Ms. Jones were made, however, over two years before the murders, and the prosecution did not introduce any evidence whatsoever of threatening or violent behavior by Mr. Walker against Ms. Jones at any time between these remarks and the time of the murders.

Mr. Walker is also asked on the tape whether Ms. Jones had been pregnant before and whether he and Ms. Jones had disagreed on that occasion about whether she should have an abortion. (S.R.19) Mr. Walker started to explain, "[i]t's not that I didn't want --" and then said that he had told Ms. Jones (on that prior occasion), "I think she should get an abortion." (S.R. 19-20) Mr. Walker said Ms. Jones did not want to have a second abortion, but he had told her, "I think an abortion's the best thing to keep our lives peaceful."[24] (S.R.20; T. 1181-82) Subsequently, Lieutenant Meeks of the Miami police department testified, also over defense objection, that Mr. Walker told him he had been dating Ms. Jones for some time before he met the woman he later married (Vanessa Walker); that Ms. Jones became pregnant; and that Mr. Walker urged her to have an abortion, and Ms. Jones refused. (T. 1324-25) The abortion discussion was a central theme of the prosecutor's closing argument:

> Sometime in the summer of 1991 the defendant, James Walker, and this young lady, Joanne Jones had a sexual relationship. You know through Detective Cunningham that on July the 20th of 1991 Joanne Jones told the defendant for the first *time* that she was pregnant and carrying his child.
>
> I submit to you, ladies and gentlemen, that the evidence that's been presented during the course of this trial shows that when she made that statement to him on July the 20th of 1991, ***she might as well have committed suicide.*** Because that was going to be the inevitable result of that sexual union, which she decided to carry forth to birth. Because already, on that very first day of July the 20th, ***when she told that man that she was carrying his child, he didn't want that baby.***
>
> ***I don't know if you understand. But I mean he really didn't*** want ***that baby.***
>
> ***He said, Get an abortion. I'll pay for it. This is what's on that tape.***
>
> [Defense objection -- overruled]
>
> ***-- what's on that tape that you're welcome to listen to.*** He said -- and he said it to Detective Cunningham, ***Get an abortion. I'll pay for it.*** And call me later or I'll call you, like that.
>
> He didn't want to assume responsibility. And as adults we know that if we decide to engage in sexual relations we take the chance -- we take the chance the woman could get pregnant. And ***if she exercises her god-given and her constitutional right -- and*** yes

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[24] Although the prosecution also depicted this remark as a threat, it is more logically construed as a comment on the consequences of Ms. Jones' pregnancy, given the illicit nature of her relationship with Mr. Walker.

> *she had constitutional rights too -- to carry that child to birth, both parents share responsibility for that poor, innocent child.* Okay?
>
> He had no difficulty in understanding simple math. We know that. *Pay for an abortion now, it might be three or $500,* or pay for the next 18 years of that child's life.
>
> He said to the victim, and he admitted this to Detective Cunningham, If you ruin my life, I'll make your life miserable too. *Or* I *can* do that. That's what he said. *And he went on to say an abortion would keep their lives peaceful.*
>
> . . . .
>
> But the victim didn't listen. Joanne didn't listen. She *decided* to *go foward and exercise her right and to have that child.*

(T. 1466-68) (e.s.). The defense moved for mistrial at the conclusion of the prosecutor's argument, asserting that the improperly-admitted abortion evidence had been made a feature of the state's case; the motion was denied. (T. 1526) The tape-recorded interview was the one item of evidence the jury asked to review during its deliberations. (T. 1552) When the prosecutor raised the abortion issue during his penalty phase closing argument, defense counsel again objected and moved for mistrial, and the objection was again overruled.[25] (T. 2211-12)

A. Relevance

The evidence that Mr. Walker had urged Joanne Jones to have an abortion was offered for the ostensible purpose of proving that Mr. Walker "never wanted that baby before it was born" and therefore had a motive to kill Quinton and Joanne Jones.[26] (T. 849, 856) The prosecution's theory

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[25] The prosecutor argued at the penalty phase: "[I]t is not just a coincidence, ladies and gentlemen, that number one, in 1991, the day he found out that Joanne was pregnant, you know sometime thereafter there was a disagreement between them, which wound up with him giving a statement to Detective Cunningham, in which you heard during guilt/innocence phase *that he told her and he told Detective Cunningham that he wanted her to have an abortion.* [Objection and side-bar] You know through Detective Cunningham, that that was in fact the sort of discussion that took place between them and you know through this tape and Detective Cunningham that the defendant himself admitted that he told Joanne *Jones an abortion was the best things to keep their lives peaceful and how prophetic that was. And* if she was *going* to make his life miserable he would make her life miserable. For once, a man of his word." (T. 2211-13)

[26] To the extent that the state wished to rely on the argument between Mr. Walker and Ms. Jones as evidence of discord in their relationship, that information could have been presented to the jury without bringing in the subject matter of the argument, *See People v. Morris, 285* N.W.2d 446,

that this evidence was relevant to establish Mr. Walker's attitude toward Quinton and Joanne Jones two years later depends, however, on the untenable inference that the desire to abort a fetus demonstrates an animosity toward children. ***Olson v. Walgreen Co.,*** no. CX-92-528, 1992 WL 322054, *1-2 (Minn.Ct.App. 1992) (declining to make "fundamental leap of faith . . . that because a woman at one point in her life had an abortion she is less desirous of motherhood"); *Garcia v. Providence Medical Center, 806* P.2d **766,771** (Wash.Ct.App. 1991) (declining to accept assumption that "if a woman has voluntarily consented to an abortion, she is less affected by the pain of the loss of a child than a woman who never voluntarily terminated a pregnancy"), *review denied,* **816** P.2d **1223** (Wash. **1991).** This evidence therefore should have been excluded as irrelevant. §§ 90.401, 90.402, Fla. Stat. (1993).

B. **Probative Value vs. Unfair Prejudice**

Even assuming that the abortion evidence had some logical relevance to the disputed issues of motive and premeditation, it was not admissible because its probative value was "substantially outweighed by the danger of unfair prejudice." § 90.403, **Fla.** Stat. **(1993);** *State v. McClain,* 525 ***So.*** 2d 420,421 (Fla. 1988). The "unfair prejudice" standard is intended to bar evidence "which inflames the jury or appeals improperly to the jury's emotions." *McClain,* 525 ***So.*** 2d at 422 (quoting C.W. **EHRHARDT,** FLORIDA **EVIDENCE** § 403.1 (2d *ed.* 1984)); ***accord Westley v. State,*** 416 ***So.*** 2d 18, 19 (Fla. 1st DCA **1982)** (citing Fed.R.Evid. 403, Comment).

Here, as already noted, the probative value of the abortion evidence to establish Mr. Walker's state of mind is negligible given the substantial lapse of time -- over two years -- between his remarks to Ms. Jones and the instant crimes and the dubious inference on which its relevance to motive depends. Moreover, the prosecution did not "need" this evidence to establish motive, as it had available and presented to the jury evidence of the paternity and child support litigation between Ms. Jones and Mr. Walker. See *McClain,* ***525*** So, 2d at **422** (factors to be considered under section 90.403

44748 (Mich.Ct.App. 1979). Again, however, given the substantial lapse of time between the remarks and the crime, and the absence of any subsequent threats, the relevance of the argument itself is dubious.

include "the need for the evidence; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, *e.g.*, an emotional basis; the chain of inference necessary to establish the material fact; and the effectiveness of a limiting instruction.") (quoting C. W. EHRHARDT, supra § 403.1).

Weighing against the marginal probative value of the evidence is the indisputable fact that abortion, despite its constitutionally-protected status, is "an issue which sparks emotional controversy in society . . . and consequently, has the potential for *inflaming* the passions of a jury." *Davila v. Bodelson,* 704 P.2d 1119, 1125 (N.M.Ct.App. 1985), *cert. denied,* 704 P.2d 431 (N.M. 1985).[27] The controversial nature of abortion has been found sufficient to preclude the admission of such evidence when the potential for unfair prejudice is simply to reflect badly on a person's character.[28] In a murder case, the emotional impact of the issue is far greater because, regardless of the stated reason for offering the evidence, it inevitably raises the question at the heart of the abortion controversy: whether the desire or intent to abort an unborn fetus is equivalent to the intent to commit premeditated murder. Thus, even when the prosecution introduces the evidence for another purpose, the danger of unfair prejudice arises precisely because it *may* be treated by one or more jurors as probative of the defendant's intent or propensity to commit murder, *People v. Ehlert,* ___ N.W.2d ___, 1995 WL 505014 (Ill.Ct.App. Aug. 25, 1995) (evidence of defendant's prior abortions -- which some jurors may have regarded as moral equivalent of murder -- inadmissible in prosecution for infanticide); Morris,

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[27] *Compare In re T.*W., 551 So. 2d 1186, 1192-93 (Fla. 1989) and Operation *Rescue v. Women's Health Center, Inc.* 626 So. 2d 664, 666-69 (Fla. 1993) (setting forth factual findings underlying injunction against anti-abortion protestors), *aff'd in part and rev'd in part sub nom Madsen v. Women's Health Center,* ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994); *cf. State v. Barquet,* 262 So. 2d 431, 433 (Fla. 1972) (characterizing abortion as "emotional and explosive" issue).

[28] See *Billett v. State,* 877 S.W.2d 913,914 (Ark. 1994) (defendant properly precluded from presenting evidence of his opposition to witness aborting his child to show bias); People *v.* Brown, 599 N.Y.S.2d 277, 278 (N.Y. Ct.App. 1993) (prosecution properly precluded from presenting evidence of rape victim's abortion); Kirk *v. Washington State Univ.,* 746 P.2d 285, 293-94 (Wash. 1987) (defendant in personal injury action properly precluded from presenting evidence of plaintiffs abortions to show cause of preexisting depression); People *v. Cornes,* 399 N.E.2d 1346,1351 (Ill.Ct.App. 1980) (defendant in rape case properly precluded from presenting evidence that victim confided in him about abortion to show consensual personal relationship with victim).

285 N. W.2d at 44748 (evidence that defendant argued with victim over abortions inadmissible in murder prosecution because some jurors could conclude defendant had previously committed murder).

In this case, the jury was not left to draw such prejudicial inferences on its own. The prosecutor not only used the abortion evidence in closing argument to establish Mr. Walker's bad character, contending that he was callous and irresponsible to suggest abortion as an option,[29] but also invited the jury to draw a parallel between abortion and premeditated murder by implying that Mr. Walker had formed the intent to kill Quinton Jones while he was still in the womb[30] and had killed Joanne Jones for exercising her "god-given and her constitutional right" to give birth to the child. (T. 1466-67) The evidence in this case did not, therefore, merely have a "tendency" to "suggest an improper[, emotional] basis" for resolving the case. *McClain, 525 So. 2d* at 422. Rather, the prosecutor's closing argument invited the jurors to resolve the disputed issue of premeditation on one of the most emotional bases imaginable -- their personal moral beliefs about abortion. See *Wilkins,* 607 So. 2d at 501 (improper to admit evidence and allow argument that defendant and his wife considered abortion of baby-victim in prosecution for attempted murder and aggravated child abuse). Jurors who believed tbat abortion is murder could not help but find the fact that Mr. Walker had urged Ms. Jones to abort her pregnancy with Quinton to be dispositive of the issue of premeditation.

C. Harm

"In view of the strong and opposing attitudes concerning abortion, it is difficult to imagine how such evidence would ***not*** have an extremely prejudicial effect on the jury." *Garcia, 806* P.2d at 771 (e.s.); *accord Morris, 285* N.W.2d at 447; *Ehlert,* 1995 WL 505014 at *6. In this case, the "danger of unfair prejudice" was fully realized in the prosecutor's closing argument which played directly on the emotional volatility of the abortion issue. See *Wilkins,* 607 So. 2d at 501. The erroneously

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[29] "He didn't want to assume responsibility . . . ***Pay for an abortion now, it might be three or $500,*** or pay for the next 18 years of that child's life." (T. 1467)

[30] ***"I don't know if you understand. But I mean he really didn't want that baby. He said, Get an abortion."*** (T. ***1466)***

admitted evidence and improper argument thereon deprived Mr. Walker of a fair trial in violation of the state and federal constitutions. FLA. CONST. art. I § 9; U.S. CONST. amend. XIV. Certainly, given the state's emphasis on this evidence and the fact that premeditation was the central issue in dispute at trial, it cannot be established "beyond a reasonable doubt tbat the error did not affect the verdict." ***See State v.*** Lee, 531 So. 2d 133, 137 (Fla. 1988).

This evidence and argument was, moreover, so inflammatory that its prejudicial effect was not confined to the guilt/innocence phase of the trial but also infected the penalty phase. See ***Castro v. State,*** 547 So. 2d 111, 115-16 (Fla. 1989). As noted above, the prosecution was permitted, over defense objection, to make the abortion argument again at the penalty phase, implicitly inviting the jury to consider Mr. Walker's constitutionally-protected conduct as a nonstatutory aggravating circumstance in violation not only of the eighth amendment but also in violation of Mr. Walker's right to privacy under the state and federal constitutions. See ***Dawson v. Delaware, 503*** U.S. 159, 112 S.Ct. 1093, 1099, 113 L.Ed.2d 465 (1992); ***Elledge v. State, 346 So.*** 2d 998, 1003 (Fla. 1977).

II.

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE DEFENDANT'S STATEMENTS ON GROUNDS (1) THAT THE POLICE FAILED TO HONOR THE DEFENDANT'S REQUEST FOR COUNSEL DURING THE INTERROGATION, (2) THE STATEMENTS WERE NOT VOLUNTARY IN THE TOTALITY OF THE CIRCUMSTANCES, AND (3) THE DEFENDANT'S INCULPATORY STATEMENT WAS THE PRODUCT OF AN UNLAWFUL ARREST, IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9, 12 AND 16 AND THE UNITED STATES CONSTITUTION, AMENDMENTS IV, V, AND XIV.

Defense counsel moved before trial to suppress Mr. Walker's statements to the police on three grounds: (1) the police failed to honor the defendant's request for counsel during the interrogation; (2) the defendant's statements were not voluntary in the totality of the circumstances in this case because the police employed a variety of deceptive and psychologically coercive tactics to obtain an inculpatory statement; and (3) the defendant's third and only inculpatory statement was the product of an unlawful arrest because tbe police lacked probable cause to arrest Mr. Walker for first degree murder. (T. 227-***28;*** R. 91-92)

After hearing the testimony of the three police officers who participated in the interrogation of Mr. Walker, the trial court orally denied the motion to suppress, without making specific findings of fact, (T. 250-5 1) Judge Snyder concluded that the interrogation methods used by the police were proper and that, "given the totality of the circumstances," Mr. Walker's statement "was freely and voluntarily given." (T. 251) Judge Snyder apparently also rejected the claim that, once Mr. Walker indicated he wanted an attorney, the police were required to clarify his request before proceeding with the interrogation, (T. 248-50) Judge Snyder made no distinct ruling on the issue of probable cause. The motion to suppress was properly renewed at trial and was again denied.[31] (T. 1364)

A. The Trial Court Erred in Refusing to Suppress the Defendant's Statement to the Police When the Police Failed to Confine Their Questions to Clarifying the Defendant% Ambiguous Request for Counsel, in Violation of the Florida Constitution, Article I, Section 9.

The evidence presented at the suppression hearing established that Mr. Walker came voluntarily to police headquarters, at the request of Detectives Watterson and Everett. The detectives advised Mr. Walker of his *Miranda*[32] rights, after assuring him that they were required to do so "before we interview anyone." (T. 126, 156, 177-78, 198-99) They did not disclose that Mr. Walker was the focus of their investigation. (T. 156, 198) Mr. Walker executed a rights waiver form at 9:40 a.m. (R. 273) At about noon, when Detectives Watterson and Everett were not satisfied with Mr. Walker's exculpatory statements, they placed him under arrest for two counts of first degree murder. (T. 142, 166,209 1276-77) Mr. Walker was not readvised of his rights; he was told "you are not leaving this room so you may as well start telling the truth." (T. 187) When Mr. Walker would not change his statement, "something was said about if you want to stick to that story, we want to get it on tape or we want to bring in a stenographer." (T. 142, 186, 1276) Mr. Walker said, "If you do that," or "If I do that," "I want an attorney." (T. 142, 186, 1276) The testimony of Detectives Watterson and

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[31] Because Judge Salmon had not presided over the pre-trial suppression hearing, he was not in a position to be aware of inconsistencies between the officers' testimony at the suppression hearing and at trial.

[32] *Miranda v. Arizona, 384* U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Everett was contradictory as to what occurred next. Detective Watterson testified that the officers simply responded "okay, we won't do that" and continued the interrogation. (T. 142, 1277) He stated candidly at trial that Mr. Walker's request for an attorney was not honored because the detectives did not want an attorney present at the interrogation. (T. 1301-02) Detective Everett claimed that, before the interrogation continued, Walker was further asked whether he wanted to continue talking and answered affirmatively. (T. 186, 191) At trial, however, Detective Everett claimed that Mr. Walker said ***nothing*** about wanting an attorney, stating only "if you do that I don't want to talk."[33] (T. 1377)

Acknowledging tbat Mr. Walker's request for counsel was ambiguous in scope, defense counsel argued that the officers had failed to properly clarify Mr. Walker's wishes before proceeding with the interrogation and that Mr. Walker's subsequent inculpatory statement therefore should be suppressed. (T. 23 1-32) The trial court orally denied the motion to suppress, suggesting that the police had no obligation to clarify Mr. Walker's request for counsel. (T. 248)

1. **Applicable Legal Standard**

Last ***year, in Davis v. United States,*** US. ___, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994), a majority of the Supreme Court held that, under the federal constitution, a suspect must "unambiguously request counsel" to trigger the prophylactic rule of ***Edwards v. Arizona,*** 451 U.S. ***477,*** 101 S.Ct. 1880, 68 L.Ed.2d ***378*** (1981). ***In Traylor v. State, 596 So.*** 2d 957, 966 (Fla. 1992), however, this Court reaffirmed that, as ***a matter of state constitutional law under*** Article I, Section 9, if a suspect "indicates ***in any manner*** that he or she wants the help of a lawyer, interrogation must not begin until a lawyer has been appointed and is present or, if it has already begun, must immediately stop until a lawyer is present." (es.)

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[33] The testimony of detectives Watterson and Everett was similarly inconsistent with respect to what happened when Mr. Walker again stated "if you do that, I want an attorney here," (T. 146), after they proposed to have a stenographer take down his inculpatory statement. Detective Watterson testified that he again responded, "we won't do that then." (T. 146) Detective Everett, however, claimed they had further inquired whether Mr. Walker was willing to continue speaking to them, and he had answered affirmatively, (T. 191)

Prior to the Supreme Court's decision in *Davis,* it was wellestablished in Florida that when a suspect makes an equivocal or ambiguous request for counsel, "further ***inquiry is limited to clarifying the suspects wishes. "*** *Long v. State,* 517 So. 2d 664, 667 (Fla. 1987) (emphasis in original), ***cert. denied,*** 486 U.S. 1017, 108 S.Ct. 1754, 100 L.Ed.2d 216 (1988).[34] This Court presently has pending before it, ***in the case*** of ***State*** v. ***Owen,*** no, 85,781, the certified question whether these precedents should be abandoned and ***Davis*** adopted as a matter of Florida constitutional law.

Appellant submits that, consistent with primacy doctrine adopted in ***Traylor***, this Court should interpret the Self-Incrimination Clause of Article I, Section 9 to afford broader protection against compelled confessions than is afforded by the federal constitution, as construed by the *Davis* majority.[35] At least one other state supreme court has already declined to follow ***Davis*** as a matter of state constitutional law, agreeing instead with the position of the concurring Justices, who would have required the police to clarify an ambiguous request for counsel before continuing an interrogation. ***State*** v. ***Hoey,*** 881 P.2d 504, 523 (Hawai'i 1995). As the concurring justices ***argued in Davis, this*** intermediate approach, which has long been the law in Florida, is more consistent with the prophylactic purposes of ***Miranda,*** because it "assures that a suspect's choice to deal with police only through counsel will be 'scrupulously honored."' 114 S.Ct. at 2359-60 (Souter, J., concurring, joined by Blackmun, Stevens, and Ginsburg, J.) (citations omitted). The concurring justices also stressed that "criminal suspects" are "an odd group to single out for the Court's demand of heightened linguistic

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[34] ***Accord Slawson v. State,*** 619 ***So. 2d 255,258*** (Fla. 1993), cert. ***denied,*** ___ US. ___, 114 S.Ct. 2765,129 L.Ed.2d 879 (1994); *Martinez* ***v. State, 564 So.*** 2d 1071, 1073 (Fla. 1990); *Thompson* v. State, 548 So. 2d 198,203 (Fla. 1989); ***Kyser v. State, 533 So.*** 2d 285,287 (Fla. 1988); ***Valle v. State, 474 So.*** 2d ***796,799*** (Fla. 1985), cert. ***granted and remanded on other grounds, 476 U.S.*** 1102, 106 S.Ct. 1943, ***90*** L.Ed.2d ***353*** (1986); ***Waterhouse v. State, 429 So.*** 2d 301, 305 (Fla.), cert. denied, 464 U.S. 977, 104 S.Ct. 415, 78 L.Ed.2d 352 (1983); *Cannady* v. ***State, 427 So. 2d 723,728*** (Fla. 1983). Florida's rule is consistent with the federal constitutional rule followed by a majority of jurisdictions before ***Davis. See Davis,*** 114 S.Ct. at 2359 & n. 1 (Souter, J., concurring).

[35] See ***Deck*** v. ***State,*** 653 So. 2d 435 (Fla. 5th DCA 1995) (construing *Traylor* to require continued ***adherence to Long), petition for reviewpending; cf. Haliburton v. State,*** 514 So. 2d 1088, 1090 (Ha. 1987) (construing Article I, Section 9 more broadly than fourteenth amendment due process clause as ***construed in Moran v. Burbine, 475*** U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)).

care." *Id.* Not only is the "menacing" context of a police interrogation uniquely nonconducive to clear, assertive self-expression, but many criminal suspects are uneducated, ignorant of their rights, and "lack . . , a confident command of the English language." *Id.* at 2360-61.

Such concerns are of even greater importance in a state, like Florida, that is ethnically and linguistically diverse. *Traylor* emphasized that the state constitution should be construed in light of Florida's "unique state experience" and "evolving customs, traditions, and attitudes." 596 So. 2d at 962. Florida is a populous, dynamic state; its traditions have been enriched by immigrants from many cultures. Many of those recently arrived to Florida are poor and uneducated; they do not speak English; and many have fled totalitarian regimes where citizens have enjoyed no rights at all against the police.[36] Davis' rule of "heightened linguistic care" is therefore uniquely ill-suited to even minimally implement the Florida Constitution's prohibition against compulsory self-incrimination. This court should therefore adhere to Long as a matter of state constitutional law, rather than adopting the position of the *Davis* majority.

2. **Ambiguous Request for Counsel**

Under the *Long* standard, the officers in this case should have clarified Mr. Walker's request for counsel before continuing their interrogation. Mr. Walker's remark, "If you do that, I want an attorney" was at least an equivocal request for counsel. Although Detectives Watterson and Everett construed this request to apply only to a stenographically recorded statement, that interpretation could not be confirmed without appropriate follow-up questioning. See *Owen v. State, 560 So.* 2d 207,211 (Fla. 1990) (where defendant stated "I'd rather not talk about it" police violated *Long* by failing to clarify whether defendant was invoking right to remain silent or simply did not want to talk about particular detail), *cert. denied,. 498* U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990).

Moreover, even if Mr. Walker's remark was properly interpreted to mean that he wanted an attorney present only before making a recorded statement, this demonstrates that he did not understand

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[36] This is particularly true of *South* Florida. *See generally* ALEJANDRO PORTAS & ALEX STEPICK, CITY ON THE EDGE: THE TRANSFORMATION OF MIAMI (1993).

that anything he *said* – whether recorded or not -- could be used against him. In *Martinez, sup-a, this* Court held that where a suspect's remarks regarding counsel suggested that he did not understand his *Miranda* rights -- in that case the right to appointed counsel -- the police are limited, pursuant to Long, to clarifying the suspect's wishes. 564 So. 2d at 1074 (defendant asked "But what if I don't have any money?" while being advised of his *Miranda* rights). A defendant's understanding that anything he *says* will be used against him is just as essential to his ability to make a knowing and intelligent waiver of his right to counsel as is his understanding that he does not have to pay for counsel. Although a defendant need not understand all of the legal consequences of his decision in order to validly waive his right to counsel, *Martinez* and *Thompson, supra,* establish that he must at least understand the *Miranda* warnings themselves.

The circumstances of this case underscored the need for clarification. Mr. Walker was advised of his rights only once, at the beginning of the interview, after the police falsely suggested he was not the focus of their investigation. *Compare Martinez,* 564 So. 2d at 1072 (defendant's ambiguous request for counsel made during fourth recitation of *Miranda* rights). He invoked his right to counsel after over two hours of intensive interrogation. At this point, he had just been placed under arrest for two counts of first degree murder and told that he could not leave until the police were satisfied that he had told them the truth. His *Miranda* rights were not renewed upon his arrest. Given the change in Mr. Walker's status and his obvious misunderstanding of the *Miranda warnings, the* voluntariness of his subsequent confession could be assured only by explaining his rights to him again and, more importantly, ensuring that he understood them.[37] *Cf.* Long, 517 So. 2d at 666 (defendant made ambiguous request for counsel, noting that "complexion" of interrogation had changed); *State* v. *Wininger,* 427 So. 2d 1114, 1116 (Fla. 3d DCA 1983) (defendant's request to go home "made on the

[37] The prosecution below made much of the fact that Mr. Walker was at the time employed as a bailiff in criminal court. (T. 188) It was established at the penalty phase, however, that Mr. Walker had an IQ of only 76, in the borderline range. (T. 2062, 2070-71) It therefore cannot be presumed that his job experience gave him a better-than-average understanding of his constitutional rights.

heels of being informed for the first time tbat he was a suspect, was, at the least, an indication in some manner that the defendant did not want to answer further questions").

This case is therefore distinguishable from ***Connecticut v. Barrett, 479*** U.S. 523, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987), on which the state relied below. The defendant in ***Barrett,*** contemporaneously with waiving his *Miranda* rights, stated explicitly that "he would not give the police any written statements but he had no problem in talking about the incident." 479 U.S. at 525. Barrett was advised of his rights twice more and both times reiterated "that he would not give a written statement unless his attorney was present but had 'no problem' talking about the incident." *Id.* at 525-26. Barrett also testified at the suppression hearing that he had fully understood his ***Miranda*** rights. *Id.* at 532. As Justice Brennan emphasized in his concurrence in ***Barrett,*** the defendant's own testimony dispelled any doubt that he understood his right to counsel and tbat his partial waiver of tbat right was knowing and intelligent. *Id.* at 532. ordinarily, however, such "a partial invocation of the right to counsel, without more, invariably will be ambiguous. It gives rise to doubts about the defendant's precise wishes regarding representation and about his or her understanding of the nature and scope of the right to counsel." *Id.* at 534 (Brennan, J., concurring).[38] Accordingly, where, as here, a defendant partially invokes his right to counsel in circumstances that indicate a fundamental misunderstanding of the scope or nature of that right, his request must be regarded as ambiguous and properly clarified before questioning continues,

3 . **Failure to Clarify**

This Court has held that, in such circumstances, the defendant's wishes can be properly clarified by renewing the *Miranda* warnings, ensuring that the defendant understands them, and that

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[38] ***Barrett,*** like ***Davis,*** obviously is not binding on this Court with respect to the Florida Constitution. *Barrett* has been followed by only one appellate court in Florida. ***State v. Ferrer, 507*** So. 2d 674, 675 (Fla. 3d DCA 1987). In that case, the defendant apparently relied upon his refusal to make a written statement without an attorney as grounds to suppress oral statements he had already made to the police, rather than claiming, as here, that the failure to clarify his request required the suppression of subsequent statements. *Id.*

he knowingly, intelligently, and voluntarily waives his rights, before the interrogation continues.[39] It is undisputed that no such clarification occurred here, Indeed, the record in this case does not clearly establish that the police even asked whether Mr. Walker wanted to continue talking. Although Detective Everett claimed at the suppression hearing that he asked Mr. Walker whether he still wanted to talk if no stenographer was called, Detective Watterson testified that ***no*** follow up questions were asked. The credibility of Detective Everett's testimony must be questioned in light of its inconsistency not only with Detective Watterson's testimony but also with his own testimony at trial, in which he denied that Mr. Walker had said ***anything*** about an attorney.[40]

According to Detective Watterson's testimony, the violation of ***Long*** was patent. A valid waiver of Mr. Walker's right to counsel "cannot be established by showing only that he responded to further police-initiated custodial interrogation. " *Long,* 517 So. 2d at 667 (quoting *Edwards,* 451 U.S. at 484). Even if Detective Everett's testimony was credited, the bare question whether Mr. Walker wanted to continue talking was insufficient under ***Martinez, Slawson,*** and *Cannady* to clarify his request or to dispel the grave doubt that he actually understood his *Miranda* rights.

B. The Trial Court Erred in Refusing to Suppress the Defendant's Statements Which Were the Product of Psychological Coercion and Therefore Were Not Made Voluntarily, in Violation of the Florida Constitution, Article I, Section 9 and the United States Constitution, Amendments V and XIV.

The trial court also erred in ruling that Mr. Walker's confession was voluntary and therefore admissible. The trial court's conclusion was premised on the erroneous view that the interrogation

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[39] *Cannady,* 427 So. 2d at 729 (defendant readvised of rights and knowingly and intelligently waived right to counsel, after being given opportunity to call his lawyer, before interrogation continued); ***accord Slawson,*** 619 So. 2d at 258 (defendant's equivocal request for counsel properly clarified by advising him of his rights and insuring he understood them before executing waiver); ***Aycock v. State,*** 528 So. 2d 1223, 1224 (Fla. 2d DCA)(defendant's ambiguous request for counsel properly clarified by readvising defendant of his rights and stressing that he had right to talk to a lawyer "now," before he executed new waiver), ***review denied,*** 536 So. 2d 243 (Fla.1988).

[40] This factual discrepancy was never resolved by the trial court, which made no findings of fact in support of its ruling on the motion to suppress. Given the factual discrepancies in the testimony at the suppression hearing as well as the further inconsistencies that developed at trial, a remand for fact findings would also be appropriate in this case.

"techniques" employed by the police in this case were perfectly proper and therefore could not render the confession involuntary.

The due process and self-incrimination clauses of both the Florida and United States Constitutions preclude the state from using a defendant's coerced confession in its case-in-chief and impose upon the state the burden of establishing that the defendant's statement "was 'free and voluntary.'" ***Brewer v. State, 386 So.*** 2d 232, 235 (Fla. 1980) (quoting ***Bram v. United States,*** 168 U.S. 532, 542-43, 18 S.Ct. 183, 187, 42 L.Ed.2d 568 (1897)); ***see also Traylor, 596 So. 2d at 964;*** Coffee ***v. State,*** 25 Fla. 501, 6 So. 2d 493, 496 (1889); ***Simon v. State, 5*** Fla. 285, 296 (1853). Courts have long "recognized that coercion can be mental as well as physical" and that "modern" police interrogation practices are "psychologically rather than physically oriented, " ***Miranda, 384*** U.S. at 448 ***(quoting Blackburn v. Alabama,*** 361 U.S. 199,206, 80 S.Ct. 274, 279, 4 L.Ed.2d 242 (1960)); ***see also Traylor, 596 So.*** 2d at 964; ***State v. Sawyer,*** 561 So. 2d 278, 281 (Fla. 2d DCA 1990); ***Rickard*** v. ***State,*** 508 So. 2d 736,737 (Fla. 2d DCA 1987). Where psychological coercion is alleged, the voluntariness of the confession must be evaluated "based upon consideration of the 'totality of the circumstances.'" ***Blackburn,*** 361 U.S. at ***206; Traylor,*** 596 So. 2d at 964. A confession must be excluded as involuntary "if the attending circumstances, or the declarations of those present at the making of the confession, are calculated to delude the prisoner as to his true position, or to exert improper and undue influence over his mind. " ***Brewer, 386 So,*** 2d at ***235-36 (quoting Frazier v. State,*** 107 So. 2d 16, 21 (Fla. 1958); ***Harrison v. State,*** 152 Fla. 86, 12 So. 2d 307 (Fla. 1943)); ***Simon, 5*** Fla. at 296.

The "ultimate test" is whether "the confession [is] the product of an essentially free and unconstrained choice by its maker. . , . If it is not, if [the defendant's] will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." ***Columbe v. Connecticut, 367*** U.S. ***568, 602,*** 81 S.Ct. 1860, 1879, 6 L.Ed.2d 1037 (1961); ***accord Traylor,*** 596 So. 2d at 956 ("The test thus is one of voluntariness, or free will"). Accordingly, although a particular interrogation "technique," considered "individually, might not vitiate a

confession" the use of a number of "techniques" &signed to overcome the defendant's will may, in combination, be so coercive as to render the confession involuntary in the totality of tbe circumstances. *Williams v. State,* 441 *So. 2d 653, 656* (Fla. 3d DCA 1983), *review denied, 450 So.* 2d 489 (Fla. 1984); *Sawyer,* 561 So. 2d at 288; *State v. Char-on, 482 So.* 2d 392, 393 (Fla. 3d DCA 1985).

In this case, the state's own evidence established that the police deployed an array of coercive interrogation "techniques" before they finally succeeded in obtaining an inculpatory statement from Mr. Walker.[41] First, the officers "deluded [Mr. Walker] as to his true position" in the investigation, *Brewer, 386 So. 2d* at 235-36, by assuring him that they were required to give *Miranda* warnings to everyone they interviewed in a homicide investigation and failing to inform Mr. Walker he was the focus of their investigation. (T. 126, 156, 177-78, 198-99) Second, the officers lied about the evidence and insisted that they knew Mr. Walker was guilty.[42] After Mr. Walker first denied having seen Ms. Jones on August 21, (T. 129-30, 180, 1245-46), the police represented that they needed fingerprints for "elimination" and asked Mr. Walker to sign a form allowing them to take his photo and fingerprints. (T. 133-34, 181-82, 1254) As Mr. Walker finished signing the form, Detective Watterson falsely told Mr. Walker that the police had either removed "his" fingerprint or "a"

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[41] Mr. Walker was questioned for six hours in a windowless interrogation room, approximately 25 feet by 10-12 feet, with the detectives seated between Mr. Walker and the door. (T. 123-25, 165, 177-78, 202)

[42] "Florida courts have frequently condemned the articulation by the police of incorrect, misleading statements to suspects" while holding that "[p]olice deception does not automatically invalidate a confession." *State v. Cayward, 552 So. 2d* 971, 973 (Fla. 2d DCA 1989) (manufacturing false documents, however, "offends . . . traditional notions of due process" and requires suppression), *review dismissed, 562 So. 2d 347* (Fla. 1990); *see also Frazier v. Cupp, 394* U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) (misrepresentations of evidence by police, while insufficient to render confession involuntary *per se* arc relevant *to* determining voluntariness); *cf. Haliburton,* 514 So. 2d at 1090 (police refusal to inform defendant that attorney had been appointed for him, despite court order to allow defendant to see attorney, violated Due Process Clause of Florida Constitution).

Lies or insistence upon a defendant's guilt may, however, be one of several factors rendering a confession involuntary. *See Williams,* 441 So. 2d at 656-57 (police falsely claimed to have found the defendant's fingerprint at *the* crime scene); *Fillinger v. State, 349 So. 2d* 714, 716 (Fla. 2d DCA 1977) (police insisted on defendant's guilt), *cert. denied, 374 So.* 2d 101 (Fla. 1979); *Martinez v. State,* 545 So. 2d 466,467 (Fla. 4th DCA 1989) (police repeatedly told defendant he was lying and that the evidence against him was solid).

fingerprint from the duct tape taken from the victim. (T. 135, 182,203, 1255) Watterson and Everett both testified that lying to suspects is part of their "interview technique." (T. 161, 204, 1256) According to the detectives, Mr. Walker became flushed and nervous and said he wasn't sure he should sign the form. (T. 135, 182, 1255) The police told Mr. Walker they did not believe his statement and knew that he had been having trouble with Joanne Jones.[43] (T. 136)

Mr. Walker continued to deny any involvement in the homicides, and Detectives Watterson and Everett persisted in telling Mr. Walker that they did not believe him, and he should "clear his conscience" and tell them what really happened. (T. 138-39) Mr. Walker then changed his story and gave a second statement, in which he said that he had met Joanne and Quinton Jones at the movie theater on the evening of August 21 and that the three of them had been abducted by two assailants who forced Mr. Walker to duct tape Joanne and Quinton and then released Mr. Walker near the Orange Bowl, threatening to kill him if he called the police. (T. 139-40, 1272-74) Detective Watterson yelled at Mr. Walker that he was "full of shit" and "that was the worse [*sic*] story I ever heard in all the time I ever been a police officer." (T. 140, 165, 1274)

Third, the police confronted Mr. Walker with a "disgusting," "horrible" photograph of Quinton Jones' partially decomposed body floating in the water and said "the person who did this did a terrible thing." (T. 138, 207; R.99) Everett later testified that this was another "interview technique." (T. 1403) Fourth, the police deliberately exploited Mr. Walker's religious beliefs.[44] The

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[43] The detectives had not verified the information provided by Ms. Jones' family at the time of the interrogation. (T. 155, 176, 195)

[44] This Court has disapproved exploitation of a defendant's sincerely held religious beliefs, condemning, for example, the "Christian burial technique" as "unquestionably a blatantly coercive and deceptive ploy." *Roman v. State, 475 So.* 2d 1228, 1232 (Fla. 1985), *cert. denied, 475* U.S. 1090, 106 S.Ct. 1480, 89 L.Ed.2d 734 (1986); see *also Johnson v. State, 20* Fla. L. Weekly S343, 344 (Fla. July 13, 1995) ("Using sincerely held religious beliefs against a detainee is quite a distinct issue from a simply noncoercive plea for a defendant to be candid."); *People v. Montano, 277* Cal.Rptr. *327,339* (Cal.Ct.App. 1991); *People* v. *Adams,* 192 Cal.Rptr. 290, (Cal.Ct.App. 1983) ("Religious beliefs are not matters to be used by governmental authorities to manipulate a suspect to say things he or she otherwise would not say. The right to worship without fear is too precious a freedom for us to tolerate an invasion and manipulation by state officials of the religious beliefs of individuals, including those

detectives had learned before the interview tbat Mr. Walker was a deacon in his church and testified that they both, therefore, intentionally invoked God "several times" during the interrogation. (T. 158, 163, 201, 205-06, 208, 1294) Everett testified that this was "an interview technique that I've learned over the years when you are talking to offenders and murderers. Sometimes they are close to God. I'm close to God and I just felt at that time maybe he might want to tell God what happened if he didn't wanttotclluswhathappened . . . I was going to say to him, you know, something that would make him fmally tell me the truth." (T. 206, 208) Watterson also characterized such religious appeals as a interview "technique." (T. 1293)

Fifth, the police engaged in racially-charged role-playing and emotional manipulation.[45] Watterson testified that he and Everett employed the good cop - bad cop "technique," with Watterson, who is white, playing the belligerent role while Everett, who is African-American, pretended to be Mr. Walker's "brother." (T.161-62, 212, 215) When Mr. Walker started to cry late in the interview, Detective Everett took his hands and told him it would be all right to cry and cried with him. (T. 215-16, 1378, 1413, 1417, 1422) Everett also characterized this as part of his "technique." (T. 216, 1412)

Sixth, Mr. Walker was denied an attorney and isolated from his family after his arrest. When Mr. Walker persisted in asserting his innocence, he was placed under arrest for two counts of first degree murder. (T. 142, 166, 187, 209) The *Miranda* warnings were. not renewed. (T. 210) Instead,

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accused of crime."),

[45] Courts havealsoexpressed disapproval of such emotional manipulation and recognized its coercive effect. See *Spano v. New York,* 360 US. 315, 323, 79 S.Ct. 1202, 1207, 3 L.Ed.2d 1265 (1959) (criticizing exploitation of defendant's relationship with childhood friend to procure confession); *DeConingh v. State, 433 So. 2d* 501, 503 (Fla. 1983) (deputy took advantage of friendship with defendant, who was in vulnerable emotional state and on medication), cert. *denied, 465* U.S. 1005, 104 S.Ct. 995, 79 L.Ed.2d 228 (1984); *Rickard v. State,* 508 So. 2d 736, 737 (Fla. 2d DCA 1987) (police threatened emotionally distraught defendant with loss of her children); *Hawthorne v. State, 377* So. 2d 780,784 (Fla. 1st DCA 1979) (police appealed to defendant's concern for her children); *Ware* v. *State,* 307 So. 2d 255,256 (Fla. 4th DCA) (police used "family approach" -- suggesting defendant could be more quickly reunited with his family if he confessed -- "to lull him into a false sense of *security"), cert. denied, 316 So.* 2d *286* (Fla. 1975); State v. *Chorpenning, 294 So. 2d* 54, 55-56 (Fla. 2d DCA 1974) (police threatened defendant with loss of his foster child); see *abo Pressley v. State,* 469 So. 2d 908,909 (Fla. 5th DCA) (Sharp, J., dissenting) (disapproving technique of pretending to sympathize with defendant), cert. *denied, 474* U.S. 982, 106 S.Ct. 387, 88 L.Ed.2d 340 (1985).

Mr. Walker was told "you arc not leaving this room so you might as well start telling the truth," clearly conveying that any effort to invoke his right to silence would be unavailing. (T. 187) Detective Watterson suggested they bring in a stenographer to take down Mr. Walker's second exculpatory statement and, as discussed above, Mr. Walker requested an attorney. The interrogation nevertheless continued. (T. 188) Lieutenant Meeks, the commander of the homicide unit, shortly thereafter spoke to Mr. Walker alone and told him there was no need for his family to be involved.[46] (T. 224)

Seventh, the police made implied threats and promises of leniency.[47] Mr. Walker ultimately asked to speak to Everett without Watterson in the room. (T. 169, 188) Detective Everett warned Walker that he was facing the death penalty and urged him "man to man, brother to brother, *let* me *help you out*." (T. 215-16) (e.s.). Everett said this was "part of [his] interview technique." (T. 215) Everett told Walker "over and over" that, if Walker told the truth, Everett would tell the assistant state attorney and the judge that he had cooperated. (T. 216-18, 1415-16). Sometime between 1 and 2 p.m., while Everett was alone with Walker, Walker finally admitted to killing Joanne and Quinton Jones. (T. 189,216)

According to the officers' own testimony, Mr. Walker's confession was extracted by a combination of lies, threats, implied promises of leniency, exploitation of his religious beliefs, and

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[46] Although Meeks testified at the suppression hearing that Walker admitted his guilt during this one-on-one session, (T. 224-25), Detectives Everett and Watterson both testified that Meeks told them, upon emerging from the interrogation room, that Walker was sticking to the abduction story. (T. 143, 168, 205, 215)

[47] The use of implied threats and promises has also been condemned and recognized as coercive. See Braver, 386 So. 2d at 235-36 (police "raised the spectre of the electric chair [and] suggested that they had the power to effect leniency"); *Martinez,* 545 So. 2d at 467 (police threatened defendant with the electric chair); *Sawyer,* 561 So, 2d at 288 (defendant "harangued, yelled at [and] cajoled" and "threatened with first degree murder and its attendant consequences"); ***Rickard, 508 So.*** 2d 736, 737 (Fla. 2d DCA 1987) (police threatened defendant with loss of her children and made frequent mention of substantial assistance program); ***Gaspard v. State,*** 387 So. 2d 1016, 1022 (Fla. 1st DCA 1980) (defendant threatened repeatedly with electric chair); ***Hawthorne, 377 So.*** 2d at 784 (police suggested defendant could get out on bond and said they would help her if she confessed); *Fillinger,* 349 So. 2d at 716 (police told defendant they would advise prosecutor and judge of her cooperation if she confessed and that cooperation would be considered in setting bond).

emotional manipulation. While no one of these techniques alone is necessarily sufficient to vitiate the confession, their combined effect was sufficiently coercive to overcome Mr. Walker's will and render the confession involuntary. Indeed, the techniques used by the police in this case are strikingly similar to those employed in ***Brewer,*** where the police had "raised the spectre of the electric chair, suggested that they had the power to effect leniency, and suggested to the [defendant] that he would not be given a fair trial." 386 So. 2d at 235-36. This Court found the methods in that case sufficiently coercive not only to render the resulting oral confession inadmissible but to also taint the written confession obtained after the defendant was again advised of his rights.[48] 386 So. 2d at 236.

The trial judge nevertheless concluded that Mr. Walker's confession was voluntary:

> Let me say this, that the matters if I didn't rule on as to those two motions, they are hereby denied and I think a great deal is being over looked, that the Defendant called to give the information. The police didn't call him, he called the police.[49]
>
> He came before they had a chance to come over here, he was down at the police station. ***And these techniques that were used by the police, everybody knows about them. They have not been disapproved by the law in any way. They are used constantly. They practically are used in every murder case I've ever heard about.*** And I think there's no question that given the totality of the circumstances, that this statement that the Defendant gave was freely and voluntarily given and the motion to suppress is denied. (T. 250-51) (e.s.)

In emphasizing the purported "propriety" and common usage of the techniques employed in this case, the trial judge appeared to construe the state and federal constitutions as barring the admission

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[48] Similar combinations of the techniques used in this case have been found to render the resulting confession involuntary. ***See Williams,*** 441 So. 2d at 656-57 (lies, threats, promises of leniency, and emotional manipulation); ***Sawyer,*** 561 So. 2d at 288 (emotional manipulation and implied threats and promises); ***Martinez,*** 545 So. 2d at 467 (misleading defendant regarding his position, insistence on guilt and threats of electric ***chair); Rickard, 508 So.*** 2d at 737 (threats and implied promises of lenience); ***Gaspard, 387 So. 2d*** at 1022 (lies and threats of electric chair); ***Hawthorne, 377 So.*** 2d at ***784 (emotional*** manipulation and implied promises of leniency); ***Fillinger, 349 So. 2d*** at 716 (insistence on defendant's guilt and implied promises of leniency); ***Ware, 307 So. 2d*** at 256 (emotional manipulation); ***Chorpenning,*** 294 So. 2d at 55-56 (threats and implied promises of leniency).

[49] Although Mr. Walker initially contacted the police, he came to headquarters at their request. (T. 123, 177) The fact that a defendant voluntarily comes in for questioning does not render voluntary all that transpires in the ensuing interrogation. See, e.g., ***Sawyer,*** 561 So. 2d at 283 (defendant agreed voluntarily to come in for interview at police headquarters but subsequently-obtained confession was involuntary in totality of the circumstances).

of only those confessions obtained by the use of police interrogation techniques that "are so offensive to a civilized system of justice that they must be condemned" as violative of due process. See *Miller v. Fenton*, 474 U.S. 104, 109, 106 S.Ct. 445, 449, 88 L.Ed.2d 405 (1985). Due process "applies equally," however, to exclude a confession "when the interrogation techniques were improper only because, in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will." *Id.* at 110. That is, although "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment," *Colorado* v. *Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515,522, 93 L.Ed.2d 473 (1986), "coercive activity" is not limited to conduct that is "shocking" but also includes conduct that is intended to and does, in the circumstances of a particular case, overcome the defendant's will. *See Malloy* v. *Hogan, 378* U.S. 1, 7, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964) ("the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary"').

The trial court's ruling was therefore based on a fundamental misapprehension of the law, mistakenly equating the conclusion that an individual interrogation technique is not so shocking or so inherently coercive as to render a confession involuntary per se with an affirmative endorsement of the practice and a holding tbat it can never be coercive. The cases discussed above make clear, however, both that many of the interview techniques employed in this case *have* been disapproved by the courts and that they are sufficiently coercive, particularly when used in combination, to overcome a defendant's will.[50] The officers in this case freely acknowledged that their "techniques" were designed to "wear [Mr. Walker] down" to confess; that this was the goal of their interrogation session; and that they were prepared to "do anything they had to do" -- within the confines of the law (as they

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[50] As the Supreme Court observed nearly 30 years ago, the very purpose of the psychological interrogation techniques used in this case is to "subjugate the individual to the will of his examiner." *Miranda, 384* U.S. at 457-58. In this case, the giving of *Miranda warnings* -- after misleading Mr. Walker as to his status in the investigation -- was insufficient "to dispel the compulsion inherent in custodial surroundings" and the coercive effects of the officers' interrogation techniques. *Miranda, 384* U.S. at 458.

erroneously understood it) -- to get a statement they believed to be the truth. (T. 163, 166, 204, 206) They described their success in obtaining a confession from Mr. Walker as an example of the effectiveness of their methods. (T. 166) The officers, like the trial judge, apparently assumed any interrogation technique that is not so outrageous as to render a confession involuntary *per* se can never be unlawful. The relevant inquiry, however, is whether the ***combination*** of these techniques extracted an involuntary confession from Mr. Walker. The officers' testimony below established tbat it did. The state therefore did not carry its burden of establishing the voluntariness of the defendant's confession, and the trial court's contrary conclusion -- based upon an incorrect legal standard -- requires reversal.

C. The Trial Court Erred in Refusing to Suppress the Defendant's Inculpatory Statement as the Product of an Unlawful Arrest, in Violation of the Florida Constitution, Article I, Sections 9 and 12 and the United States Constitution, Amendments IV, V and XIV.

In denying the defendant's motion to suppress, the trial court also implicitly ruled that the police had probable cause to arrest Mr. Walker for first-degree murder during the interrogation and that Mr. Walker's inculpatory statement, given after his arrest, was therefore not the product of an unlawful arrest. (T. 250-51) This ruling was also erroneous.

"Probable cause exists where the facts and circumstances within [the officers'] knowledge and of which tbey had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed [by the person *arrested.]*" ***Brinegar*** *v. United* ***States,*** 338 U.S. 160, 175-76, 69 S.Ct. 1302, 1310-11, 93 L.Ed. 1879 (1949) (internal quotations omitted), In this case, Detectives Watterson and Everett acknowledged that, at the time Mr. Walker came to the station, they had no physical evidence or witnesses to link him to the crime. (T. 154, 194) The evidence relied upon as establishing probable cause to arrest Mr. Walker for two counts of first degree murder consisted of the following: (1) that Mr. Walker had given inconsistent statements regarding his activities on tbe night of August 21; (2) Mr. Walker's reaction when the police falsely told him they had obtained either "his" fingerprint or "a" fingerprint from the

duct tape,[51] (T. 135, 182,203, 1255); (3) his purportedly unique knowledge of the location of the duct tape,[52] (T. 140, 184); and (4) the information that Ms. Jones had been having problems with Mr. Walker.[53] (T. 122, 176)

While this "evidence" may have given the police grounds for "reasonable suspicion," it did not establish probable cause to arrest him for two counts of first degree murder. See *Stevens* v. *State,* 574 So. 2d 197,202 (Fla. 1st DCA 1991) (police lacked probable cause to arrest for murder or grand theft where defendant was seen with murder victim's car and gave false name to the police); *State* v. *Rogers,* 427 So. 2d 286, 287-88 (Fla. 1st DCA 1983) (police lacked probable cause to arrest for murder where defendant had been seen driving a car similar to that of murder victim, had been dating the victim, and tried to evade the sheriff who arrested him). Mr. Walker's third and only inculpatory statement was, moreover, "obtained by exploitation of the illegality of his arrest." *Dunaway v. New York, 442* U.S. 200, 217, 99 S.Ct. 2248, 2259, 60 L.Ed.2d 824 (1979); *Brown v. Illinois, 422* U.S. *590,600, 95* S.Ct. 2254, 2260, 45 L.Ed.2d 416 (1975); *Wong Sun v. United States,* 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963). The causal connection between the unlawful arrest and Mr. Walker's confession was direct and unbroken. As noted above, the police not only failed to

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[51] If, as Detective Everett testified, Mr. Walker was told that "his" fingerprint was found on the duct tape his reaction would not necessarily indicate guilt as opposed to understandable nervousness at being implicated in a crime he did not commit. (T. 182,203)

[52] Although Everett contended that no one but the police and the perpetrator could have known the location of the duct tape on the victims' bodies, (T. 184), a newspaper article, which appeared on the day of the interrogation and was introduced into evidence by the defense, reported that the woman found in Sewell Park was "bound with duct tape" and suggestively noted that police would not say whether the boy was "also bound." Bill Gato & David Hancock, ***Bodies of Mom, Boy Found in City Park,*** MIAMI HERALD Aug. 24, 1993 at 1B. (T. 193) It is also not clear how much information Detectives Everett and Watterson provided when they told Mr. Walker they had recovered his fingerprint; Watterson testified that they told Walker the tape was from "the victim," (T. 135), while Everett said it was "the victim, JoAnn." (T. 182)

[53] The information from Ms. Jones' family had not been verified at the time of the interrogation, and some of it proved to be incorrect. (T. 155, 176, 195) For example, Ms. Jones' family asserted that Mr. Walker had once sexually assaulted Ms. Jones, but she had "lost in court," when in fact no charges had ever been filed. (T. 122, 155, 176) Similarly, another bailiff had erroneously reported that Mr. Walker had an argument with Ms. Jones at the court house. (T. 153-54)

readvise Mr. Walker of his *Miranda* rights upon his arrest but told him "you arc not leaving this room so you may as well start telling the truth." (T. 187) Mr. Walker confessed less than two hours later, under continuous interrogation. (T. 189, 209, 216) Because "there was no intervening event of significance whatsoever" to dispel the taint of his unlawful arrest, Mr. Walker's confession should have been suppressed under the fourth amendment. *Dunaway, 442* U.S. at 218.

III.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN A PROSECUTION WITNESS TESTIFIED ABOUT THE DEFENDANT'S PURPORTED COMMISSION OF AN UNCHARGED CRIME, AND NO INSTRUCTION COULD CURE THE PREJUDICE TO THE DEFENSE, THEREBY DEPRIVING THE DEFENDANT OF A FAIR TRIAL IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 9 AND THE UNITED STATES CONSTITUTION, AMENDMENT XIV.

Detective Watterson testified at trial that he told Mr. Walker during the interrogation session "that I was aware of the fact that he had a sexual assault charge filed against him." (T. 1257) Defense counsel objected immediately that Watterson's remark constituted impermissible "other crimes evidence"[54] and moved for a mistrial, (T. 1257-58) Defense counsel explained that Mr. Walker had never even been arrested for or charged with the alleged sexual assault and argued that the unsubstantiated charges were not probative of any issue in the case. (T. 1258, 1261-62) The trial judge concluded that if he had been given an opportunity to rule on this evidence in advance, he would have excluded it, finding "[n]o question that the prejudicial value far outweighs any probative value." (T. 1264) He nevertheless denied the motion for mistrial and, over defense objection to the adequacy of any curative instruction, told the jury: "Members of the jury, I want to give you a special instruction with respect to a statement that was made by this witness. First, is this: No charges -- 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. 1265, 1268-69, 1270)

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[54] *See Williams v. State,* 110 So. 2d *654* (Fla.), *cert. denied,* 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); § 90.404(2), Fla. Stat. (1993).

The trial court properly concluded that any evidence regarding the unsubstantiated sexual assault allegation was inadmissible. The evidence was not relevant to any material fact in issue in this case. *See Williams v. State,* 621 So. 2d 413, 414 (Fla. 1993). The state's contention below that the allegation was relevant -- regardless of its truth or falsity -- to establish "the flow of the conversation between the officer and the defendant which led to the confession" was specious. (T. 1263) The fact that Detective Watterson had confronted Mr. Walker with such false information would not help to establish the voluntariness of Mr. Walker's confession. Thus, "the only possible issue for which this evidence could be used" was to establish Mr. Walker's "[bad] character and criminal propensity." *Garron v. State, 528 So.* 2d 353, 358 (Fla. 1988).

The improper disclosure of "collateral crimes" evidence to the jury is presumptively harmful. *Castro,* 547 So. 2d at 115. In this case, it was all the more egregious because the prosecution elicited the information after representing to both defense counsel and the trial court that they would not present evidence about the sexual assault allegation.[55] The prosecution thereby evaded the defendant's motion in limine and ensured that the inflammatory evidence would be heard by the jury before an objection could be. lodged. Although the trial court instructed the jury to disregard Detective Wattcrson's reference to a sexual assault charge, such instructions are "of legendary ineffectiveness" in limiting or preventing juries' consideration of such evidence, *Geralds* v. *State,* 601 So. 2d 1157, 1163 (Fla. 1992)

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[55] As defense counsel noted, they had filed a motion in limine before trial to exclude all testimony and documentary evidence relating to North Miami Police Department case number 91-17659, which involved Ms. Jones' allegation that Mr. Walker had sexually assaulted her. (T. 279,824) The motion was denied after the state represented to the trial court that it intended to present only those portions of the taped North Miami Police interview containing the discussion of abortion and not the remainder of tbe interview regarding the sexual assault allegation. (T. 848, 855, 863) The prosecution did not inform the trial court at that time that it intended to elicit testimony regarding the sexual assault allegation from any other witness.

(quoting *Malcolm v. State,* 415 So.2d 891, 892 n. 1 (Fla. 3d DCA 1982)).[56] In the circumstances of this case, the motion for mistrial should have been granted.[57]

Iv.

THE TRIAL COURT ERRED IN ALLOWING EXPERT TESTIMONY REGARDING DNA TESTS ON A CIGARETTE BUTT FOUND IN THE VICTIM'S CAR WHERE THE EVIDENCE WAS NOT RELEVANT TO ANY FACT IN ISSUE, IN VIOLATION OF SECTIONS 90.401 AND 90.702, FLORIDA STATUTES, THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 9 AND THE UNITED STATES CONSTITUTION, AMENDMENT XIV.

The defense moved both before and during trial to preclude expert testimony regarding the results of DNA tests performed on a cigarette butt recovered from Ms. Jones' car, on the ground that it was irrelevant and did not clarify any issues for the jury. (T. 821-22, 862, 1129, 1154) The pre-trial motion was denied, and Dr. Roger Kahn of the Metro-Dade crime lab's DNA section was permitted to testify, over renewed defense objection, that he had performed PCR testing on the cigarette filter. (T. 1128, 1130, 1142-43) The DNA from the filter was found to be type 1.1, 1.2 -- the type shared by Mr. Walker and his brother Willie Rogers and 12.2% of the African-American population. (T. 1142-43, 1146) The defense renewed its motion in limine again at the end of Dr. Kahn's testimony, and the motion was denied. (T. 1154)

Under section 90.702, Florida Statutes, expert testimony is admissible only if it "will assist the jury in understanding the evidence or in determining a fact in issue." § 90.702, Fla. Stat. (1993); *Hayes* v. *State,* 20 Fla. L. Weekly S296, S298 (Fla. June 22, 1995); *Ramirez v. State,* 651 So. 2d

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[56] See *also* Abraham Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a), 38* EMORY L.J. 135, 175-79 (1989) (citing empirical evidence that mock jurors who hear inadmissible other crimes evidence and arc instructed to disregard it have substantially higher conviction rates tban jurors who never hear the inadmissible evidence in both strong (20%) and weak *(35%) cases).*

[57] *See Cooper v. State, 20* Fla. L. Weekly D1867 (Fla. 2d DCA Aug. 16, 1995) (witness' remark that defendant allegedly had raped his (defendant's) daughter was so prejudicial it could not be cured by instruction and required mistrial); *Arsis v. State,* 581 So. 2d 935 (Fla. 3d DCA 1991) (trial court committed reversible error in failing to grant mistrial after prosecution elicited other crimes evidence in violation of order in limine); *Vaczek v. State, 477 So.* 2d 1034 (Fla. 5th DCA 1985) (mist&l required where prosecution elicited inflammatory evidence after representing he would not do so and in violation of trial court's order in limine -- curative instruction inadequate).

1164, 1167 (Fla. 1995). In this case, Dr. Kahn's testimony regarding the test results on the cigarette filter was not relevant to any "fact in issue." The DNA test results were not probative, by themselves, of either Mr. Walker's or his brother's presence in Ms. Jones' car because, as Dr. Kahn testified, 12.2% of African-Am&cans, 6% of Caucasians, and 4.8% of Hispanics share the DNA type identified on the filter paper. (T.1146-47) Mr. Walker does not smoke, (T. 1218), and the state presented no evidence regarding Willie Rogers' smoking habits -- *i.e.,* whether he does, and if so whether he smokes the same brand as the cigarette found in the car. Consequently, Dr. Kahn's testimony was irrelevant and inadmissible under both sections 90.401 and 90.702, Florida Statutes. See *Stano* v. *State,* 473 So. 2d 1282, 1285-86 (Fla. 1985) (expert testimony regarding false confessions was not relevant and therefore was inadmissible absent some connection to defendant's own confession), *cert. denied, 474* U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986). The error was, moreover, harmful because it invited the jury to rely on speculative evidence which was cloaked in an aura of scientific reliability. See *Ramirez v. State, 542 So. 2d 352, 355-56* (Fla. 1989).

PENALTY PHASE ISSUES

V.

THE DEFENDANT WAS DENIED A FUNDAMENTALLY FAIR AND RELIABLE SENTENCING HEARING BY THE PROSECUTOR'S IMPROPER INJECTION OF FUTURE DANGEROUSNESS INTO THE PROCEEDINGS AND THE TRIAL COURT'S REFUSAL TO THEREAFTER DETERMINE AND INSTRUCT THE JURY ON THE DEFENDANT'S PAROLE INELIGIBILITY, IN VIOLATION OF FLORIDA LAW AND THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV

Mr. Walker's sentencing proceeding was rendered fundamentally unfair because the defense was precluded from rebutting the prosecution's improper and misleading insinuations regarding Mr. Walker's future dangerousness and eligibility for parole. The prosecution in this case (1) implied during the cross-examination of a defense witness that Mr. Walker would kill again if released from prison; (2) opposed the defendant's request to determine his alternative sentences prior to the jury's deliberations at the penalty phase and to instruct the jury that he would not be eligible for parole for

at least 50 years (in effect a life without parole sentence since Mr. Walker was 33 years old); and (3) then argued to the jury that, if sentenced to life for his two capital murder convictions, Mr. Walker could be released from prison after serving only a 25-year minimum mandatory term. After the jury's advisory verdict, the trial court imposed consecutive sentences for the two capital murder counts (which would have resulted in a combined minimum mandatory term of 50 years if Mr. Walker had been sentenced to life) and a guidelines departure sentence of life without parole for his contemporaneous noncapital offenses.

The trial court erred first in denying the defendant's motion for mistrial after the prosecutor raised the issue of future dangerousness and second in denying the defendant's motion to determine and instruct the jury on his parole ineligibility. While each of these errors independently warrants a new sentencing hearing, their combined prejudicial effect cannot be deemed harmless beyond a reasonable doubt in the circumstances of this case, where the jury recommended death by the narrowest of possible margins, a vote of only 7 to 5, and there was substantial mitigating evidence to support life sentences.

A. The Prosecution's Reliance on the Nonstatutory Aggravating Circumstance of Future Dangerousness Tainted the Validity of the Jury's Recommendation and Undermined the Reliability of the Sentencing Hearing, in Violation of Florida Law and the Florida Constitution, Article I, Sections 9 and 17, and the United States Constitution Amendments VIII, and XIV.

During his cross-examination of Dr. Eisenstein, a neuropsychologist called to testify for the defense, the prosecutor asked whether Dr. Eisenstein thought that Mr. Walker "may kill again." (T. 2114) Defense. counsel promptly objected that the prosecutor was attempting impermissibly to establish the non-statutory aggravating circumstance of Mr. Walker's future dangerousness and moved for a mistrial. (T. 2114) The trial judge sustained the objection -- thus preventing the witness from answering the prosecutor's question -- but denied the motion for mistrial. (T. 2115) Subsequently, in closing argument, the prosecutor again alluded to the defendant's future dangerousness, urging the jury to disregard any argument by defense counsel that Mr. Walker would be subject to consecutive

life sentences, because the imposition of such sentences was within the trial court's discretion, "[a]nd the only thing that is certain in life is death and taxes." (T. 2255)

The prosecutor's question to Dr. Eisenstein was patently improper under Florida law and the eighth amendment. It was asked, in tbe course of Dr. Eisenstein's efforts to explain the nature of the defendant's mental illness and its effect on his ability to appreciate the criminality of his conduct, for the obvious purpose of converting mitigating evidence regarding the defendant's mental disabilities into the non-statutory aggravating circumstance of future dangerousness. Suggesting that such quintessentially mitigating evidence is an aggravating factor violates both the legislative purpose of Florida's capital sentencing statute and the eighth amendment. ***Miller v. State, 373 So. 2d 882, 886*** (Fla. 1979).[58] Moreover, this Court has admonished expressly that "the probability of recurring violent acts by the defendant if he is released on parole in the distant future" is not a proper aggravating circumstance in Florida. ***Miller, 373 So.*** 2d at 886; ***Huckaby v. State, 343 So.*** 2d 29, 33 (Fla.), cert. ***denied, 434*** U.S. 920, 98 S.Ct. 393, 54 L.Ed.2d 276 (1977).[59]

The prosecutor's question to Dr. Eisenstein was "intended to and [did] inject elements of emotion and fear into the jury's deliberations."[60] ***King v. State, 623 So.*** 2d 486, 488 (Fla. 1993) (quoting *Garron* v. *State,* 528 So, 2d 353,359 (Fla. 1988)). The question did not have to be answered to achieve its improper purpose. To the contrary, the question itself, and the unavoidable impression

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[58] ***See also Zant v. Stephens, 462*** U.S. 862, 885, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235 (1983) (state may not attach "'aggravating' label to factors . . . that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness") (citing ***Miller).***

[59] See ***also*** Norris v. *State,* 429 So. 2d 688,690 (Fla. 1983) (trial judge improperly considered possibility of parole in overriding jury's life recommendation); ***white v. Stale, 403 So.*** 2d 331, 337 (Fla. 1981) ("[t]he attempt to predict future conduct cannot be used as a basis to sustain an aggravating circumstance"), ***cert. denied, 463*** U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983); ***Barclay v. State, 470 So.*** 2d 691, 694-95 (Fla. 1985) (same).

[60] The question was especially prejudicial in this case because several jurors, including one who ultimately served on the jury, expressed fear during tbe voir dire examination that the defendant would know their names and where they lived, (T. 715-18) This then required additional voir dire by the parties and the court regarding the ability of these jurors to be fair. (T. 716-19, 792-93) Thus, as the prosecutor was well aware, the issue of future dangerousness and retaliation was a concern to the jurors in this case.

that the defense did not want the jury to hear the answer, ensured that future dangerousness would be planted firmly in the jurors' minds as a consideration in sentencing, "Neither rebuke nor retraction" could dispel the resulting prejudice to the defense. *Pait* v. *State,* 112 So. 2d 380, 385 (Fla. 1959); *Duque v. St&e, 460 So. 2d* 416,417 (Fla. 2d DCA 1984), review *denied,* 467 So. 2d 1000 (Fla.1985); *Blackburn v. State, 447 So. 2d 424,426* (Fla. 5th DCA 1984). Instructing the jurors to disregard the question, or telling them that whether the defendant would kill again is not a relevant consideration in sentencing, would only have emphasized the issue further and strengthened the jurors' impression that information was being withheld from them. *Cf. Simmons v. South Carolina,* U.S. ___, ___, 114 S.Ct. 2187, 2197, 129 L.Ed.2d 133 (1994) (jury could not be presumed to follow instruction not to consider defendant's parole eligibility because instruction suggested parole *was* available and that "for some unstated reason, [the jury] should be blind to that fact") (plurality opinion). Once raised, the specter of the defendant's future dangerousness could be exorcised from the sentencing process only by declaring a mistrial. *Garron,* 528 So. 2d at 360; *Raulerson v. State,* 102 So. 2d 281,285~86 (Fla. 1958); *McMillian v. State, 409 So.* 2d 197, 198-99 (Fla. 3d DCA 1982); *Reed v. State, 333 So.* 2d 524,526 (Fla. 1st DCA 1976).

Instead, having already implied that Mr. Walker would kill again, the prosecutor emphasized in closing argument that the jury could not be "certain" Mr. Walker would remain in prison if sentenced to life. It has long been the law in Florida that prosecutors may not secure the death penalty or a conviction by appealing to jurors' fears that the defendant will be released on parole and kill again. *Teffeteller v. State, 439 So. 2d* 840, 844-45 (Fla. 1983), *cert. denied, 465* U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984); *Grunt v. State,* 194 So. 2d 612, 613-15 (Fla. 1967); see *also Nowitzke v. State, 572 So.* 2d 1346, 1354 (Fla. 1990); *William v. State, 68 So.* 2d *583* (Fla. 1953); *Sims v. State,* 371 So. 2d 211,212 (Fla. 3d DCA 1979). That, however, was precisely what the prosecution did in this case.

B. The Trial Court's Refusal to Determine and Instruct the Jury on the Length of the Defendant's Parole Ineligibility Denied the Defendant Due Process, Precluded the Jury from Considering Relevant Mitigating Evidence, and Undermined the Reliability of the Sentencing Proceeding, in Violation of Florida Law, the Florida Constitution Article I, Sections 9 and 17, and the United States Constitution Amendments VIII and XIV.

The prosecutor's misconduct in injecting the issue of future dangerousness into the sentencing process was compounded by the trial court's refusal to allow the defense to establish that, contrary to tbe prosecutor's intimations, Mr. Walker would not be eligible for parole in his natural life. Knowing that, in the event of a life recommendation by the jury, the state would seek and the trial court would almost certainly impose consecutive life sentences with a combined minimum mandatory term of 50 years and a guidelines departure sentence of life imprisonment for the contemporaneous noncapital convictions,[61] the defense asked the trial court to determine in advance (1) whether Mr. Walker's sentences for capital murder would be consecutive or concurrent and (2) the sentences for Mr. Walker's non-capital convictions so that the jury could be accurately instructed regarding his parole ineligibility.[62] The trial judge denied the motion and corresponding proposed instructions .[63] (T.

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[61] *See State v. Enmund, 476 So. 2d* 165, 168 (Fla. 1985); *Bunney v. State, 603 So.* 2d 1270, 1271 (Fla. 1992).

[62] The defense also asked to present a witness from the Department of Corrections, to establish that Mr. Walker would actually be required to serve his entire minimum mandatory sentence. (T. 1663-65; R. 403, 413-14) This portion of the alternative sentence motion was denied immediately, while the trial court deferred ruling on the remainder of the motion. (T. 1662-65) Appellant acknowledges that this Court has previously found no error in the exclusion of such evidence, *King* v. *Dugger,* 555 So. 2d 355, 359 (Fla. 1990). In this case, however, the defense produced empirical evidence that the standard instruction is not an adequate substitute for evidence, citing a study of Florida capital jurors which found that, despite the standard instruction, fully 59.1% of jurors who voted for death, and 42.9% of jurors who voted for life, believed defendants would serve less tban the minimum mandatory *term.* (T. 1665; R. 414 (citing William Bowers, ***Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions, 27*** L. & SOC. REV. *157,* 169-70 (1993)); *cf. Simmons,* 114 S.Ct. at 2191 (to demonstrate misunderstanding of "life" sentence, defendant proffered state-wide public opinion survey showing that only 7.1% of jury-eligible adults in South Carolina believed an inmate sentenced to life imprisonment would actually be required to spend the rest of his life in prison), The trial court's refusal to allow the proffered evidence was therefore error in this case.

[63] The defense proposed three alternative instructions, each advising the jury mat it could consider in mitigation that the alternative to death would be consecutive life sentences with a total minimum mandatory of 50 years; proposed instructions one and two would also have informed the

2146; R. 525-27) As noted above, in his final sentencing or&r, the trial judge, in fact, imposed consecutive sentences for the capital murder convictions and, citing the capital convictions as grounds for departure, imposed a guidelines life sentence for Mr. Walker's contemporaneous felony convictions. (R. 584). Thus, if Mr. Walker had not been sentenced to death, he would be serving two consecutive life sentences, with a combined minimum mandatory term of 50 years, followed by a consecutive life sentence without possibility of parole.[64] The trial court's denial of the motion and special instructions, in the circumstances of this case, violated Mr. Walker's due process rights and undermined the reliability of the sentencing process by withholding from the jury relevant mitigating evidence.

1. Due Process

The United States Supreme Court has recently made clear that where, as here, the state puts a defendant's future dangerousness at issue in the penalty phase of a capital case, "elementary principles of due process" require that it cannot also deny the jury accurate information regarding the defendant's ineligibility for parole, *Simmons,* 114 S.Ct. at 2194 (plurality opinion of Blackmun, J.); *id.* at 2201 (O'Connor, J., concurring, joined by Rehnquist, C. J., and Kennedy, J.). In this case, as in *Simmons,* the prosecution "raised the specter of future dangerousness generally but then thwarted all efforts by [the defendant] to demonstrate that contrary to the prosecutor's intimations, he never would be released on parole and thus, in his view, would not pose a future danger to society." Id. at 2194. As the prosecutor well knew, the alternative to sentences of death in this case was, as a practical

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jury, respectively, of Mr. Walker's actual sentences for the non-capital offenses or his maximum potential sentences. (R. 525-27) Even if the consecutive sentence issue had been resolved in advance, as the defense requested, arguments of counsel would not have been an adequate substitute for an instruction by the court. See *Simmons*, 114 S.Ct. at 2199 (Souter, J., concurring).

[64] A guidelines life sentence is a true life sentence without possibility of parole. See ***Stewart*** v. ***State,*** 549 So. 2d 171, 175 (Fla. 1989), cert. ***denied, 497*** U.S. 1031, 110 S.Ct. 3294, 118 L.Ed.2d 313 (1990); *Dolan* v. *State,* 618 So. 2d 271,272 (Fla. 2d DCA), ***review denied, 626 So. 2d 204*** (Fla. 1993); *Gresham* v. State, 506 So. 2d 41 (Fla. 2d DCA), cause *dismissed,* 509 So. 2d 1117 (Fla. 1987). Moreover, because of his first degree murder convictions, Mr. Walker would not be eligible for control release. § 947.146(3)(I), Fla. Stat. (1993 & Supp. 1994).

matter, life without possibility of parole.[65] As in ***Simmons,*** however, the prosecutor deliberately sought to conceal this fact from the jury by opposing the defendant's efforts to resolve his alternative sentences in advance.[66] 114 S.Ct. at 2194-95. The prosecution therefore "create[d] a false dilemma" for the jury, which it then deliberately exploited by contending that imposing the death penalty was the only way the jury could be "certain" Mr. Walker would never be released from prison and kill again. See ***id.*** at 2191, 2198, 2195.

The Mississippi Supreme Court, anticipating ***Simmons,*** has condemned precisely such prosecutorial manipulation of the sentencing process. ***Turner v. State, 573 So.*** 2d 657, 674-75 (Miss. 1990), ***cert. denied,*** 500 U.S. 1910, 111 S.Ct. 1695, 114 L.Ed.2d 89 (1991). In ***Turner, the state*** contended that the defendant was not entitled to an instruction on his parole ineligibility because his habitual offender status was "totally speculative" at the time of his capital sentencing hearing. The court observed, however, that any uncertainty regarding the defendant's parole ineligibility was solely the result of the discretionary practice of holding habitual offender hearings after the penalty phase and refused to accept this practice "as logical or justifiable. " ***Id.*** at 674-75. Because the habitual offender hearing could be held first, without "undue inconvenience," "logic and constitutional principles of due process and fundamental fairness" required that the defendant's parole ineligibility be resolved before the case is submitted to the jury at the penalty phase to allow the jury to consider accurate, "non-

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[65] While the Court's holding in ***Simmons*** specifically addresses only the defendant's right to inform the sentencing jury of a life without parole alternative, the underlying due process principles apply with equal force to a lengthy minimum mandatory term, 114 S.Ct. at 2201 (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., concurring). The fact tbat a 33-year-old defendant will be required to serve a minimum mandatory term of 50 years before being eligible for parole is a powerful, if not dispositive, response to jurors' fears that the defendant would kill again if ever released on parole. See ***Clark*** v. ***Tansy,*** 882 P.2d 527,533 (N.M. 1994) (where prosecution argued defendant would kill again if released on parole, defendant should have been permitted to establish and instruct jury that he would have been incarcerated until at least age 86 before becoming eligible for parole).

[66] A South Carolina statute prohibited parole for any prisoner who had previously been convicted and sentenced for a violent crime. ***Simmons,*** 114 S.Ct. at 2191 & n.2. Simmons proffered testimony, outside the jury's presence, by attorneys for the Department of Corrections and Department of Probation, Parole and Pardons to establish that his record would, in fact, make him ineligible for parole. ***Id.***

speculative information" about the alternatives to the death penalty. Id. at 675 (emphasis omitted).[67] Thus, due process does not permit the state, as it did here, to first insist that the defendant's parole ineligibility remain uncertain at the penalty phase and to then exploit that uncertainty to secure the death penalty by buttressing an (improper) aggravating circumstance of future dangerousness,

2. **Mitigating Evidence**

The prosecution's insistence that Mr. Walker's parole ineligibility remain uncertain also withheld from the jury relevant mitigating evidence and undermined the reliability of the capital sentencing process, in violation of the eighth amendment and article I, section 17 of the Florida Constitution.[68] This Court has properly recognized that the length of time a defendant would be "removed from society" if sentenced to life imprisonment is relevant mitigating evidence that the jury must be permitted to consider,[69] ***Jones v. State, 569*** So. 2d 1234, 123940 (Fla. 1990); ***accord Turner*** v. State, 645 So. 2d 444,448 (Fla. 1994) (jury's life recommendation could properly have been based

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[67] See ***also Clark,*** 882 P.2d at 534 (trial court must, upon defendant's request, impose sentence for noncapital convictions prior to jury deliberations on death penalty); ***State v. Henderson,*** 789 P.2d 603, 606-07 (N.M. 1990) (recommending procedure made mandatory in ***Clark).***

[68] " [R]egardless of whether future dangerousness is an issue at sentencing, " the eighth amendment "requires provision of 'accurate sentencing information,"' including the defendant's parole ineligibility, "as 'an indispensable prerequisite to a reasoned determination of whether [he] shall live or die,"' ***Simmons,*** 114 S.Ct. at 2198 (Souter, J., joined by Stevens, J., concurring) (quoting ***Gregg v. Georgia, 428*** U.S. 153, 190, 96 S.Ct. 2909, 2933, 49 L.Ed.2d 859 (1976)).

[69] Although in *Nixon* v. Stale, 572 So. 2d 1336, 1345 (Fla. 1990), cert. ***denied, 502*** U.S. 854, 112 S.Ct. 164, 116 L.Ed.2d 128 (1991), this Court construed Rule of Criminal Procedure 3.390(a), to prohibit instructions regarding the possible penalties for a capital defendant's contemporaneous felony convictions, the defendant in Nixon had not requested that the sentences for his noncapital convictions be imposed prior to the penalty phase deliberations to eliminate any element of uncertainty, and Rule 3.390(a) does not, by its terms, preclude an instruction that informs the jury of sentences actually ***imposed. See also Marquard v. State,*** 641 ***So.*** 2d 54, 57 (Fla. 1994), ***cert. denied,*** ___ U.S. ___, 115 S.Ct. 946, 130 L.Ed.2d 890 (1995); ***Gorby v. State, 630 So. 2d 544,548*** (Fla. 1993). To the extent that Nixon rests on the rationale that the jury should not be instructed on sentences for "offenses in which the jury plays no role in sentencing," 572 So. 2d at 1345, appellant respectfully submits *Nixon* should be reconsidered because (1) it is inconsistent with the plain language of Rule 3.390(a), which expressly exempts capital cases; (2) it is inconsistent with ***Jones and Timer, supra,*** which properly recognized the mitigating effect of information regarding the defendant's alternative sentences; ***and (3)*** for ***the*** reasons stated ***in*** *Clark* and ***Henderson,*** *supra,* it violates the defendant's rights under the state and federal constitutions to due process and to present mitigating evidence.

in part on fact that alternative to death sentences would have been two life sentences with combined minimum mandatory of 50 years).[70] Information regarding the defendant's parole ineligibility responds directly to the incapacitative goal of capital punishment, which is often of paramount importance to capital jurors.[71] A defendant's parole ineligibility is also highly relevant, when considered in conjunction with other mitigating evidence, to the retributive purposes of capital punishment. Thus, as this Court recognized in *Turner,* a jury could reasonably conclude that, in light of substantial mental mitigation which reduced or extenuated the defendant's moral culpability, a sentence of life imprisonment without parole for 50 years is sufficient punishment. 20 Fla. L. Weekly at S632. The same jury could well conclude, however, that a sentence of life imprisonment without parole for only 25 years would not be sufficient. The length of the defendant's parole ineligibility is therefore potentially dispositive of the jury's ability to give effect to other mitigating evidence and thus of its ultimate decision whether the death penalty or its alternative is the appropriate sentence.

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[70] Although such information may not "relate specifically to [the defendant's] culpability for the crime he committed," it nevertheless is "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" ***Skipper v. South Carolina, 476*** U.S. 1, 4-5, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986) (quoting *Lockett* v. ***Ohio, 438*** U.S. 586, 604, 98 S.Ct. 2954, 2965, 57 L.Ed.2d ***973*** (1978)); ***accord Jones, 569 So. 2d*** at 1239; ***Turner, 573 So. 2d*** at ***674; Henderson, 789*** P.2d at 606-07 (because jury would have "been more likely to impose a life sentence instead of a death sentence" if informed that defendant would serve consecutive terms totalling 55 years before being eligible for parole, jury should have been permitted to consider information as mitigation).

[71] The importance of incapacitation to capital jurors has been well documented. See, e.g., *Simmons,* 114 S.Ct. at 2191 (noting tbat 75 percent of respondents in South Carolina study indicated that length of time defendant "actually would have to spend in prison would be an 'extremely important' or 'very important' factor in choosing between life and death."); William Bowers, ***supra,*** 27 L. & Soc. Rev. at 169-70; Theodore Eisenberg & Martin T. Wells, ***Deadly Confusion: Juror Instructions in Capital Cases, 79*** Cornell L. Rev. 1, 7-8 (1993); J. Mark Lane, ***"Is there Life without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence, 26*** Loy. L.A.L. Rev. ***327,*** ___ (1993); William W. Hood III, ***Note, The Meaning of "Life" for Virginia Jurors and its Effect on Reliability in Capital Sentencing, 75*** Va. L. Rev. 1605, 1620-25 (1989); Anothy Paduano & Clive A. Stafford Smith, ***Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty,*** 18 Colum. Hum. Rts. L. Rev. 211, 221-25 (1987); *cf.* ***Waterhouse v. State, 596 So.*** 2d 1008, 1015 (Fla. 1992) (jury inquired on resentencing whether time defendant had already served would be credited against his minimum mandatory); ***Downs v. State, 572 So. 2d 895,*** 900-01 (Fla. 1990) (same).

In this case, although defense counsel was permitted to argue to the jury that Mr. Walker *could* be given consecutive life sentences tbat would preclude him from ever being released from prison, that argument in mitigation was negated completely by the prosecution's contention tbat the uncertainty of such sentences actually being imposed militated in favor of the death penalty. Indeed, given the prosecution's improper injection of the issue of future dangerousness into the sentencing proceedings, the alternatives to the deatb penalty plainly became an aggravating circumstance and had no mitigating effect whatsoever. Because the jury in this case was precluded from considering Mr. Walker's parole ineligibility in mitigation, and was invited to rely on the non-statutory aggravating circumstance of future dangerousness, the weighing process was unfairly and improperly skewed toward death, thereby " 'diminish[ing] the reliability of the sentencing determination"' in violation of the eighth amendment and article I, section 17. See *Simmons,* 114 S.Ct. at 2198 (Souter, J., concurring) (quoting ***Beck v. Alabama, 447*** U.S. 625,638, 100 S.Ct. 2382, 2390, 65 L.Ed.2d 392 (1980)); *Clark,* 882 P.2d at 534; ***Turner, 573 So. 2d*** at 675; *cf. Jackson* ***v. State,*** 648 ***So.*** 2d 85, 90 (Fla. 1994); ***Elledge, 346 So.*** 2d at 1003.

State as well as federal principles of due process and reliability in capital sentencing therefore require reversal in this case for a new sentencing before the jury.[72]

C. The Prosecutor's Misconduct in Injecting the Issue of Future Dangerousness into the Sentencing Proceeding and the Trial Court's Refusal to Determine and Instruct the Jury That the Defendant Would Not Be Eligible for Parole for Fifty Years Cannot Be Deemed Harmless Beyond a Reasonable Doubt Where the Jury Recommended Death by a Vote of Only Seven to Five.

This Court has recognized that making the defendant's future dangerousness an issue in sentencing is particularly likely to skew the balancing process toward death because it not only adds

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[72] Consistent with the primacy doctrine adopted in *Traylor* v. *State,* 5% So. 2d 957, 962 (Fla. 1992), this Court has construed both the due process (article I, section 9) and excessive punishments (article I, section 17) clauses of the Florida Constitution more broadly than their federal counterparts. See ***Allen v. State, 636*** So. ***2d 494,497 &*** n.5 (Fla. 1994) (article I, section 17); ***Tillman*** v. State, 591 ***So. 2d*** 167, 169 ***&*** n.2 (Fla. 1991) ***(same); Dep't of Law Enforcement v. Real Property, 588 So.*** 2d 957, 964-66 (Fla. 1991) (article I, sections 9 and 17); *Kritzman v.* ***State, 520 So.*** 2d ***568, 570*** (Fla. 1988) (article I, section 9).

one more (improper) aggravating circumstance to the sentencing equation, but may also turn mitigating circumstances into aggravating factors. ***Miller, 373 So.*** 2d at 885-86. Similarly, as discussed above, withholding from the jury accurate information regarding the length of a defendant's parole ineligibility may preclude jurors from giving effect to other mitigating evidence. In this case, where the jury recommended death "by only a one-vote margin," the erroneous introduction of future dangerousness as a consideration in sentencing and the improper limitations on the jury's ability to consider and give effect to relevant mitigating evidence cannot be found harmless beyond a reasonable doubt. ***Rivera v. Dugger, 629 So. 2d*** 105, 109 (Fla. 1993).[73]

All of the aggravating circumstances found by the trial judge arose from this crime.[74] The unrebutted mitigating evidence established that Mr. Walker had an abusive childhood; has an IQ of only 76; suffers from organic brain damage; and exhibited signs of mental illness since at least early adolescence. Mr. Walker's natural mother abandoned him when he was between 13 and 17 months old and malnourished as a result of her neglect. (T. 1826-27) He was raised by his father and a stepmother, Ann Chambers, whom he believed to be his biological mother until his early teens. (T. 1828, 2165-66) Numerous family members testified at the penalty phase that James' father was dictatorial, physically and verbally abusive, and never showed affection to James. (T. 1833-34, 2043, 2026-27, 2162-63) The environment in the Walker household was tense and often violent; from an early age, James was terrified of his father. (T. 1834-35, 2037, 2039) James suffered bouts of depression as a child, often locking himself in his room and staying in bed. (T. 2184) Shortly before

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[73] ***Accord Phillips v. State,*** 608 So. 2d 778,783 (Fla. 1992), cert. ***denied,*** U.S. ___, 113 S.Ct. ***3005,*** 125 L.Ed.2d 697 (1993); ***Way v. Dugger, 568 So.*** 2d 1263, 1267 (Fla. 1990); ***Preston v. State,*** 564 So. 2d 120, 123 (Fla. 1990); ***Mikenas v. Dugger,*** 519 So. 2d 601,602 (Fla. 1988); ***Morgan v. State,*** 515 So. 2d 975,976 (Fla. 1987), cert. ***denied, 486*** US. 1036, 108 S.Ct. 2024, 100 L.Ed.2d 610 (1988); ***Floyd*** v. ***State, 497 So.*** 2d 1211, 1215 (Fla. 1986).

[74] The trial judge found as aggravating circumstances: (1) prior violent felony, based on the double homicide; (2) pecuniary gain, (3) HAC; and (4) CCP. The judge properly merged the aggravating circumstances of pecuniary gain and CCP, as they were based on the same aspect of the offense. (R. 583) The sufficiency of the evidence in support of each of these aggravating circumstances is discussed below.

James' father and Ann Chambers divorced, when James was 13 or 14 years old, he became severely depressed and had a "nervous breakdown" tbat required medical attention. (T. 2172) James' father subsequently moved to Fort Lauderdale and severed all ties with his family -- who had been the main source of love and affection in James' life -- when he became convinced that his mother (James' grandmother) was trying to poison him. (T. 2170-71, 2184-85)

After high school, Mr. Walker served in the Army. (T. 1837, 2031) After being honorably discharged, Mr. Walker returned to Miami and worked as a security guard and then as a bailiff. (T. 2182) He had two impulsive and unsuccessful marriages before he married Vanessa Walker. (T. 2176) In 1988, his employer, a circuit court Judge, became concerned about Mr. Walker's behavior at work and asked a psychologist, Dr. Leonard Haber, to evaluate him. (T. 2016) Based on his assessment, Dr. Haber was concerned about Mr. Walker's impulsive tendencies and his thoughts about harming his ex-wife and possibly others and concluded that Mr. Walker required immediate psychological treatment. (T. 2017-18) Dr. Haber referred Mr. Walker to another psychologist, Dr. Ronald Bergman, who diagnosed Mr. Walker as having paranoid personality disorder. (T. 1809-10) Dr. Bergman found that Mr. Walker was highly distrustful of others, especially women; he felt mistreated by others and believed they were always trying to take advantage of him; and he overreacted to interpersonal difficulties. (T. 1810-12) Dr. Bergman concluded tbat Mr. Walker experienced deep internal rage which, at that time, was only slightly visible on the surface, manifested as generalized agitation. (T. 1812) Although Mr. Walker stopped seeing Dr. Bergman after about seven months, Dr. Bergman kept his file open, because he expected Mr. Walker would need help in the future. (T. 1811)

The psychologists who examined Mr. Walker after his arrest concluded that he suffered from borderline personality disorder with paranoid features as well as indications of manic depression. (T. 1765-84, 1787, 2073) Dr. Eisenstein, the neuropsychologist, also found that Mr. Walker suffered

significant organic impairment and has an IQ of only 76, in the low borderline range.[75] (T. 2062, 2070-71) The combination of mental illness and organic brain damage is worse than either one alone and substantially impairs Mr. Walker's ability to make rational, moral decisions in highly stressful situations. (T. 207 1, 2074-75) The unrebutted testimony of four mental health experts therefore established tbat Mr. Walker had serious psychological problems, dating back well before the crimes he committed.

The homicides in this case arose from an extramarital affair gone bad. Mr. Walker had continued his relationship with Joanne Jones after his marriage to Vanessa Walker and fathered an illegitimate child, Quinton Jones. As he was attempting to reconcile with Vanessa, from whom he had been separated, Joanne sued him to establish paternity and recover back child support Shortly before the homicides, Vanessa learned that James had a child with Joanne, when she discovered that money for child support was being withheld from his paychecks, (T. 1223)

Even a psychologically healthy person could be expected to feel that his life was unraveling as he faced the potentially devastating consequences of an extramarital affair. Mr. Walker, however, perceived the world through a paranoid lens, which created a well of internal rage even in less stressful periods of his life. (T. 1812) This, together, with his irrational and impulsive decision-making were sufficient to cause concern to the psychologists who saw him five years before the homicides. (T. 1811, 2017-18) Both of the psychologists who examined Mr. Walker after his arrest concluded he was acting under extreme emotional disturbance at the time of the crime. (T. 1791, 2076-77) Dr. Eisenstein also believed that the combination of Mr. Walker's mental illness and organicity had substantially impaired his ability to conform his conduct to the requirements of law.[76] (T. 2076-77)

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[75] Although Dr. Eisenstein applied the more conservative standard that an IQ of 69 or below constitutes mental retardation, (T. 2054-55), the American Association of Mental Retardation now classifies individuals with IQ scores of 75 or below as presumptively retarded. *Wills v. Texas,* *U.S.* ___, 114 S.Ct. 1867 n.1, 128 L.Ed.2d 488 (1994) (Blackmun, J., dissenting from deniaiif certiorari).

[76] Dr. Toomer believed this statutory mitigating circumstance was "very likely applicable" given the nature of Mr. Walker's illness but could not state to a reasonable psychological certainty that

The mitigating evidence in this case establishes that James Walker was severely damaged psychologically as a result of organic brain damage, mental illness and a history of childhood abuse. The evidence also established that, while Mr. Walker could function relatively well in a highly-structured environment where someone tells him what to do or guides his conduct, his ability to make rational, moral judgments under stress in a complex, unstructured environment was seriously impaired. (T. 2071, 2074-75) As in ***Miller,*** this mitigating evidence became a double-edged sword once the prosecution improperly injected the issue of future dangerousness into the sentencing process. The prosecutor deliberately provoked the jurors' fears that Mr. Walker's mental problems made him a continuing threat to society by asking Dr. Eisenstein if Mr. Walker might kill again and then played on those fears again by arguing that imposing the death penalty was the only way to be. "certain" Mr. Walker would never be released from prison,

Those fears could have been assuaged if the trial court had granted the defendant's request to determine and instruct the jury that the alternative to the death penalty would be consecutive life sentences with a combined minimum mandatory term of 50 years, effectively a sentence of life without parole for a 33 year-old defendant, Because Mr. Walker's parole ineligibility was left uncertain, however, the implication of future dangerousness could not be effectively rebutted, and the jury was instead led to believe that Mr. Walker could be released on parole after serving only a 25-year minimum mandatory term. These errors not only precluded the jury from considering Mr. Walker's parole ineligibility as a mitigating circumstance but also interfered with its ability to give effect to substantial mitigating evidence regarding his abusive childhood, low IQ, organic brain damage, and mental illness. In the circumstances of this case, where one juror's vote would have made the difference between recommendations of death and life imprisonment, and there was substantial mitigating evidence to support a life sentence, these errors cannot be deemed harmless beyond a reasonable doubt. ***Phillips, 608 So.*** 2d at 783.

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it applied. (T. 1793, 2010)

VI.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT A GRAPHIC DESCRIPTION OF DEATH BY DROWNING WHEN THERE WAS NO EVIDENCE THAT THE VICTIMS WERE CONSCIOUS SO THAT THE TESTIMONY WAS IRRELEVANT AND INADMISSIBLE, IN VIOLATION OF SECTIONS 90.401 AND 90.403, FLORIDA STATUTES, THE FLORIDA CONSTITUTION ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

At the penalty phase, the prosecution re-called the Medical Examiner, Dr. Williams, to support the HAC aggravating circumstance. Dr, Williams reiterated that Joanne Jones' death was caused by a combination of drowning, smothering, and strangulation, and the prosecutor then asked him to describe the process of drowning. (T. 1711-12) The defense objected that since Dr. Williams was unable to say whether Joanne Jones was conscious when she drowned,[77] his testimony about drowning was irrelevant and would only inflame the jury. (T. 1712-13) The prosecutor contended that the issue was for the jury to decide, and the objection was overruled. (T. 1713) Dr. Williams proceeded to provide a detailed description of drowning, explaining that the victim engages in a struggle to keep above water, then tries to hold his or her breath; that carbon dioxide builds up, stimulating the brain to want to breatbe, until tbe victim finally gasps and inhales water. (T. 1714) He elaborated that the victim may choke and vomit and, eventually, as water fills the lungs, seizures occur, the heart becomes more stressed and beats irregularly, and the victim dies within between 3 and 5 minutes.[78] (T. 1714)

Dr. Williams' testimony was inadmissible under both sections 90.401 and 90.403 of the Evidence Code. §§ 90.401, 90.403, Fla. Stat. (1993). As an initial matter, the prosecutor's contention that, absent affirmative evidence tbat the victims were unconscious, the issue was a factual matter for

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[77] At the guilt innocence phase, Dr. Williams testified that he could not say to a reasonable medial certainty whether Ms. Jones was conscious when she drowned. (T. 1078, 1080) With respect to Quinton Jones, he found no anatomic evidence of drowning and, in his opinion, Quinton Jones died as a result of suffocation caused by the placement of duct tape over his mouth and nose. (T. 1066-67)

[78] At the penalty phase, Dr. Williams again agreed that the physical evidence was consistent with Ms. Jones' having been unconscious when she drowned and that, although the physiological signs of drowning would be present whether or not a person was conscious, the psychological struggle he had described requires consciousness. (T. 1722-27, 1729-31)

the jury, was incorrect. The victim's consciousness is an essential element of the HAC aggravating circumstance, on which the state bears the burden of proof.[79] In this case, the state's own expert testified that he could not say that the victim was conscious when she drowned. Thus, the state failed to make out even a prima facie case with regard to an element it was required to prove beyond a reasonable doubt. Having failed to establish the essential factual predicate of the victim's consciousness, Dr. Williams testimony regarding the conscious experience of drowning was plainly irrelevant under section 90.401 and was therefore inadmissible. Second, even if the testimony was "relevant" it was not admissible under section 90.403, The probative value of Dr. Williams' testimony was negligible, because it was contingent on pure speculation, That is, to find his testimony probative at all, the jurors would have to speculate that, contrary to the medical evidence, Ms. Jones was conscious. At the same time, his graphic description of drowning, evoking both the psychological and physical terror of such a death, was highly inflammatory and posed a substantial danger of unfair prejudice. The jurors were invited to find the HAC aggravating circumstance based not on the actual medical evidence but on their emotional response to Dr. Williams' horrific description of drowning. § 90.403, Fla. Stat. (1993); *McClain,* 525 So. 2d at 422 ("unfair prejudice" standard bars evidence "which inflames the jury or appeals improperly to the jury's emotions) (quoting C.W. EHRHARDT, *supra,* § 403.1). The trial court's error in admitting this inflammatory evidence was particularly egregious because the court also refused, as discussed further below, to instruct the jury that actions or events occurring after the unconsciousness or death of the victim are not relevant to establish HAC.

[79] See cases cited *infra* note 100.

VII.

THE PROSECUTOR'S CLOSING ARGUMENT, IN WHICH HE ATTACKED THE DEFENSE AND THE LEGITIMACY OF MENTAL MITIGATING CIRCUMSTANCES AND ASKED THE JURORS REPEATEDLY TO IMAGINE THEMSELVES IN THE POSITION OF THE VICTIMS WAS IMPROPER AND INFLAMMATORY AND DEPRIVED THE DEFENDANT OF A FUNDAMENTALLY FAIR AND RELIABLE SENTENCING PROCEEDING IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17 AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

The prosecutor's closing argument in this case was pervaded by improper and inflammatory remarks which deprived the defendant of a fundamentally fair sentencing proceeding and undermined the reliability of the jury's recommendation.

A. Attacks on Defense Counsel, Defense Witnesses and Mitigation Evidence

First, the prosecutor engaged in a sustained, sarcastic attack on the doctors who testified for the defense, including characterizing Dr. Toomer as a "hired gun," (T. 2235), and suggesting that Dr. Bergman had manufactured a diagnosis to obtain insurance *money*. (T. *2233)* (the "DSM which is a book made up of all the personality disorders *which is very useful when you want to get paid by an insurance company"*). This attack culminated in the charge that, in the defense of capital cases, as in personal injury cases, unethical lawyers and doctors collude to distort and falsify a client's diagnoses:

> You know, attorneys aren't always presented in the best light, ladies and gentlemen. They have skeletons in their professional closets. You bear bad things about worker's comp. lawyers and PI [personal; injury] lawyers, but these lawyers who are casting such a bad light couldn't make any money without doctors who are willing to come in to testify that an injury is there, when you can't see it. A doctor who will say there is a whiplash when you can't see it. A doctor who will say there is emotional distress when there is no other evidence of it.

(T. 2250) The trial court sustained defense counsel's objection to this argument and admonished the prosecutor that he had impermissibly attacked defense counsel. (T. 2251) The judge denied the defense motion for mistrial but warned the prosecutor "you are in a serious problem" and directed him to "[c]lear it up." (T. 2251)

When he resumed his argument, however, the prosecutor stated: "The point is, ladies and gentlemen, with regard to skeletons in closets, you have heard the live testimony of two skeletons, Dr.

Toomer and Dr. Eisenstein. And my remarks were intended only -- and directed only at them. " (T. 2251) He then went on to characterize the expert's opinions as "a joke." (T. 2252) Far from correcting the implication of collusion and fraud, the prosecutor's "clarification" simply completed his metaphor that doctors Toomer and Eisenstein were "skeletons" in the closet of unethical defense lawyers.

Florida courts have admonished repeatedly that "[v]erbal attacks on the personal integrity of opposing counsel, rather than appropriate comments on the credibility of witnesses and inferences to be drawn from the evidence before the jury, are wholly inconsistent with the prosecutor's role." *Redish* v. *State,* 525 So. 2d 928, 931 (Fla. 1st DCA 1988) (reference to defense counsel's "cheap tricks").[80] It is equally unprofessional and improper for a prosecutor "to apply offensive epithets to defendants or their witnesses." *Green v. State, 427 So. 2d* 1036, 1037 (Fla. 3d DCA), *review denied,* 438 So. 2d 834 (Fla. 1983). Thus, the prosecutor's belief tbat his remarks would be perfectly acceptable if directed solely at the witnesses was erroneous. The attacks on the personal integrity of doctors Toomer and Eisenstein went beyond legitimate comments on their credibility. See *Nowitzke* v. *State,* 572 So. 2d 1346, 1350-54 (Fla. 1990) (prosecutor's sustained attacks on defense witnesses exceeded proper bounds of impeachment).

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[80] *Accord Adams v. State,* 192 So. 2d 762,764 (Fla. 1966) (characterizing defense counsel as "twist[ing]" statements, "pervert[ing] and "distort[ing]" facts); *Valdez v. State,* 613 So. 2d 916, 918 (Fla. 4th DCA 1993) (arguing that defense counsel failed to give jury "accurate story"); *Jenkins v. State, 563* So. 2d 791,791 (Fla. 1st DCA 1990) (accused defense counsel of seeking acquittal at all *costs); Fuller v. State, 540 So.* 2d 182, 184-85 (Fla. 5th DCA 1989) (suggested it was "sinister and improper" for defense counsel to reserve opening statement); *Ryan v. State, 457 So.* 2d 1084, 1089 (Fla. 4th DCA 1984) (implying defense counsel was dishonest with *jury), review denied, 462 So. 2d* 1108 (Fla. 1985); *Briggs v. State, 455 So,* 2d 519, 521 (Fla. 1st DCA 1984) (suggesting defense counsel being untruthful and deliberately misleading jury); *Peterson v. State, 376 So. 2d* 1230, 1234 (Fla. 4th DCA 1979) (police "not only , , . have to crawl down there and deal with people like [defendant], but they have *to* deal with people like *his* lawyer"), *cert. denied, 386 So. 2d 642* (Fla. 1980).

The prosecutor also improperly denigrated the mitigating evidence and attacked the legitimacy of mental illness and borderline intelligence as mitigating circumstances.[81] Despite the complete absence of evidence suggesting that the diagnostic instruments or methods used by the doctors who testified for the defense were in any way invalid or scientifically flawed, the prosecutor repeatedly ridiculed the testing instruments and suggested they were not legitimate or scientifically accepted. (T. 2240-41, 224445224647) Similarly, although the prosecution had presented no evidence regarding the prevalence of personality disorders, the prosecutor contended tbat Mr. Walker had a personality disorder "like so many people" and dismissed Dr. Bergman's diagnosis with the remark, "Big deal."[82] (T. 2233). With regard to doctors Toomer and Eisenstein, the prosecutor again asserted, "And you know when it was finished, all the testimony to wrap up the medical evidence, what do you have, what do you have? Borderline personality, maladapted behavior. ***Big &al. Big &al. A lot of people have that . . . And it certainly doesn't excuse the murder of these people."*** (T. *2249-50) In the same vein,* the prosecutor erroneously asserted that Mr. Walker's IQ was only "4 points short of average" and contended that, ***"It's no big deal*** to be at 76, it doesn't excuse this double murder." (T. 2245) In fact, Mr. Walker's IQ is 24 points below average, in the borderline range. (T. 2054-55) Finally, he repeatedly mischaracterized the definition and function of mitigating evidence, maintaining that "it certainly doesn't excuse" the homicides. (T. 2229, 2245, 2249-50).

The prosecutor therefore conveyed to the jury that the mitigating evidence was fabricated by unethical defense lawyers and their "hired gun" experts, that mental retardation and personality disorders are cornmon and insignificant, and in any event are legally irrelevant because they cannot

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[81] See *Garron,* 528 So. 2d at 357 ("it is reversible error to place the issue of the validity" of a legitimate and lawful defense "before the jury in the form of repeated criticism of the defense in general"); see ***also Riley*** v. ***State,*** 560 So. 2d 279, 280 (Fla. 3d DCA 1990) (prosecutor "may not ridicule a defendant or ***his theory*** of defense"); ***accord Rosso v. State, 505 So. 2d*** 611, 613 (Fla. 3d DCA 1987).

[82] On cross examination, Dr. Bergman had agreed with the prosecutor's assertion that paranoid personality disorder is "not an entirely uncommon phenomena ***[sic],"*** (T. 1814), and tbat the DSM-III describes hundreds of mental illnesses, (T. 1816). This, however, is far from providing adequate evidentiary support for the assertion that "so many people" have personality disorders.

"excuse" the crimes. The combined effect of these remarks was to invite the jury improperly to ignore valid mitigating circumstances that were established by unrebutted expert testimony.

B. "Golden Rule" Arguments

The prosecutor also repeatedly asked the jurors to put themselves in the victims' shoes and to answer the victims' cries with the death penalty:

> [MR. RUBIN:] Let's talk about Quinton. Seventeen-month-old baby, taken out that night by his mother to spend time with his daddy. Okay. Can you ***imagine what must have gone through his little mind when the altercation began?***
>
> MR. McDONALD: Objection, golden rule argument
>
> THE COURT: Overrule the objection.
>
> ***MR. RUBIN:*** ***Can you imagine? . , . . [Quinton] taped, thrown through the air into the water by a person that you love and trust. Blood of your blood, your own father, your own uncles.*** Alone, scared, duct taped at night, gasping for air and life. God knows how long it took but two seconds would be too long and you know it didn't take ***two*** seconds. ***Try to imagine*** ***if you*** can, that is what he did. (T. 2220-21)
>
> . . . .
>
> [MR. RUBIN:] . . . I submit to you, ladies and gentlemen, that the aggravating factors outweigh any mitigating evidence. ***Just imagine one final time that 17-month-old baby gasping for air.***
>
> MR. McDONALD: I object to this and request a side-bar.
>
> THE COURT: Overrule the objection.
>
> MR. RUBIN: Let's talk about time, ***I would ask you to sit here and watch the clock and see how long ten seconds even takes, to be gasping for air and getting water through the tape, imagine how those people suffered, imagine how that baby must have cried out.*** (T. 2253)
>
> . , . .
>
> ***[MR. RUBIN:] This case cries out, ladies and gentlemen, for the death penalty as loudly as Joann [sic] Jones and Quinton Jones must have cried out that night.*** ***You*** are the voice of the community, ladies and gentlemen. You have heard the evidence, you will hear the law. ***Answer those cries with your verdicts.*** Tell the defendant with your verdicts --
>
> MR. McDONALD: Objection, Your Honor.
>
> THE COURT: Overruled. (T. 2256)

This argument was in flagrant violation of the long-standing prohibition on "Golden Rule" arguments which improperly "inject elements of emotion and fear into the jury's deliberations." *Garron, 528 So. 2d* at *358-59 &* n.6; *accord King v. State, 623 So.* 2d 486,488 (Fla. 1993); Rhodes *v. State, 547* So. 2d 1201, 1205-06 (Fla. 1989); *Bertolotti v. State, 476 So.* 2d 130, 133 (Fla. 1985) ("the prohibition of such remarks has long been the law in Florida"). Indeed, Mr. Rubin's argument bears such striking resemblance to the argument in *Garron* that he could have used the published decision as his model. Nevertheless, the trial court overruled defense counsel's repeated objections, denied a request for side-bar, and allowed the prosecutor's improper and inflammatory argument to continue unchecked.

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This Court has admonished that inflammatory and improper arguments at the penalty phase of a capital case are a "violation[] of the prosecutor's duty to seek justice and not merely 'win' a death recommendation." *Garron, 528* So. 2d at 359 (citing ABA Standards for Criminal Justice 3-5.8 (1980)); *accord Bertolotti, 476 So.* 2d at 133. Particularly "[i]n a close case . . . where the jury is walking a thin line between a verdict of [life and death], the prosecutor cannot be allowed to push the jury to the side of [death] with improper comments such as these." Ryan, 457 So. 2d at 1091. The trial court's failure to check the prosecutor's patently improper argument cannot be found harmless beyond a reasonable doubt where, as here, the argument could have "sway[ed] . . . the vote of only one juror," making the "critical difference? between a bare-majority death recommendation and a "six to six [vote] , . . resulting in a recommendation of life." *Phillips, 608 So.* 2d at *783; accord Rivera, 629 So.* 2d at 109; *Way, 568 So. 2d* at 1266; *Preston, 564 So. 2d* at 123; *Alvin v. State, 548 So.* 2d 1112, 1115 (Fla. 1989); *Morgan,* 515 So. 2d at 976.

VIII.

THE TRIAL COURT'S REFUSAL TO GIVE THE DEFENDANT'S REQUESTED INSTRUCTIONS ON MITIGATING CIRCUMSTANCES PRECLUDED THE JURY FROM GIVING EFFECT TO MITIGATING EVIDENCE AND UNDERMINED THE RELIABILITY OF THE JURY'S RECOMMENDATION, IN VIOLATION OF THE FLORIDA CONSTITUTION ARTICLE I, SECTION 17 AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

The defense objected below to several aspects of the standard jury instructions on the ground that they restricted tbe jury's ability to consider and give effect to mitigating evidence, in violation of the eighth amendment and article I, section 17 of the Florida Constitution and requested special instructions to remedy each of these defects.[83] Each instruction is discussed in turn below:

A. The Trial Court Improperly Refused to Give the Defendant's Requested Instruction Defining Mitigating Evidence.

First, the defense objected tbat the standard instructions fail adequately to inform the jury of the meaning and function of mitigating circumstances and therefore preclude the jury from giving effect to mitigating evidence, particularly evidence supporting non-statutory mitigating circumstances. The defense therefore requested a special instruction defining "mitigating circumstances" as "those factors which, in fairness and mercy, may be considered as grounds for imposing a sentence less than death. Mitigating circumstances include any aspect of the defendant's background and life which may create a doubt whether death by electrocution is the appropriate sentence for the defendant." (R. 475, 518) The requested instruction is an accurate statement of the law[84] and has been approved by both

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[83] Each objection to the standard instructions and each denial of a corresponding defense instruction discussed below is asserted to be a violation of the eighth amendment and of article I, section 17 of the Florida Constitution. See *Penry v. Lynaugh, 492* U.S. 302, 319, 109 S.Ct. 2934, 2951,106 L.Ed.2d 256,283 (1989); *Accord Lockett v. Ohio, 438* U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978); *Eddings* v. *Oklahoma,* 455 U.S. 104, 113-15, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1980); *Skipper v. South Carolina, 476* U.S. 1, 4-8, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986); *Hitchcock v. Dugger,* 481 U.S. 393, 398-99, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987); *Mills v. Maryland, 486* U.S. 367,37677, 108 S.Ct. 1860, 1866, 100 L.Ed.2d 384 (1988); *Copeland v. Dugger, 565 So. 2d* 1348, 1349-50 (Fla. 1990); *Downs v. Dugger,* 514 So. 2d 1069, 1070-71 (Fla. 1987).

[84] Mitigating factors include any evidence that tends to "extenuat[e] or reduc[e] the degree of moral culpability for the crime committed." *Cheshire v. State, 568 So. 2d 908,* 911 (Fla. 1990) (quoting *Rogers v. State,* 511 So. 2d *526, 534* (Fla. 1987), *cert. denied, 484* U.S. 1020, 108 S.Ct.

this Court and the Eleventh Circuit Court of Appeals.[85] Moreover, "there is a reasonable likelihood" that, without the special instruction defining mitigation, the jury in this case applied the standard instructions "in a way that prevent[ed] the consideration of constitutionally relevant evidence." *Boyde v. California, 494* U.S. 370,380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990); see *also Mills, 486* U.S. at 375-76.[86] The prosecutor repeatedly told the jury that the mitigating evidence of childhood abuse, mental illness, and borderline intelligence could not "excuse" the homicides. (T. 2229, 2245, 2249-50) This argument suggested that the jurors should disregard the mitigating evidence because it did not rise to the level of a legal justification or excuse -- a patently erroneous and misleading statement of the law.[87] The trial court's refusal to give the defendant's requested instruction was therefore reversible error. ***See California v. Brown, 479*** U.S. 538, 546, 107 S.Ct. 837, 842, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring); *Penry, 492* U.S. at 326.

733, 98 L.Ed.2d 681 (1988)); ***accord Maxwell v. State, 603 So, 2d 490,491*** n.2 (Fla. 1992).

[85] ***Peek v. Kemp, 784*** F.2d 1479, 1490 n. 12 (11th Cir.) (en banc) (instruction defining mitigating circumstances is "manifestly desirable," though not constitutionally required in all cases), ***cert. denied, 479*** U.S., 107 S.Ct. 421, 93 L.Ed.2d 371 (1986); ***Jones v. State, 652 So. 2d 346,*** 351 (Fla. 1995) (holding that jury was not improperly restricted in its consideration of non-statutory mitigating circumstances where jury was given both "catch-all" instruction and instruction defining mitigation), ***petition for certiorari filed*** (June ***28,*** 1995); see ***also Watkins v. Murray, 493*** U.S. 907, 910, 110 S.Ct. 266,267, 107 L.Ed.2d 216 (1989) (Marshall, J., dissenting from denial of ***certiorari)*** ("'Mitigating evidence' is a term of art, with a constitutional meaning that is unlikely to be apparent to a lay jury[,]" absent a clarifying instruction); ***Johnson v. Kemp, 759*** F.2d 1503, 1508-09 (11th Cir. 1985).

[86] As discussed further below, the catch-ah instruction was not sufficient, by itself, to make clear that evidence proffered to support the statutory mental mitigating circumstances could be considered in mitigation even if it did not satisfy the statute's restrictive language. The special instruction would have corrected this ambiguity and ensured that the jurors were properly able to give effect to non-statutory as well as statutory mitigation. *Cf. Jones, 652 So.* 2d at 35 1.

[87] ***See Morgan v. State, 639 So, 2d 6,*** 13 (Fla. 1994); *Knowles* ***v. State, 632 So.*** 2d 62, 67 (Fla. 1993); *Campbell* ***v. State,*** 571 So. 2d 415, 418-419 (Fla. 1990); ***Huckaby v. State, 343 So. 2d 29, 33*** (Fla.), cert. ***denied, 434*** U.S. 920, 98 S.Ct. 393, 54 L.Ed.2d 276 (1977); *Dixon* ***v. State, 283 So. 2d*** 1, 10 (Fla. 1973), ***cert. denied sub nom Hunter v. Florida,*** 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

B. Tbe Trial Court Erred in Refusing to Modify tbe Standard Instructions Regarding the Statutory Mitigating Circumstances of Mental or Emotional Disturbance and the Capacity of the Defendant to Conform His Conduct to tbe Requirements of Law.

Defense counsel also objected that the adjectives "extreme" and "substantially" in the standard instructions for the statutory mental mitigating circumstances[88] improperly restrict the jury's ability to consider and give effect to relevant mitigating evidence and therefore requested that the restrictive language be deleted. (T. 2154-56; R. 438) Although this Court held in *Johnson v. State,* 20 Fla. L. Weekly S343, S346 (Fla. July 13, 1995), that such an instruction would violate the separation of powers doctrine by requiring the trial court to "rewrite the statutory description of mental mitigators," appellant respectfully submits tbat modifying the instructions on the statutory mitigating circumstances to cure an eighth amendment defect does not violate separation of powers principles any more than expanding the instructions on aggravating circumstances to cure unconstitutional vagueness. This Court correctly held *in Cheshire* that "it clearly would be unconstitutional for the state to restrict the [sentencer's] consideration solely to 'extreme' emotional disturbances. Under the case law, my emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say." *568 So.* 2d at 912; *accord Hitchcock v. Dugger, 481* U.S. 393,398~99, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987).

Moreover, the "catch-all" instruction is not sufficient, by itself, to inform the jurors of their obligation to consider in mitigation evidence that does not satisfy the statute's restrictive terms.[89] The catch-all instruction advises the jurors to consider "any *other* aspect of the defendant's character or record, and any *other* circumstance of the offense," and is therefore at best ambiguous as to the jurors' obligation to consider evidence on an aspect of the defendant's character or record or a circumstance

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[88] §§ 921.141(6)(b) & (f), Fla. Stat. (1993).

[89] Appellant acknowledges that this Court has "repeatedly upheld" the standard instructions on mitigating circumstances. *Walls v. State,* 641 *So,* 2d 381,389 (Fla. 1994), *cert. denied,* ___ U.S. ___, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995). Nevertheless, appellant respectfully submits that the clarity and effectiveness of the catch-all instruction should be reexamined.

of ***the offense*** that is ***already covered by the enumerated mitigating circumstances.*** (T. 2287) The instructions, read as a whole, improperly suggest that emotional disturbance or mental illness must reach the statutory level to be considered at all, since only "other" aspects of the defendant's character or circumstances of the offense are covered by the catch-all instruction. The probability that the instructions were so construed was particularly great in this case, because the prosecutor contended both during his cross examination of the defense witnesses and in his closing argument that the evidence did not establish that Mr. Walker was under "extreme" emotional disturbance at the time of the crime. (T. 1972-78, 2242) The trial court's refusal to give the defendant's requested instruction was therefore error.

C. **The Trial Court Erred in Refusii to Modify the Standard Instructions to Clarify That Consideration of Mitigating Circumstances Is Mandatory Rather than Permissive and That Mitigating Circumstances Need Not Be Found Unanimously.**

The defense also objected that the standard instructions improperly state that the jury "may" consider mitigating circumstances and requested that the standard instruction be modified to clarify tbat the jury "shall consider" mitigating circumstances established by the evidence. (T. 2142; R. 438,475 76,519) As this Court has admonished, the sentencer in a capital case "may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from.. . consideration. " ***Campbell,*** 571 So. 2d at 419 (quoting ***Eddings,*** 455 U.S. at 114-15).[90] Thus, while the jurors may decide what weight to assign to each mitigating factor, they ***must*** consider the mitigating circumstances established by the evidence. The permissive language in the standard instruction is therefore legally incorrect and misleading. The trial court's error in refusing modify the standard instruction was compounded in this case by the prosecutor's similar misstatement of the law during closing argument, in which he told the jurors that, after finding one or more aggravating

[90] ***Accord Dailey v. State, 594 So. 2d 254, 259*** (Fla. 1991); ***Brown v. State, 526 So. 2d 903, 908*** (Fla.), ***cert. denied, 488 U.S. 944,*** 109 S.Ct. 371, 102 L.Ed.2d 361 (1988); ***Downs,*** 514 So. 2d at 1070-71.

circumstances, "then you may consider any mitigating evidence tbat has been offered."[91] (T. 220445) The requested modification would have ensured that the jurors understood their obligation to consider mitigating circumstances. *Cf. Brown, 479* U.S. at 545 (O'Connor, J., concurring) (jurors must be clearly informed "that they *are to consider* any relevant mitigating evidence") (e.s.).

The defense also objected that the standard instructions improperly suggest that mitigating circumstances must be found unanimously and requested that the standard instruction be modified to inform the jury that "Mitigating circumstances do not have to be found unanimously." and that "If any of you are reasonably ~~convinced~~ believe that a mitigating circumstance exists, you may consider it. " ('I'. 214445; R. 478,519) The Supreme Court has made clear that jury instructions which suggest that mitigating circumstances must be found unanimously unconstitutionally limit the ability of the jury to give effect to mitigating evidence. *McKoy v. North Carolina, 494* U.S. 433, 439-40, 110 S.Ct. 1227, 1231-32, 108 L.Ed.2d 369 (1990); *Mills, 486* U.S. at 374. The standard instruction uses the word "you" ambiguously and could be interpreted as meaning "you the jury, " suggesting that unanimity is required. The requested modification would have clarified that the word "you" means "any of you" and clearly and correctly informed the jurors that mitigating circumstances need not be found unanimously. The trial court's refusal to give the requested instruction was therefore error.[92]

D. The Trial Court Erred in Refusing to Give the Defendant's Requested Instruction on the Weighing Process.

The defense also requested the following special instruction regarding the weighing process:

> The weighing of aggravating and mitigating circumstances is not just a counting process. You are free to assign whatever weight you find appropriate to the aggravating and mitigating circumstances which are proved, and then make your own reasoned judgment about the appropriate penalty in light of the totality of the circumstances present.

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[91] Defense counsel's motion for mistrial following this remark was denied. (T. 2205)

[92] This Court has held that "Florida law does not require that the jury be instructed to make an individual determination as to the existence of any mitigating circumstance " *Ferrell v. State, 653 So. 2d 367,370* (Fla. 1995) (citing *Waterhouse v. State, 596 So. 2d* 1008, 1017 (Fla.), *cert. denied,* ___ U.S. ___, 113 S.Ct. 418, 121 L.Ed.2d 341 (1992)). Florida law, however, does not preclude modification of the standard instructions to comply with McKay and *Mills, supra.*

(T. 2157-58; R. 528). The requested instruction is consistent with this Court's seminal holding that "the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances." *Dixon, 283* So.2d at 10. The instruction is necessary to ensure that jurors understand that their inquiry is a qualitative rather than a quantitative one and is particularly critical when the jury is not instructed on non-statutory mitigating circumstances and therefore may erroneously conclude that death is the appropriate penalty because the enumerated aggravating circumstances outnumber the enumerated mitigating circumstances. Such a mechanical judgment would be patently inconsistent with *Dixon and* would improperly prevent the jury from giving effect to relevant mitigating evidence in violation of the eighth amendment and article I, section 17 of the Florida Constitution.

E. The Trial Court Erred in Refusing to Instruct the Jury on Non-statutory Mitigating Circumstances.

Finally, the defense requested that the jury be instructed on the specific non-statutory mitigating circumstances on which the defense had presented evidence. (R. 439-41) Although this Court has repeatedly declined to require such instructions,[93] appellant respectfully submits that the requested instruction was necessary in this case because the standard instructions, for the reasons explained above, do not clearly inform the jurors of their obligation to consider both statutory and non-statutory mitigating circumstances. *Brown, 479* U.S. at 545 (O'Connor, J., concurring).

At a minimum, in the absence of an instruction on specific non-statutory mitigating circumstances, the trial court should not have refused the defendant's request to instruct the jury on the meaning and function of mitigation and to modify the standard instructions to eliminate other barriers to the consideration of mitigating evidence, In this case, where the jury recommended death by a vote of only 7 to 5, even one juror who was misled as to his or her ability to consider and give effect to mitigating evidence could have made the difference between life and death.

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[93] *E.g., Finney v. State, 20* Fla. L. Weekly S401, S404 (Fla. July 20 1995); *Ferrell, 653 So.* 2d at *370; Robinson* v. *State,* 574 So. 2d 108, 111 (Fla.), *cert. denied, 502* U.S. 841, 112 S.Ct. 131, 116 L.Ed.2d 99 (1991).

IX.

THE TRIAL COURT ERRED IN REFUSING TO MODIFY THE STANDARD INSTRUCTIONS TO MARE CLEAR THAT THE PROSECUTION BEARS THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT DEATH IS THE APPROPRIATE PENALTY, IN VIOLATION OF THE FLORIDA CONSTITUTION ARTICLE I, SECTIONS 9 AND 17 AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

Defense counsel objected below that the standard instructions improperly place the burden of persuasion on the defense to establish that death is ***not*** the appropriate penalty and requested two modifications and one addition to the standard instructions to make clear that tbe prosecution bears the burden of proving both the existence of sufficient aggravating circumstances and that those aggravating circumstances outweigh the mitigating circumstances. (T. 2140, 2145; R. 472-73, 475, 479, 517-18, 520)

Florida's capital sentencing statute requires both the sentencing jury and judge to determine "[w]hether sufficient mitigating circumstances exist which outweigh tbe aggravating circumstances found to exist," § 921.141(2)(b), (3)(b), Fla. Stat. (1993), and therefore creates a presumption that, once one or more aggravating circumstances is established, death is the appropriate penalty. See ***Dixon, 283*** So.2d at ***9. In Jackson v. Dugger, 837*** F.2d 1469, 1473 (1 lth Cir.), ***cert. denied, 486*** U.S. 1026, 108 S.Ct. 2005, 100 L.Ed.2d 236 (1988), the Eleventh Circuit held that "[s]uch a presumption, if employed at the level of the sentencer, vitiates the individuahzed sentencing determination required by the Eighth Amendment. " The language objected to below has precisely the same effect as the instruction invalidated in ***Jackson***, which advised the jury that "death is presumed to be the proper sentence unless [aggravating factors] are overridden by one or more . , . mitigating circumstances ." 837 F.2d at 1473. The standard instructions place the ultimate burden of persuasion squarely on the defense, thus making death the presumptively appropriate sentence if aggravating and mitigating circumstances are in equipoise. The "burden-shifting" language in the standard instructions, like the instruction given in ***Jackson,*** therefore "tilts the scales by which the jury is to balance aggravating and

mitigating circumstances in favor of the state" and improperly precludes the jury from giving effect to mitigating evidence, *Id.*[94]

Defense counsel also submitted that the reasonable doubt standard should be applied to the weighing process as a whole, and requested a corresponding special jury instruction.[95] (T. 2144; R. 477,519) The fifth and fourteenth amendments "protect[ ] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship, 397* U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The same standard of proof must be applied to establish any fact upon which a death sentence is to be based, to satisfy the heightened reliability required by the eighth *amendment. Woodson v. North Carolina, 428* U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed. 2d 944 (1976) (plurality opinion); *Elledge, 346* So.2d at 1003; see *also Specht v. Patterson,* 386 U.S. 605, 608, 87 S.Ct. 1209, 1211-12, 18 L.Ed.2d 326 (1967).

X.

THE TRIAL COURT'S REFUSAL TO GIVE THE DEFENDANT'S REQUESTED INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES DENIED THE DEFENDANT DUE PROCESS OF LAW AND UNDERMINED THE RELIABILITY OF THE JURY'S RECOMMENDATION, IN VIOLATION OF THE FLORIDA CONSTITUTION ARTICLE I, SECTIONS 9 AND 17 AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

The defense also raised several objections below to the statutory aggravating circumstances and their corresponding standard jury instructions.[96]

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[94] *Cf. Arango* v. *State,* 411 So. 2d 172, 174 (Fla. 1982) ("burden-shifting" instruction might violate due process under *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), but instructions *as a whole* properly instructed jury it could recommend death only "if the state showed the aggravating circumstances outweighed the mitigating circumstances"), cert. *denied, 457* U.S. 1140, 102 S.Ct. 2973, 73 L.Ed.2d 1360 (1982).

[95] Appellant submits tbat the decision to the contrary in *Ford v. Strickland, 6%* F.2d 804, 817-18 (11th *Cir.)* (en banc), *cert. denied, 464* U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), was erroneous.

[96] Each objection to the standard instructions and each denial of the defendant's requested instructions discussed below is asserted to be a violation of the eighth and fourteenth amendments and article I, sections 9 and 17 of the Florida Constitution.

A. The Trial Court Erred in Refusing to Give the Defendant's Requested Instruction on the HAC Aggravating Circumstance and Giving Instead the Standard Instruction Which Is Unconstitutionally Vague and Improperly Relieves the State of its Burden of Proof.

At trial, appellant asserted that both the statutory aggravating circumstance that the crime was "especially heinous, atrocious and cruel" ("HAC")[97] and its corresponding standard jury instruction are unconstitutionally vague facially and as applied and improperly relieve the state of its burden of proof. (T. 2133-34; R. 473-74) The defense. submitted three alternative instructions, (R. 495-96, 497-98, 499-500), all of which were denied, and the jury was given the standard instruction, over defense objection. (T. 2152-53, 2291)

Because the bare statutory language of the HAC aggravating circumstance is unconstitutionally vague, its validity depends on the adoption and consistent application of a constitutionally-adequate limiting construction. *Espinosa v. Florida,* U.S. ___, 112 S.Ct. 2926, 2928, 120 L.Ed.2d 854 (1992).[98] The jury in this case was given the standard instruction incorporating the limiting language adopted by this Court in ***Dixon, supra, and*** approved in part in *Proffitt* v. *Florida,* 428 U.S. 242, 255-56, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913 (1976) (noting that HAC appeared to be limited to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim"). The standard jury instruction fails to fulfill *Proffitt's* expectations, however, because it suggests that a "conscienceless or pitiless and unnecessarily torturous" crime is only one example of the type of crime that may be deemed heinous, atrocious and cruel. Further, the instruction suggests that this aggravator may be found when a crime is "conscienceless" *or* "pitiless and unnecessarily torturous to the victim" rather than accurately stating that the crime "must ***be both*** conscienceless or pitiless *and* unnecessarily torturous to the victim. " ***Richardson*** v. ***State,*** 604 So. 2d 1107, 1109 (Fla. 1992) (emphasis in

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97 § 921.141(5)(h), Fla. Stat. (1993).

98 ***Accord Stringer v. Black, 503*** U.S. 222, 112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (1992); *Shell* ***v. Mississippi,*** 498 U.S. 1, 3, 111 S.Ct. 313, 314, 112 L.Ed.2d 263 (1990) (Marshall, J., concurring); *Maynard* ***v. Cartwright, 486*** U.S. 356, 363-64, 108 S.Ct. 1853, 1859, 100 L.Ed.2d 372 (1988); *Godfrey* v. ***Georgia, 446*** U.S. 420, 428-29, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980).

original). Because every first-degree murder can be characterized as "conscienceless," the standard instruction remains unconstitutionally vague The phrase "unnecessarily torturous" is similarly lacking in content.

The standard instruction also fails to clearly and accurately inform the jury that HAC may be properly found only if (1) the defendant intended to cause pain and suffering to the victim[99] and (2) the victim actually consciously suffered for a substantial period of time before death[100] and therefore improperly relieves the state of its burden of proving each element of the aggravating circumstance beyond a reasonable doubt. [101]

The defense submitted three alternative special instructions, each of which accurately stated Florida law and was more comprehensible than the standard instruction, The first instruction contained

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[99] ***Cheshire*** v. State, 568 So. 2d 908, 912 (Fla. 1990) (HAC aggravator properly limited to "torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another") (quoting ***Dixon, 283 So. 2d*** at 9); ***accord Robertson v. State,*** 611 So. 2d 1228, 1233 (Fla. 1993); *Wickham v.* State, 593 So. 2d 191, 193 (Fla. 1991), cert. *denied,* ***505*** U.S. 1209, 112 S.Ct. 3003, 120 L.Ed.2d 878 (1992); *Santos* v. ***State,*** 591 So. 2d 160, 163 (Fla. 1991); ***Stein v. State, 632 So. 2d*** 1361, 1367 (Fla.), ***cert. denied,*** U.S. ___, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994); see ***also Bonifay v. State, 626 So.*** 2d 1310, 1313 (Fla. 1993); ***Williams v. State, 622 So.*** 2d 456, 463 (Fla. 1993) (no vicarious liability for HAC unless defendant knew or ordered particular manner of killing); ***Williams v. State, 574 So. 2d*** 136, 138 (Fla. 1991); ***Porter v. State,*** 564 ***So.*** 2d 1060, 1063 (Fla. 1990); ***Mills v. State,*** 476 So. 2d 172, 178 (Fla. 1985) ("[t]he intent and method employed by the" defendant determines whether HAC aggravator is applicable rather than "pure fortuity" of whether victim lingered or died instantly of gunshot wounds), ***cert. denied, 475*** U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986).

[100] See e.g., ***DeAngelo*** v. ***State,*** 616 So. 2d 440, 442-43 (Fla. 1993) (trial court did not err in declining to'fmd HAC where evidence not clear that victim conscious during ordeal); Rhodes v. *State,* 547 So. 2d 1201, 1208 (Fla. 1989) (HAC not properly found where victim may have been semiconscious at time of death); ***Bundy*** v. *State,* 471 So, 2d 9, 22 (Fla. 1985) (evidence insufficient to support HAC where no evidence victim experienced extreme fear and apprehension before death), ***cert. denied, 479*** U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986); *Gorham* v. *State,* 454 So. 2d 556, 559 (Fla. 1984) (insufficient evidence of apprehension of death), ***cert. denied,*** 469 U.S. 1181, 105 S.Ct. 941, 83 L.Ed.2d 953 (1985); ***Jackson v. Stale,*** 451 So. 2d 458,463 (Fla. 1984) (consciousness necessary for HAC); ***Herzog v. State,*** 439 So. 2d 1372, 1380 (Fla. 1983) (evidence insufficient where victim may have been semi-conscious).

[101] ***See Francis v. Franklin,*** 471 U.S. 307,105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom* ***v. Montana, 442*** U.S. 510, 524, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); see also ***Motley v. State,*** 155 Fla. 545, 20 So. 2d 798, 800 (1945) (failure to instruct on each element of a crime or defense violates due process under Florida Constitution),

the language proposed by a majority of this Court's committee on standard jury instructions in 1992. (R. 495) It states the applicable law clearly and concisely, setting out the element of the defendant's intent and the requirement of conscious suffering by the victim. It does not leave jurors to grapple with opaque concepts such as "unnecessar[y] tortur[e]," "wicked[ness]" and "vile[ness]." The second instruction (1) modified the standard instruction to include the element of the defendant's intent, (2) clarified that the "unnecessarily torturous" language is not merely an example of HAC but a limiting requirement, and (3) eliminated the ambiguity that suggests the jury may find any crime deemed "conscienceless" to be HAC. (R. 497) The third instruction included only the latter two corrections. (R. 499) Each of the proposed instructions also stated accurately that "[a]ctions taken after the victim dies or loses consciousness cannot be considered in determining whether the murder was especially heinous, atrocious or cruel," (R. 496, 498,500)

The limiting language contained in the three alternative defense instructions was critically important in this case because, as discussed further below, the state did not establish that the defendant intended to torture the victims. Moreover, as discussed above, the state was permitted to elicit a graphic description of the psychological and physical torment of drowning, even though the Medical Examiner was unable to say that either victim was conscious at the time. (T. 1714, 1730-31, 1733) In addition, although there was evidence that Joanne Jones had been strangled, the Medical Examiner testified that her injuries were consistent with unconciousness having resulting within a few seconds. (T. 1727, 1736-37) Thus, the jury if properly instructed, could have found both the element of torturous intent and the element of conscious suffering by the victims to be absent in this case.[102]

[102] The prosecutor also erroneously suggested in closing argument that only events after death, as opposed to after loss of consciousness, were irrelevant to HAC. (T. 2219)

B. The Trial Court Erred Refusing to Give an Expanded Instruction on the CCP Aggravating Circumstance Where *the Jackson* Instruction Was Insufficient to Cure the Constitutional Infirmity in the Statute and Standard Jury Instruction.

Defense counsel also objected that the cold, calculated and premeditated ("CCP") aggravating circumstance[103] and its corresponding standard jury instruction arc unconstitutionally vague facially and as applied and that the standard instruction improperly relieves the state of its burden to prove each element of the circumstance; the defense submitted two alternative special instructions. (T. 2131-32; R. 473-74) The second instruction, which was granted by the trial court, followed exactly the instruction set out in the then-new decision in *Jackson v. State*, *648 So.* 2d 85, 89 n.8 (Fla. 1994), which held that the standard CCP instruction is unconstitutionally vague. (R. 509-10, 513-14) The defense, however, ***argued*** that ***the Jackson*** instruction did not entirely cure the vagueness problem and requested that the definition of the "coldness" element be modified as follows: "'Cold' means the murder was the product of calm and cool reflection and not an act prompted by emotional frenzy, panic, or a fit of rage."[104] (T. 2129-31 R. 507-08, 511-12). The trial court denied defense counsel's first requested instruction and gave ***the Jackson*** instruction over defense objection. (T. 2153-54)

The definition of "coldness" as excluding "an act prompted by emotional frenzy, panic, or a fit of rage" was potentially dispositive of the existence of the CCP aggravator in this case because the state's evidence of heightened premeditation was purely circumstantial and was contradicted by the defendant's confession, in which he stated that he had killed Joanne Jones after a heated argument[105]

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[103] § 921.141(5)(I), Fla. Stat. (1993).

[104] The prosecution opposed this modification even though the additional language came directly from *Jackson* and prior decisions of this Court and was similar to language contained in the state's own proposed CCP instruction, (T. 2130-31). ***See Jackson, 648 So. 2d*** at 89 (citing ***Richardson, 604 So. 2d*** 1109). The additional language, which may have been omitted inadvertently from ***the*** instruction set forth in ***Jackson, has*** been added to the draft of the new standard CCP instruction prepared by the Supreme Court Committee on Standard Jury Instructions in Criminal Cases.

[105] The state attacked the defendant's statement that he had argued with Ms. Jones based on evidence of a struggle in her car. (T. 2222) While this evidence contradicted the defendant's statement with respect to where the struggle occurred it is not inconsistent with there having been an argument that escalated into a physical struggle.

and then killed Quinton Jones, presumably in a panic.[106] The failure to give the defendant's requested instruction was therefore reversible error,

C. The Trial Court Erred in Refusing to Give the Defendant's Requested Instruction on the Pecuniary Gain Aggravating Circumstance and Giving Instead the Standard Instruction Which Is Unconstitutionally Vague and Improperly Relieves the State of its Burden of Proof.

The defense objected below that the pecuniary gain aggravating circumstance[107] and its corresponding standard instruction are unconstitutionally vague facially and as applied and that the standard instruction improperly relieves the state of its burden of proof. (T. 2135; R. 473) This Court has held consistently that the pecuniary gain aggravating circumstance may be found only when the state has established beyond a reasonable doubt that "the murder [was] an integral step in obtaining some sought-after specific gain." *Chaky v. State,* 651 So. 2d 1169, 1172 (Fla. 1995).[108] That is, pecuniary gain must be the "primary motivation" for the murder, *Hill v. State, 549 So.* 2d 179, 183 (Fla. 1989); Scull v. *State,* 533 So. 2d 1137, 1142 (Fla. 1988), cert. *denied, 490* U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989). Moreover, this aggravating circumstance may be inferred from circumstantial evidence only if "the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance." Chaky, 651 So. 2d at 1172; *Simmons v. State, 419 So.* 2d 316, 318 (Fla. 1982).

The defense accordingly requested the following expanded instruction on pecuniary gain

> The crime for which the defendant is to be sentenced was committed for financial gain. You may consider this aggravating circumstance only if you 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 specific gain.

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[106] For the reasons stated in the preceding section, the failure to give the expanded instruction also improperly relieved the state of its burden to prove the "coldness" element of CCP.

[107] § 921.141(5)(f), Fla. Stat. (1993).

[108] *Accord Peterka v. State, 640 So.* 2d 59, 71 (Fla. 1994), cert. *denied,* ___ U.S. ___, 115 S.Ct. *940,* 130 L.Ed.2d *884* (1995); *Hardwick v. State,* 521 *So,* 2d 1071, 1076 (Fla.), *cert. denied, 488* U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988); Rogers v. *State,* 511 So. 2d 526,533 (Fla. 1987), cert. *denied, 484* U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

(T. 2135; R. 515)[109] The requested instruction was denied, and the jury was instructed, over defense objection, in the bare terms of the statutory aggravating circumstance. (T. 2151-52, 2285, 2291)

As with the CCP aggravating circumstance, "this Court has found it necessary to explain" that the pecuniary gain aggravator applies more narrowly than the unadorned statutory language suggests, *Jackson*, 648 So. 2d at 88. The specific requirements for establishing the pecuniary gain aggravating circumstance therefore similarly "call for more expansive instructions to give content to the . . . statutory factor" and to prevent its arbitrary application by the jury. *Id.* at 89. Further, by failing to instruct the jury on the elements of the aggravating circumstance, as defined by the opinions of this Court, the standard instruction improperly relieves the state of its burden of proof.[110]

In this case, the trial court's refusal to give the expanded instruction requested by the defense cannot be deemed harmless beyond a reasonable doubt. The state's evidence that the defendant killed the victims for pecuniary gain was purely circumstantial, based on the fact that Mr. Walker had protested his inability to pay in court proceedings to obtain child support for Quinton Jones. Although the defendant stated in his confession that he had killed Joanne Jones after an argument over child support, the jury, if properly instructed, could have found on this record that the state had failed to prove that pecuniary gain was the primary motive for the killings as opposed to pure anger. See *Chaky*, 651 So. 2d at 1172-73 ("[a]lthough one could surmise from" circumstantial evidence that defendant killed his wife for insurance proceeds, evidence was insufficient to establish beyond a reasonable doubt that murder was committed for pecuniary gain).

D. The Trial Court Erred in Refusing to Instruct the Jury on the Circumstantial Evidence Standard and on the Burden of Proof for Aggravating Circumstances.

As noted above, this Court has held that, to prove an aggravating factor by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis tending to negate that

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[109] The defense also requested an instruction on circumstantial evidence, the denial of which is addressed as a separate issue below.

[110] See cases cited *supra* note 101.

factor.[111] The defense asked that the jury in this case be instructed accordingly, and the request was denied.[112] (T. 2143; R. 476, 519)

A separate instruction on the circumstantial evidence standard is not required if the jury is properly instructed on the reasonable doubt standard and the states burden of proof. *Pietri* v. *State,* 644 So. 2d 1347, 1353 n.9 (Fla. 1994), *cert. denied,* U.S. ___, 115 S.Ct. 2588, 132 L.Ed.2d 836 (1995); *Trepal v. State,* 621 *So. 2d* 1361, 1366 (Fla. 1993), *cert. denied,* ___ U.S. ___, 114 S.Ct. 892,127 L.Ed.2d 85 (1994); *In re Standard Jury Instructions in Criminal Cases,* 431 So. 2d 594,595 (Fla. 1981). In this case, although the jury was instructed that each aggravating circumstance must be. established beyond a reasonable doubt, no reasonable doubt instruction was given at the penalty phase. Moreover, the trial court refused to instruct the jury that the defendant must be presumed "innocent" of each aggravating circumstance "until and unless the presumption is overcome by proof beyond a reasonable doubt." (T. 2144; R. 476, 519) Thus, while the jury was instructed on the applicable *standard* of proof, it was instructed on neither *the burden* of proof, nor the definition of reasonable doubt. The trial court's refusal to give the circumstantial evidence instruction was therefore error. Moreover, the error cannot be considered harmless given the circumstantial nature of the states evidence regarding the HAC, CCP *and* pecuniary gain aggravating circumstances and the substantial mitigating evidence,

E. The Trial Court Erred in Refusing to Instruct the Jury Not to Consider Non-statutory Aggravating Circumstances.

The defense also asked the trial court to instruct the jury not to consider nonstatutory aggravating circumstances. (T. 2141-42; R. 474, 518) This Court has expressly forbidden "any unauthorized aggravating factor going into the equation which might tip the scales of the weighing

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[111] *E.g., Chaky,* 651 So. 2d at 1172 (pecuniary gain); *Geralds* v. *State,* 601 So. 2d 1157, 1163 (Fla. 1992) (CCP); *Simmons,* 419 So, 2d at 318 (pecuniary gain).

[112] The state opposed the instruction on the ground that the defendant's confession "takes it out of a purely circumstantial evidence case." (T. 2143) The confession, however, provided no direct evidence to support the HAC, CCP or financial gain aggravating circumstances and was, in fact, inconsistent with the existence of any of these aggravating factors.

process in favor of death." *Elledge, 346 So. 2d* at 1003.[113] The trial court's refusal to give the special instruction in this case was especially harmful given the prosecutor's deliberate injection of the issue of future dangerousness into the sentencing proceedings and his emphasis on the emotionally volatile issue of abortion, both of which are improper, non-statutory aggravating circumstances.

F. The Trial Court Erred in Instructing the Jury on the Prior Violent Felony and Felony-murder Aggravating Circumstances.

The defense argued below that the prior violent felony aggravator,[114] was (1) inapplicable in this case because the defendant's prior felony convictions all arose from the same episode and (2) improperly duplicates the felony-murder aggravator[115] in the circumstances of this case. (T. 2140-41; R. 473-74) Although this Court has approved application of the prior violent felony aggravator to a contemporaneous homicide conviction, *e.g, Stein,* 632 So. 2d at 1366, appellant respectfully submits that it should be reserved for repeat violent felony offenders. *Cf. State v. Barnes, 595 So.* 2d 22, 24 (Fla. 1992) (Kogan, J., concurring) (a defendant should not be habitualizcd "for separate crimes arising from a single incident"), Moreover, because the collateral offenses -- kidnapping and burglary of a vehicle with an assault -- were inextricably intertwined with the homicides in this case, the felony-murder aggravating circumstance does not capture any aspect of the defendant's conduct, distinct from the commission of the homicide itself, that truly aggravates the capital offense. The submission of these aggravating circumstances to the jury therefore skewed the weighing process unfairly toward death and undermined the reliability of the jury's recommendation in violation of the eighth amendment and article I, section 17 of the Florida Constitution.[116]

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[113] *Accord Miller v. State, 373* So.2d *882* (Fla. 1979); *Purdy* v. *State, 343* So.2d *4* (Fla.), cert. *denied, 434* U.S. 847, 98 S.Ct. 153, 54 L.Ed.2d 114 (1977); *Dixon, 283 So.* 2d at 10.

[114] § 921.141(5)(b), Fla. Stat. (1993).

[115] § 921.141(5)(d), Fla. Stat. (1993).

[116] Although the trial court properly considered the contemporaneous felonies, other than the homicide convictions, as "part and parcel of the murders" and therefore gave them no independent weight as aggravating circumstances, (R. 578), the jury nevertheless could have done so.

XI.

THE JURY WAS MISLED AS TO THE SIGNIFICANCE OF ITS ADVISORY VERDICT IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMENDMENTS ***VIII*** AND ***XIV,*** AS ***HELD IN CALDWELL V. MISSISSIPPI*** AND THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 17 .

During the prosecutor's voir dire examination, he told the prospective jurors that "you ***render an advisory verdict to the Court. The Court passes final sentence. "*** (T. 721) Defense counsel objected and moved to strike the panel or for a mistrial, arguing that the prosecutor had improperly stressed the word "advisory" "and it's not going to show up on this piece of paper that that stress was there when they said it. " (T. 72 1-22) Defense counsel argued further that, by failing to explain the weight accorded to an "advisory" verdict, the prosecution was "trying to minimize the role of this jury's verdict in the death penalty process. " (T. 722) The trial judge sustained the objection and admonished the prosecutor not to elaborate on the court's explanation of the sentencing process. (T. 723-24) The judge denied the motion for mistrial,[117] however, and declined to re-instruct the jury, remarking "I'll instruct them when the time comes." (T. 724)

The trial court subsequently granted the defendant's request to instruct the jury at the beginning of the penalty phase that the trial judge is required to give great weight to the jury's recommendation. (T. 1671, 1675-77; R. 434) At the conclusion of the penalty phase, however, the trial judge denied defense counsel's request to make the same modification, (T. 2137; R. 471-72), and, over defense objection, gave the standard instruction:

> As you have been told the final decision as to what punishment should be imposed is the responsibility of the judge. However, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

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[117] One panel of prospective jurors had already been stricken after the prosecutor described the sentencing process inaccurately. (T. 572-73)

(T. 2283; R. 447)[118] The trial judge therefore failed to instruct the jury on the weight accorded their verdict when it most mattered -- immediately before deliberations. The standard instruction is an inaccurate and misleading characterization of Florida law, because nothing in the ordinary meaning of the words "advisory" or "recommendation" suggests that the advice or recommendation in question *must* be given "great weight, "[119] Rather, the common and ordinary meaning of these words would lead jurors to believe that, although the trial judge may ***consider*** their "advice" or "recommendation," the judge is free to disregard it. The trial judge, however, is not free to disregard the jury's recommendation "unless the facts suggesting a [contrary sentence are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975); see ***also Grossman v. State, 525 So. 2d 833,839*** n.1 (Fla. 1988), ***cert. denied, 489*** U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). The standard instructions, coupled with the prosecutor's emphasis on the advisory nature of the jury's verdict, therefore improperly diminished the jury's sense of responsibility for its sentencing decision in violation of ***Caldwell v. Mississippi, 472*** U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). ***See Mann v. Dugger, 844*** F.2d 1446, 1458 (11th Cir. 1988) (en banc), cert. ***denied, 489*** U.S. 1071, 109 S.Ct 1353, 103 L.Ed.2d 821 (1989).[120]

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[118] The words "advisory" and "recommend" or "recommendation" were used -- without elaboration -- to characterize the jury's verdict a total of 15 more times in the final instructions. (T. 2288-90)

[119] The modified instruction requested by the defense accurately described the jury's role in sentencing under Florida law. ***See Riley v. Dugger,*** 517 ***So.*** 2d ***656, 657*** (Fla. 1988); ***accord Espinosa,*** 112 S.Ct. at 2928.

[120] Although this Court has held repeatedly that the standard instructions do not violate *Caldwell*, appellant respectfully submits that those decisions should be reconsidered. ***E.g., Johnson v. State, 20*** Fla. L. Weekly S343, S346 (Fla. July 13, 1995); ***Sochor v. State,*** 619 So. 2d 285,291 (Fla.), ***cert. denied,*** ___ U.S. ___, 114 S.Ct. 638, 126 L.Ed.2d 596 (1993); Combs v. ***State, 525 So.*** 2d 853, 857-58 (Fla. 1988).

XII.

FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV, BECAUSE IT PERMITS IMPOSITION OF THE DEATH PENALTY UPON A BARE MAJORJTY VOTE OF THE SENTENCING JURY, FAILS ADEQUATELY TO GUIDE THE JURY'S DISCRETION, AND DOES NOT REQUIRE WRITTEN FINDINGS REGARDING THE SENTENCING FACTORS, THEREBY PRECLUDING ADEQUATE APPELLATE REVIEW.

A. The Simple-Majority Rule

The trial court denied the defendant's Motion to Declare § 921.141, Florida Statutes, Unconstitutional or to Require a 9 to 3 Majority, (T. 2147; R. 463-65) Mr. Walker was thereafter sentenced to death upon a bare majority vote of seven to five, a margin that would have been insufficient to constitute a death recommendation or verdict in virtually any other state.[121]

The slimmest margin the United States Supreme Court has permitted under the Sixth Amendment for determining a defendant's guilt is a 9 to 3 majority. ***Johnson v. Louisiana, 406*** U.S. 356, 363, 92 S.Ct. 1620, 1625, 32 L.Ed.2d 152 (1972).[122] Although the Supreme Court has held that the sixth amendment right to a jury trial does not extend to capital sentencing proceedings, *Spaziano* v. *Florida,* 468 U.S. 447, 458-59, 104 S.Ct. 3154, 3161, 82 L.Ed.2d 340 (1984), principles of due process and eighth amendment requirements of reliability compel adherence to similar standards of

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[121] Of the 39 jurisdictions, including federal, that retain a death penalty, four provide for sentencing by the court alone. Of the 31 jurisdictions that provide for sentencing by the jury alone, all require a unanimous vote to impose a death sentence. Of the four states in which the jury is advisory, only Florida and Delaware permit a bare majority to recommend death. See Del. Code Ann, tit. 11, § 4209 (1979 & Supp. 1994); State v. *Gattis,* 1995 WL 562254 *23 (Del. Super.Ct. Aug. 24, 1995). Indiana requires aunanimous vote for a death recommendation, Ind. Code Ann. § 35-50-2-9 (Supp. 1994), and does not require the trial judge to defer to a death recommendation, *Daniels v. State,* 561 N.E.2d 487 (Ind. 1990). Alabama requires a majority of at least 10 jurors to recommend death. Ala. Code §13A-5-46 (1994).

[122] ***Compare*** *Apodaca* v. ***Oregon,*** 406 U.S. 404, 411-12, 92 S.Ct. 1628, 1633, 32 L.Ed.2d 184 (1972) (11-1 and 10-2 votes upheld) *and* ***Burch v. Louisiana,*** 441 U.S. 130, 139, 99 S.Ct. 1623, 1628, 60 L.Ed.2d 96 (1979) (five-person majority of six-person jury not constitutionally permissible).

certainty in a jury's verdict in a capital sentencing proceeding.[123] Since the trial judge is required to give "great weight" to the jury's recommendation under the *Tedder* standard, Florida's statute allows a bare majority of the jury to render a death sentence that may be overridden only in extraordinary circumstances. Like improper jury instructions, the simple-majority rule undermines the reliability of the ultimate verdict of the trial judge. *Cf. Espinosa,* 112 S.Ct. at 2928; *Jackson,* 648 *So.* 2d at 85.

B. Inadequate Guidance and Lack of Written Findings by the Jury

Defense counsel also filed a Motion to Declare Section 921.141, Florida Statutes, Unconstitutional or for Special Penalty Phase Verdict Form and Instructions, which was denied. (T. 2132-33; R. 529-31) Florida's capital sentencing statute does not provide adequate safeguards against its arbitrary application.[124] The statute does not state whether jurors must find individual sentencing factors unanimously, by majority, by plurality, or individually and therefore fails to give the jury adequate. guidance in finding and weighing the aggravating and mitigating circumstances, thereby undermining the reliability of the jury's recommendation. See *McKoy,* 494 U.S. at 440; *Mills, 486* U.S. at 375-77. Because the trial judge is required to give "great weight" to the jury's recommendation under the *Tedder standard, the* constitutional flaws *in the* procedure by which the jury renders its "advisory" verdict also taint the ultimate decision of the trial judge. *Espinosa,* 112 S.Ct. at 2928; *Jackson, 648 So.* 2d at 88.

Moreover, as Justice Shaw has emphasized, the absence of any mechanism for determining which aggravating and mitigating circumstances the jury relied upon in sentencing "presents a serious

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[123] Appellant respectfully requests this Court to reconsider its decisions finding no constitutional infirmity in permitting the advisory jury to recommend a sentence of death based upon a simple majority, *E.g., James v. State, 453 So.* 2d 786, 791-92 (Fla.), cert. *denied, 469* U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984); *Alvord v. State, 322 So. 2d 533,536* (Fla. 1975), cert. *denied, 428* U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976).

[124] It is axiomatic that " [b]ecause of the uniqueness of the death penalty, . . . it [may] not be imposed under sentencing procedures that creat[e] a substantial risk that it [will] be inflicted in an arbitrary and capricious manner. " *Gregg v. Georgia, 428* U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d *859* (1976) (citing *Furman v. Georgia, 408* U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)).

Furman problem because, if *Tedder* deference is paid, both this Court and the sentencing judge can only speculate as to what factors the jury found in making its recommendation and, thus, cannot rationally distinguish between those cases where death is imposed and those where it is not." *Combs, 525 So.* 2d at 859 (Shaw, J., specially concurring); *cf. Parker* v. *Dugger,* 498 U.S. 308, 321, 111 S.Ct. 731, 738, 112 L.Ed.2d 812 (1991) (emphasizing importance of adequate appellate review to individualized sentencing), The reliability of the sentencing process and the adequacy of appellate review can be assured by requiring the jury to make specific findings regarding at least the aggravating circumstances. The refusal to give the special verdict form requested in this case was therefore reversible error.

XIII.

THE DEFENDANT WAS SENTENCED TO DEATH IN VIOLATION OF FLORIDA LAW, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE THE TRIAL COURT IMPROPERLY FOUND THE AGGRAVATING CIRCUMSTANCES OF HAC, CCP, AND PECUNIARY GAIN AND ERRONEOUSLY REJECTED OR REFUSED TO CONSIDER STATUTORY AND NON-STATUTORY MITIGATING CIRCUMSTANCES ESTABLISHED BY THE EVIDENCE.

In his sentencing order, the trial judge found four aggravating circumstances to exist with respect to each victim -- (1) prior violent felony conviction; (2) pecuniary gain, (3) HAC; and (4) CCP. (R. 577-79) He properly merged the CCP and pecuniary gain aggravators, finding them to be supported by the same aspect of the evidence. (R. 583) In mitigation, the trial judge properly found the statutory mitigating circumstances of no prior criminal history and extreme emotional disturbance and the. non-statutory mitigating circumstance of the defendant's "mental state," each of which were established by uncontroverted evidence at trial, (R. 580-82) The judge improperly rejected, however, the statutory mitigating circumstance of substantial impairment and refused to consider the defendant's abused childhood in mitigation. (R. 580-81) He also failed to consider a number of non-statutory mitigating circumstances submitted by the defense.

A. Aggravating Circumstances

The trial court erred in finding the aggravating circumstances of pecuniary gain, HAC, and CCP, which were not established beyond a reasonable doubt.[125]

1. **Financial Gain**

The trial judge concluded that the state had proved beyond a reasonable doubt that "the defendant committedthemurders . . . to avoid paying court ordered child support" and that pecuniary gain was "the primary motive for the killings. " (R. 578) As discussed above, however, the state's evidence in support of this aggravating circumstance was purely circumstantial, based on the fact that Mr. Walker had protested his inability to pay during court proceedings to obtain child support for Quinton Jones. (T. 1203-04) The state presented no direct evidence that relief from his child support obligations was the defendant's motive for the killings. Although the defendant stated in his confession that he and Ms. Jones had argued over child support on the night of the crime, this does not establish that the killings were an integral step in obtaining a financial gain or that financial gain was the primary motive for the murder. *Chaky,* 651 So. 2d at 1172; ***Peterka,* 640 *So. 2d*** at 71; ***Hill, 549 So. 2d*** at 83; ***Scull, 533 So. 2d*** at 1142; ***Hardwick,*** 521 So. 2d at 1076; ***Rogers,*** 511 So. 2d at 533. To the contrary, the confession establishes that the defendant's primary motive for the killings was his anger at Joanne Jones.

To uphold the application of the pecuniary gain aggravating circumstance to the facts of this case would turn virtually every murder occurring in a domestic context, where the defendant had some support obligation to the victim or where the defendant and victim argued over fmancial matters, into a murder for financial gain. Because the state's evidence did not preclude the reasonable hypothesis that the killings were motivated by anger, rather than fmancial gain, this aggravating circumstance was improperly found. *Chaky,* 651 So. 2d at 1172; ***Simmons,*** 419 So. 2d at 318 ,

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[125] Appellant also submits that the evidence with respect to all three of these aggravating circumstances was legally insufficient to allow their submission to the jury. Defense counsel properly objected to their submission to the jury, on sufficiency of the evidence grounds, before the penalty phase, at the conclusion of the state's penalty phase evidence, and again at the conclusion of the penalty phase. (T. 1745-46, 2151-53, 2217-18, 2220-25; R. 382-89)

2. HAC

The evidence presented was likewise insufficient to establish the HAC aggravating circumstance, First, the trial court stated tbat the medical examiner testified that the cause of Joanne Jones' death was a combination of asphyxiation and drowning and that it takes "[s]everal minutes" to die by asphyxiation. (R. 578) The Medical Examiner testified, however, that Joanne Jones' injuries indicated that she had been strangled and that unconsciousness could have resulted in a few seconds. (T. 1722-27) The evidence therefore does not support the trial court's finding that Joanne Jones consciously suffered "while gasping for air" for several minutes. (R. 578)

Second, the Medical Examiner never testified that it took "several minutes" to die of asphyxiation; he testified that it would take three to five minutes to die from drowning. (T. 1714) As noted above, however, the medical evidence was insufficient to establish that Quinton Jones drowned or that Joanne Jones was conscious when she drowned. Because the state failed to prove that the victims consciously suffered for a substantial period of time before death, the HAC aggravating circumstance was improperly found in this case.[126] *Rhodes,* 547 So. 2d at 1208; ***Jackson,*** 451 So. 2d at 463; ***Herzog, 439 So.*** 2d at 1380; ***DeAngelo,*** 616 So. 2d at 44243.

3. CCP

The state's evidence with respect to the CCP aggravating circumstance was also purely circumstantial. Its theory that the killings were planned carefully in advance for the purpose of relieving the defendant of his child support obligations was based upon multi-layered inferences and speculation spun from the following evidence presented at trial: (1) the possible involvement of one or two of the defendant's half-brothers, (2) testimony that the defendant was seen whispering to his brother Quinton in the time leading up to the crime, (4) the circumstantial evidence of motive, and (5) the fact that duct tape was used in the killings. (T. 2217-18) This evidence, while sufficient to establish ordinary premeditation was not sufficient to establish CCP.

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[126] The trial court also made no separate finding regarding the defendant's state of mind, other than citing the "manner" of the killings. (T. 579)

The trial court's findings that "the defendant carefully, calmly and with reflection" planned to lure Joanne Jones to a place where she could be abducted, enlisted the assistance of his brothers to kill her, and then proceeded according to plan, (R. 579), is therefore not supported by any direct evidence in the record. Nor does the unadorned circumstantial evidence support the inference that the defendant master-minded the elaborate plan detailed in the trial court's sentencing or&r,[127] The state's evidence did not exclude the reasonable hypothesis, based on the defendant's confession, that the killings were not the product of heightened premeditation but occurred after a heated argument. Moreover, the evidence regarding the defendant's mental illness and impulsivity[128] also supports the hypothesis that, even if the element of advance planning existed, the killing was not "cold" but rather was 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 Joanne Jones and was having child support deducted from his pay. See ***Spencer v. State, 645*** So. 2d ***377, 384*** (Fla. 1994) (although there was evidence of advance planning, CCP not properly found where psychologist testified that defendant believed victim was trying to steal his business, had limited coping ability, and manifested emotional instability in stressful circumstances).[129] The CCP aggravating circumstance was therefore not properly found in this case.

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[127] The trial judge, who was also assigned the cases of the two codefendants, Quinton and Willy Rogers, may have been influenced by extrarecord matters, including the self-serving statements of the codefendants, which were not admissible at appellant's trial because he would not be able to confront his brothers *as* witnesses. ***Bruton v. United states, 391*** U.S. 123, 127-28, 88 S.Ct. 1620, 1623, 20 L.Ed.2d 476 (1968); Rhodes, 547 So. 2d at 1204.

[128] T. 1809-12, T. 1765-84, 1787, 1789, 1791, 1984, 2071, 2073-77.

[129] ***See also Richardson,*** 604 So. 2d at 1109 (although evidence might have established that homicide was "calculated," the evidence did not establish that it was "cold" in context of ongoing domestic dispute involving intensity of emotion); ***Santos,*** 591 So. 2d at 163 (homicide was not "cold" where defendant was under extreme emotional distress due to ongoing domestic dispute); ***Doughs v. State,*** 575 So. 2d 165, 166-67 (Fla. 1991) (cold, calculated and premeditated aggravator negated by relationship between parties, passion, and circumstances leading to murder); ***Herzog, 439 So.*** 2d at 1380 (evidence that defendant had made prior threats to victim based on belief that victim had stolen money or drugs established premeditation but not CCP).

B. Mitigating Circumstances

The trial court also made a number of errors with respect to the mitigating circumstances.

1. Standard of Proof

In finding that the defendant had no significant history of prior criminal activity, the trial judge noted that this mitigating circumstance "has been proven by clear and convincing evidence." (R. 580) The proper standard of proof for mitigating circumstances, however, is only a preponderance of the evidence, not clear and convincing evidence. *Campbell v. State,* 571 So. 2d 415, 419 (Fla. 1990). Because it is evident from the face of the sentencing order that tbe trial court failed to apply the proper standard of proof to the mitigating circumstances, this case must be reversed for resentencing before the judge.

2. Substantial Impairment Mitigating Circumstance

Dr. Eisenstein testified that, in his expert opinion, Mr. Walker's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (T. 2076-77) He based this conclusion on his finding that the combined effect of the defendant's mental illness, organic brain damage and borderline intelligence made him impulsive and unable to make rational moral decisions under stressful circumstances.[130] (T. 2074-77) The state presented no evidence to rebut the expert testimony offered by the defense.

The trial judge nevertheless refused to find this statutory mitigating circumstance, based on his opinion that the defendant's conduct "demonstrates rather than negates an ability to understand the criminality of [his] actions." (R. 581) Dr. Eisenstein had testified, however, that the type of behavior cited by the trial judge -- making false exculpatory statements to the police, laundering of his clothes, and making excuses to his mother -- was not inconsistent with the existence of this mitigating

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[130] Dr. Toomer testified that, although he could not say to a psychological certainty that this mitigating circumstance existed, Mr. Walker's psychological features -- his low tolerance for stress, his maladaptcd behavior, suspicious nature, paranoid and manic tendencies, bipolar depression, and transient thought processes -- would all interfere with his ability to conform his conduct to the requirements of the law and were therefore consistent with the existence of the substantial impairment mitigating circumstance. (T. 1793, 2010)

factor. (T. 2118-19, 2121-22) Specifically, he emphasized that one aspect of the defendant's mental illness was deep denial -- a disassociation from his own mental state and behavior. [131] (T. 2118)

The sentencing judge is required to find and weigh a mitigating circumstance that is established by "a reasonable quantum of competent, uncontroverted evidence." *Spencer, 645 So.* 2d at *385; accord Nibert v. State, 574 So. 2d* 1059, 1062 (Fla. 1990). The court may reject a mitigating circumstance only "if the record contains competent substantial evidence to support" the trial court's decision. *Spencer,* 645 So. 2d at 385. In this case, Dr. Eisenstein's expert opinion regarding the defendant's ability to conform his conduct to the requirements of law was uncontroverted and based on a battery of psychological and personality tests, a clinical interview, the defendant's personal history, and information about the facts and circumstances surrounding the crimes. (T. 2053, 2055, 2063, 2072) The trial judge did not suggest that Dr. Eisenstein's testimony was incompetent; nor did he dispute the reasons for Dr. Eisenstein's conclusion. The trial court's rejection of the substantial impairment mitigating circumstance was therefore error. *Spencer, 645 So. 2d* at 385.

3. Non-Statutory Mitigating Circumstance of Abusive Childhood

Next, the trial court, while acknowledging that the evidence regarding the defendant's abusive childhood was unrebutted, concluded that because the defendant had subsequently performed acceptably as an adult (until the time of the crime), his abusive childhood "does not mitigate the crimes he committed." (R. 581-82)

The trial court plainly found that facts alleged in mitigation were supported by the evidence (the defense presented four family members who testified at length about the defendant's abusive childhood), but concluded that this evidence was not mitigating in nature -- that is, it did not extenuate or reduce the defendant's moral culpability for the crime. [132] This Court, however, has not only held

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[131] For example, after confessing to Detective Everett that he had committed the murders, the defendant told Everett he had called Joanne Jones the next day and left a message for her, because he didn't believe she was dead. (T. 191-92)

[132] There are three distinct steps to the trial court's consideration of mitigating circumstances: (1) the determination whether the facts alleged in mitigation are supported by the evidence; (2) the

repeatedly that such evidence *is* mitigating in nature,[133] it has also expressly rejected the rationale on which the trial judge relied in rejecting the evidence in this case: "The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary." *Nibert, 574* So.2d at 1062 (citation omitted).[134] Consequently, the fact tbat the defendant has since reached adulthood, though it may in some circumstances affect the weight to be accorded to evidence of childhood abuse, cannot justify giving it *no* weight in mitigation. It is apparent from the record that Mr. Walker continued, well into adulthood, to be tormented by the memories of his abusive childhood and that his childhood experiences contributed to and exacerbated his mental illness.[135]

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determination "whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed;" and (3) assessing the weight of the mitigating circumstances. Rogers, 511 So.2d at 534.

[133] ***Elledge v. State,*** 613 So. 2d 434,436 (Fla. 1993);*Clark* v. State, 609 So. 2d 513,516 (Fla. 1992); ***Nibert, 574 So. 2d*** at 1062; *Santos,* 591 So, 2d at 163-64; ***Campbell,*** 571 So. 2d at 419 n.4; ***Livingston v. State, 565 So.*** 2d 1288, 1292 (Fla. 1988); ***Castro v. State, 547*** So. 2d 111, 116 (Fla. 1989); *Holsworth* ***v. State, 522 So. 2d 348,354*** (Fla. 1988); *Waterhouse* ***v. State, 522 So. 2d*** 341,344 (Fla.), ***cert. denied, 488*** U.S. ***846,*** 109 S.Ct. 123, 102 L.Ed.2d ***97, and cert. denied, 488*** US. 869, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988); Brown, 526 So. 2d at 908; ***O'Callaghan v. State,*** 461 So. 2d 1354, 1355-56 (Fla. 1985).

[134] Such a conclusion would also fly in the face of evidence that the effects of childhood abuse can be long-term and severe, as is demonstrated by the "cycle of violence" perpetuated by abused children who ***in turn become*** abusers themselves. ***See Hall v. State,*** 614 So. 2d 473,481 (Fla. 1993) (Barkett, C.J., joined by Kogan, J., dissenting) (noting frequency of "horrible crimes" committed by defendants who themselves ***endured*** abuse ***as*** children), ***cert. denied,*** ___ U.S. ___, 114 S.Ct. 109,126 L.Ed.2d 74 (1993).

[135] Dr. Haber testified that, on a screening test administered to Mr. Walker in 1988, in response to the question, "If you could get one question and get the answer what would it be?" Mr. Walker had asked, "can't I kill my parent[s] and would I go free because they caused me a lot of pain. I would feel so much better." (T. 2019) Mr. Walker said these feelings had begun when he was "three years old, it started growing up." (T. 2019) Dr. Toomer explained that the defendant's history of childhood abuse contributed to and exacerbated his mental illness. (T. 1784, 1789-90)

The trial court's conclusion that Mr. Walker's subsequent *good* behavior in adulthood negated the mitigating effect of his abusive childhood is even more illogical. Rather than demonstrating the absence of any ill-effects from his abusive childhood, the fact that Mr. Walker functioned productively in society for most of his adult life establishes that he succeeded for quite a long time in controlling his violent impulses -- to which his abusive childhood contributed -- by directing his rage inward rather than outward.[136] This should, if anything, weigh in mitigation and certainly is not a proper basis for disregarding the unrebutted evidence of childhood abuse.

4. **Other Non-Statutory Mitigation**

The trial court also failed to consider at least two additional "categories" of non-statutory mitigation which were established by the evidence and submitted by the defense for consideration. First, the trial court's ***only*** mention of the positive mitigation presented at trial is to negate the mitigating effect of the evidence of childhood abuse (R. 582) The trial court failed to consider ***in mitigation***, unrebutted evidence that the defendant -- despite his history of mental illness -- had served in the military and been honorably discharged; had been gainfully employed; had good qualities, as testified to by his family; and was a deacon in his church. (T. 1856, 2031, 2045, 2047, 2199; R. 431-32) These factors were addressed in the defendant's sentencing memorandum and in his requested instruction on non-statutory mitigators, which was expressly incorporated by reference in the sentencing memorandum to the court. (R. 439-40, 544-47 & n.5) This evidence is also indisputably mitigating in nature. See, e.g., *Campbell,* 571 So. 2d at 419 n.4.

Second, the trial court failed to consider that these crimes were the product of a domestic dispute between the defendant and his estranged lover, which was also submitted by the defense in mitigation. (R. 440,546) This Court has recognized that the highly-charged emotional context of such disputes also "constitutes valid mitigation." ***Cheshire,*** 568 So. 2d at 911-12 (collecting cases)

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[136] Doctors Bergman and Haber testified to Mr. Walker's history of paranoid, impulsive and violent ideation. (T. 1810-12, 2017-18) Doctors Bergman and Eisenstein testified that Mr. Walker had kept these impulses under control by directing his rage inward. (T. 1812, 2112)

(defendant jealous of estranged wife's new relationship).[137] The prosecution contended that this was not a domestic situation because (1) the. defendant and Joanne Jones were not romantically involved at the time of the murder and (2) the defendant had stated in his confession tbat he and Ms. Jones had argued over child support and his failure to spend more time with Quinton. (T. 2304-05) In each of the cases cited above, however, the defendant was estranged from the victim at the time of killing, and the circumstances surrounding their separation -- as here -- were the very factors that ultimately led to the homicides. In this case, the psychological testimony, as noted above, was consistent with the defendant having acted out of emotional turmoil created by his wife's discovery that he had fathered an illegitimate child with Joanne Jones and with the defendant entertaining a paranoid belief that Joanne Jones, his spurned lover, was attempting to ruin his marriage and life.

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Because the trial court's sentencing order contains substantial errors regarding both aggravating and mitigating circumstances, this case must be remanded at least for a new sentencing before the judge. See, e.g., *Santos,* 591 So. 2d at 164.

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[137] *Cf.* ***Spencer,*** 645 So. 2d at 384 (defendant's paranoid belief that his estranged wife was trying to steal his business negated "coldness" element of CCP); ***Richardson, 604 So.*** 2d 1107, 1109 (defendant's emotional dispute with estranged lover negated "coldness" element of CCP); *Santos*, 591 So. 2d at 161-62 (same); ***Doughs, 575 So. 2d*** at 16667 (same),

CONCLUSION

For the foregoing reasons, appellant's convictions and sentences must be reversed and the case remanded for a new trial. Alternatively, appellant's sentence of death must be vacated and the case remanded for a new sentencing proceeding before a jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Post Office Box 013248, Miami, Florida 33101 this 2nd day of October, 1995.

Christina Spaulding
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