IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,113

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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

REPLY BRIEF OF APPELLANT

AND

ANSWER TO CROSS-APPEAL

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INTRODUCTION

In this reply brief, appellant's initial brief is cited as "Initial Br." and appellee's answer brief as "Answer Br." Specific points raised in the initial brief but not addressed in the reply brief are not waived.

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

Appellee answers that evidence that Mr. Walker urged Joanne Jones to abort her pregnancy with Quinton was properly admitted to establish motive or, alternatively, that the admission of this evidence was harmless error.

Appellee first attempts to distinguish *Wilkins v. State,* 607 So. 2d 500 (Fla. 3d DCA 1992), by suggesting that the state in that case used evidence that the defendant and his wife considered an abortion of the baby-victim not to establish motive but "solely" to imply that the defendant must have hated the child once it was born. Answer Br. at 34. This is a distinction without a difference. The "tenuous inference" -- from desiring an abortion to hating the child after it is born -- which appellee agrees "does not reasonably ensue," Answer Br. at 34, is the same inference on which the prosecution's motive theory rests in this case.

That the state *also* presented evidence that the defendant disputed his paternity of the child and his support obligations, Answer Br. at 32-33, does not establish or enhance the relevance of the abortion evidence. To the contrary, it underscores why the evidence was inadmissible. The state did not "need" the abortion evidence to suggest a motive when it presented evidence of the paternity and child support disputes for that purpose. The abortion evidence was therefore gratuitous, and it was profoundly inflammatory -- precisely the type of evidence section 90.403 is intended to exclude. *See State v. McClain,* 525 So. 2d 420, 422 (Fla. 1988).

Appellee's suggestion that, if such evidence is relevant to motive, its probative value

cannot be outweighed by the danger of unfair prejudice, Answer Br. at **35,** fundamentally misconstrues section **90.403,** which applies, by its terms, to evidence that is legally relevant to ***some*** material issue in the case. **§ 90.403,** Fla. Stat. Appellee's effort to distinguish the cases cited in the initial brief on this ground is therefore unavailing. Whether the evidence is offered to prove motive or some other disputed issue, the analysis under section **90.403** is the same, and the evidence must be excluded if its probative value is outweighed by the danger of unfair prejudice. ***See Williams** v. **State,*** **621** So.2d **413, 415** (Fla. **1993)** (evidence of other crimes that is relevant and admissible under section 90.404(2)(a), may be excluded under section **90.403); C.W.** EHRHARDT, **FLORIDA** EVIDENCE **§ 403.1 (1996** ed.). **As** set out fully in the initial brief, the evidence in this case had little, if any, probative value on the issue of motive or intent but posed a very grave danger of unfair prejudice -- because it invited the jury to equate the desire for an abortion with the intent to commit premeditated murder.[1]

Finally, appellee maintains that, even if the evidence was erroneously admitted, it was harmless "in light of the overwhelming evidence of guilt herein." Answer Br. at **35. As** this Court has admonished, however, "[o]verwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part **of** the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached." ***State** v. **DiGuilio,*** **491** So.2d **1129, 1136** (Fla. **1986)** (internal quotations omitted); ***accord Chapman** v. **California, 386*** **U.S. 18, 23, 87** S.Ct. 824, **827, 17** L.Ed.2d **705 (1967).** In this case, the prosecutor repeatedly emphasized the improperly-admitted evidence in his closing argument, inviting the jury to conclude that, by having urged **Ms.** Jones to have an abortion, Mr. Walker had formed the premeditated intent to kill Quinton Jones while he was still in the womb and had

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[1]*Esty* v. *State,* 642 *So.* 2d **1074, 1078** (Fla. **1994),** *cert. denied,* ___ **U.S.** ___, 115 S.Ct. **1380, 131** L.Ed.2d **234 (1995),** on which appellee relies is therefore distinguishable. Evidence **of** the defendant's sexual relationship with the victim and his prior hostile remarks about her did not present the same kind or degree of unfair prejudice as the evidence in this case. Appellee's argument that appellant's position would preclude the state from proving motive for the murder of a doctor who performs abortions similarly **misses** the mark. Answer Br. at **35.** Such evidence would not invite the jury to equate abortion with murder, as did the evidence in this case.

killed Joanne Jones for exercising her "god-given and her constitutional right" to give birth to the child. (T. 1466-67) Premeditation was the central issue in dispute at the guilt/innocence phase of the trial, and the tape-recorded interview regarding the abortion discussion was the only evidence the jury asked to review during its deliberations. (T. 1552) The improper evidence was emphasized again in closing argument at the penalty phase in violation of ***Dawson v. Delaware,*** 503 U.S. 159, 112 S.Ct. 1093, 1099, 113 L.Ed.2d 465 (1992) and ***Elledge v. State, 346 So.*** 2d 998, 1003 (Fla. 1977). Given the substantial role this evidence played in the state's case and its obvious tendency to suggest an improper basis for the jury's verdict it cannot said "beyond a reasonable doubt that the error did not affect the verdict" on either guilt or penalty. ***See State v. Lee,*** 531 So. 2d 133, 137 (Fla, 1988).

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

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's Ambiguous Request for Counsel, in Violation of the Florida Constitution, Article I, Section 9

Appellee answers that (1) appellant did not adequately preserve the state constitutional grounds for his motion to suppress, (2) Article I, section 9 of the Florida Constitution requires no broader protection than the federal standard enunciated in ***Davis v. United States,*** U.S. ___, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994), (3) that even if *Davis* does not apply, appellant's request for counsel did not require clarification, and (4) any request for counsel was sufficiently clarified by the interrogating officers.

First, while it is true that appellant's written motion to suppress alleged a violation of his federal constitutional rights and cited ***Miranda v. Arizona, 384*** U.S. 436, 444-45, 86 S.Ct. 1602,

1612, 16 L.Ed.2d 694 (1966), (R. 91), appellant relied explicitly in his argument to the trial court on ***Traylor v. State***, 596 So. 2d 957, 966 (Fla. 1992), this Court's seminal decision which adopts the principles of ***Miranda*** as a matter of Florida Constitutional law. (T. 232, 248) Moreover, the substance of the claim on appeal -- that Mr. Walker's statement should be suppressed because he made an ambiguous request for counsel and the police failed to limit further questioning to clarification -- was presented fully to the trial court. (T. 231-33) The trial judge stated that he understood defense counsels' position, indicated he did not believe Mr. Walker's request for counsel required clarification, and orally denied the motion to suppress in its entirety, (T. 248-51) The state constitutional claim is therefore properly preserved, See, e.g., ***Thomas v. State***, 419 So. 2d 634, 636-37 (Fla. 1982) (where trial court clearly understood counsel's position and ruled adversely, no magic words required to preserve issue for appeal).

Appellee nevertheless maintains that this Court should decline to address this issue because appellant did not specifically argue in the trial court that the self-incrimination clause of the Florida Constitution is broader than that of the federal constitution. Answer Br. at 40. First, because ***Davis*** was decided nearly six months after the suppression hearing in this case, and a majority of federal courts until then had adhered to a clarification rule like Florida's, there ***was*** no apparent difference between the state and federal constitutions on this issue at the time of the suppression hearing. Second, the suggestion that application of ***Traylor*'s** primacy doctrine requires an evidentiary hearing in the trial court, Answer Br, at 41, is contrary to ***Traylor*** itself, which examined at length the history of Article I, section 9 -- the very constitutional provision at issue in this case -- without prior evidentiary findings by the trial court.

Traylor provides that, consistent with principles of federalism and the primacy doctrine, confessions should be examined "initially under our state constitution." 596 So. 2d at 961. Noting that, long before ***Miranda*** was decided, Florida had required "as a matter of state law that one charged with a crime be informed of his rights prior to rendering a confession," this Court found an independent basis for ***Miranda's*** principles in Article I, Section 9. ***Id.*** at 964.

While appellee attacks as "vague" appellant's assertion that Florida is a linguistically and

culturally diverse state, the point cannot be seriously disputed.[2] Moreover, these considerations merely reinforce Justic Souter's observation in ***Davis*** that:

> [C]riminal suspects who may (in ***Miranda's*** words) be "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures, " 384 U.S., at 457, 86 S.Ct., at 1618, would seem an odd group to single out for the Court's demand of heightened linguistic care. A substantial percentage of them lack anything like a confident command of the English language, ***see, e.g., United States v. De la*** *Jara,* 973 F.2d 746, 750 (CA9 1992); many are "woefully ignorant," ***Miranda, supra, 384*** U.S., at ***468, 86*** S.Ct., at 1624; cf. ***Davis v. North Carolina, 384*** U.S. 737,742, 86 S.Ct. 1761, 1764, 16 L.Ed.2d 895 (1966); and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them.

Davis, 114 S.Ct. at 2360-61 (Souter, J., with Blackmun, Stevens, and Ginsburg, J.J., concurring) (footnote omitted). Criticism of ***the Davis'*** majority for ignoring such "real-world" considerations, ***id.,*** does not, as appellee suggests, amount to "constitutional interpretation on the basis of mere personal preference. " Answer Br. at 42. Bather, it is based on the sound point that the clarification rule is more consistent with the prophylactic purposes of ***Miranda,*** which ***Traylor*** specifically embraced as a matter of state constitutional law under Article I, Section ***9. Davis,*** 114 S.Ct. at 2359-60 & n. 1 (Souter, J., concurring); ***Traylor, 596 So.*** 2d at 965-66.

Paraphrasing ***Miranda, 384*** U.S. at ***44445, Traylor*** held that "[u]nder Section 9, . . . [i]f the 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. " 596 So.2d at 966 (emphasis added). The same

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[2]For example, only four states have a higher percentage of foreign-born citizens than Florida and only seven have a higher percentage of residents who speak a language other than English at home. U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK, Table A. States-Population Characteristics (1994). ***Traylor*** also addressed, and rejected, appellee's suggestion that this Court should not give broader effect to the state constitution because Floridians are generally conservative on law and order issues, Answer Br. at 42, finding that, although "[e]ach law-abiding member of society is inclined to strike out at crime reflexively by constricting the constitutional rights of all citizens in order to limit those of the suspect . , . . [t]he framers of our Constitution ,. . deliberately rejected the short-term solution in favor of a fairer, more structured system of criminal justice . . , [and] where the rights of those suspected of wrongdoing are concerned, the framers drew a bright line and said to government, 'Thus far shalt thou come, but no farther . '" 596 So. 2d at 963-64.

language was cited by this Court as a basis for the clarification rule adopted in ***Cannady v. State,*** 427 So. 2d 723, 728 (Fla. **1983),** and ***Lung v. State,*** 517 So. 2d 664, 667 (Fla. **1987),** cert. denied, 486 U.S. 1017, 108 S.Ct. 1754, 100 L.Ed.2d 216 **(1988),** and is plainly inconsistent with ***Davis'*** unambiguous request rule. ***See Davis,*** 114 S.Ct. at 2361 (Souter, J., concurring). Consequently, while ***Cannady*** and ***Long*** may have rested on federal constitutional grounds, ***Traylor*** provides an independent state constitutional basis for the clarification rule.

Under that rule, "[w]hen a person expresses both a desire for counsel and a desire to continue the interview without counsel, further inquiry is limited to clarifying the suspect's wishes. " ***Long,*** 517 So. 2d at 667; ***Cannady,*** 427 So.2d at 728. Mr. Walker's statement -- "If you do that," or "If I do that," "I want an attorney," (T. 142, 186, 1276) -- embodied precisely such conflicting desires and, as argued in the initial brief, reflected a fundamental misunderstanding of his rights, Initial Br. at ***34-35, Connecticut v. Barrett, 479*** U.S. 523, 107 S.Ct. 828, 93 L.Ed.2d 920 **(1987),** on which appellee relies, is distinguished in appellant's initial brief, at 36.

Appellee maintains in the alternative that Detective Everett adequately clarified Mr. Walker's request by advising Mr. Walker that no stenographer would be brought in and asking whether he still wanted to talk. Answer Br. at 39-40. As explained in the initial brief, at 37-38, however, this does not constitute sufficient clarification under ***Slawson v. State,*** 619 So. 2d 255, 258 (Fla. **1993), *cert. denied,*** US. ___, 114 S.Ct. 2765, 129 L.Ed.2d 879 **(1994),** and ***Cannady,*** 427 So. 2d at 729. Moreover, as noted in the initial brief, at 37, Detective Everett's testimony was directly contradicted by Sergeant Watterson, who testified that the officers simply advised Mr. Walker that they would not bring in a stenographer and continued the interrogation. This is identical to the conduct held to be improper in ***Long,*** 517 So. 2d at 666-67 (remarking that the "complexion" of the interrogation had changed, defendant said "I think I might need an attorney, " officer assured defendant nothing had changed and continued interrogation). Appellee asserts that appellant has improperly attacked Detective Everett's credibility on appeal. Answer Br. at 40 n.13. As noted in the initial brief, however, the crucial discrepancy between

Watterson's and Everett's testimony was never resolved by the trial court, which made only a cursory oral ruling on the motion to suppress, Moreover, since the trial judge indicated he believed no clarification was required, it cannot be assumed that he made an implicit decision to credit Everett's testimony over Watterson's. Appellant has therefore suggested that it would be appropriate to remand the case for factual findings. Initial Br. at 37 n.40.

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

Appellee minimizes the coercive nature of the interrogation techniques employed by the officers in this case and argues that they were not sufficient singly, or together, to vitiate the voluntariness of the confession.

First, with respect to the specific interrogation techniques at issue: Appellee asserts that the repeated references to God in this case were "more analogous to a general appeal to conscience, " Answer Br. at 45, than exploitation of the defendant's sincerely-held religious beliefs. Everett and Watterson both testified, however, that they deliberately used religious appeals because they knew Mr. Walker was a deacon in his church. (T. 158, 163, 201, 205-06, 208, 1294) Detective Everett, in particular, explained that, as a religious man himself, he sought to establish a religious rapport with Mr. Walker, urging him "to tell God what happened if he didn't want to tell us what happened. " (T. 206, 208) This was not "a simple noncoercive plea for a defendant to be candid." ***Johnson*** v. ***State,*** 660 So. 2d 637, 642 (Fla. 1995), ***cert. denied,*** 1995 WL 810712 (Apr. 22, 1996).[3] With respect to the role-playing, while Detective Everett denied that he and Sergeant Watterson had employed a good-guy, bad guy routine and that things "just turned out that way, " (T. 204-05), Watterson testified that ***they did*** deliberately employ this "technique." (T. 161-62); Initial Br, at 4 n.3. Similarly, while Everett denied that there was a

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[3]With respect to the denial of counsel, appellant would simply emphasize, that for the reasons discussed in the preceding section, it is ***not*** clear that Mr. Walker understood his rights. Thus, ***Johnson,*** 660 So. 2d at 642, is distinguishable.

"racial problem" between Watterson and Walker or that racial epithets were used during the interrogation, (T. 212), he acknowledged that, while Watterson had yelled at Walker, Everett had established a rapport and appealed to Walker "man to man, brother to brother, let me help you out." (T. 215-16) Consequently, although Detective Everett denied that the race of the participants was deliberately exploited, the role-playing was plainly racially-charged. Finally, although this Court has held that the police may promise to convey the suspect's cooperation to the prosecutor and judge, Answer Br. at 46, that offer was juxtaposed in this case with the warning that Mr. Walker was facing the death penalty, and with Detective Everett's offer to "let me help you out," (T. 215-16) Thus, the clear implication, as in ***Brewer v. State, 386 So.*** 2d 232, 235 (Fla. 1980), was that Everett would help Walker avoid the electric chair if he confessed.

Although these techniques may not, individually, vitiate the voluntariness of the confession, their combined effect does. Initial Br. at 3743. Appellee distinguishes ***Brewer,*** *supra,* in part because the presumption of correctness operated in the defendant's favor in that case. Answer Br. at 48. As set out in the initial brief, however, at 43-44, it is not clear that the trial court in this case applied the correct legal standard in denying the motion to suppress. Notwithstanding his reference to the "totality of the circumstances," the trial judge appeared to conflate the conclusion that a particular interrogation technique is not so shocking as to inherently offend due process with the quite different conclusion that it can never be sufficiently coercive, when employed with other techniques, to render a confession involuntary.[4] Initial Br. at 43-44. "While a trial court's determination on a motion to suppress will normally be accorded great deference," that defererence does not apply when "the trial court applied the wrong legal standard." ***Doctor v. State,*** 596 So. 2d 442, 447 (Fla. 1992). The appropriate remedy in such

[4]Although this Court noted in ***Johnson,*** 660 So, 2d at 642, that "serious police misconduct poses a question of law for the judge, but less serious matters that may reflect on the reliability or fairness of the confession are questions of fact," this observation does not alter the obligation of the trial court judge to determine in the first instance if the police tactics at issue -- whether constituting "misconduct" or not -- were sufficiently coercive to render the confession involuntary. ***See Miller v. Fenton,*** 474 U.S. 104, 109, 106 S.Ct. 445, 449, 88 L.Ed.2d 405 (1985) (explaining distinction between due process issues of police misconduct and voluntariness).

cases is to remand for application of the correct standard. See *State* v. *Polanco, 658 So.* 2d 1123, 1125 (Fla.3d DCA 1995); Moore v. *State,* 647 So. 2d 326, 327 (Fla. 2d DCA 1994).

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

Appellee argues both that the trial court should not have sustained the objection to Sergeant Wattcrson's testimony and that any error was cured by the trial court's instruction. Appellee maintains that Watterson's statement that he knew Mr. Walker had a sexual assault charge filed against him was relevant "to assist the jury in its evaluation of the reasons why the defendant ultimately confessed and the voluntariness of the confession." Answer Br. at 52. As noted in the initial brief, at 48, however, the fact that the police confronted Mr. Walker with erroneous information about another crime would not tend to establish the voluntariness of the confession; it would tend to establish the opposite. Moreover, the "context" of the interrogation -- that the police took an "accusatorial tone" with the defendant, Answer Br. at 51 -- could be adequately established without reference to the unsubstantiated sexual assault allegation.[5] The trial judge therefore properly ruled that whatever marginal probative value the evidence might have was "far outweigh[ed] " by the danger of unfair prejudice. (T. 1264)

The facts in this case are virtually indistinguishable from *Cooper v. State, 659 So.* 2d 442, 443-44 (Fla. 2d DCA 1995), in which the court held that, even if testimony of a rape accusation against the defendant was "relevant evidence of a collateral crime which was otherwise admissible" to establish motive and the "context" of the victim's conversation with the defendant,

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[5]Appellee now argues that the evidence should have been admissible, independent of the interrogation, to prove motive. Answer Br. at 51. The prosecution never sought to admit the evidence for that purpose, however, and argued only that it was relevant to establish "the fact of the existence of this conversation and its affect [sic] on the defendant insofar as his response to the officers and his change of story." (T. 126364)

the evidence was properly excluded under section 90.403 -- as the trial court concluded in this case.[6] Moreover, the trial court's curative instruction was "insufficient to remove the prejudice inherent in the testimony." *Id.* at 444.

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

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

As an initial matter, appellee's assertion that this issue is not preserved for appellate review because defense counsel did not request a curative instruction is erroneous. Where defense counsel "makes a timely specific objection and moves for a mistrial," it is not necessary to also request a curative instruction. ***Spencer v. State,*** 645 So. 2d 377, 383 (Fla. 1994). Defense counsel in this case objected promptly, explained his specific objection that future dangerousness is not a valid aggravating circumstance in the State of Florida, and requested a mistrial. (T. 2114) The objection was sustained but the motion for mistrial was denied, (T. 2115)

Second, appellee's attempt to defend the prosecutor's question to Dr. Eisenstein, "Well, do you think then also that he [Mr. Walker] may kill again?" (T. 2 114) is untenable. Appellee suggests that, having advanced the opinion that Mr. Walker was unable to conform his behavior

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[6]*Smith v. State, 424 So.* 2d 726, 730 (Fla. 1983), *cert. denied, 462* U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983), on which appellee relies is distinguishable, as it involved the admission of the defendant's inconsistent exculpatory statements, not evidence of a prior uncharged crime. In ***Walker*** v. ***State,*** 544 So. 2d 1075 (Fla.2d DCA 1989), the defendant's statements to the victim and the police that he had recently been released from prison were not only "integral" to the facts of the crime itself but were also relevant to prove identity, which was a disputed issue at trial.

to the requirements of law at the time of the crime because of his mental illness, emotional volatility and cognitive limitations, Dr. Eisenstein was subject to cross-examination "regarding the full range of features which might exist at any given time," including, apparently, in the future. Answer Br. at 57-58. Under this rationale, the state would be entitled, under the guise of exploring the "features" of the defendant's mental problems, to ask whether the defendant would kill again in virtually any case in which the defense presented mental mitigation. Neither ***Cruse v. State,*** 588 So. 2d 983,991 (Fla. **1991),** ***cert. denied, 504*** U.S. 976, 112 S.Ct. 2949, 119 L.Ed.2d ***572*** (1992), nor ***Jones v. State,*** 652 So. 2d 346, 352-53 (Fla. 1995), ***cert. denied,*** ___ ***U.S.*** ___, 116 S.Ct. 202, 133 L.Ed.2d 136 (1995), on which appellee relies, support such a sweeping proposition. Indeed, while appellee cites these cases to suggest that otherwise-inadmissible evidence might be allowed "for the purpose of negating mitigating factors relied upon by the defense, " Answer Br. at 57, appellee makes no attempt to explain how speculation regarding the defendant's ***future*** conduct would rebut a mental mitigating circumstance relating to his state of mind at the time of the crime.[7]

There was simply no legitimate purpose for the prosecutor's question. As this Court noted ***13*** years ago, "[i]f this were a matter of first impression in this jurisdiction, there might arguably be some justification for counsel's" conduct, but this Court has held repeatedly that speculation about a defendant's future criminal conduct has "no place in our system of jurisprudence" as grounds for imposing a sentence of death. ***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).[8] Any prosecutor with a modicum of training therefore had to know that the question "do you think . . . he may kill again" is improper under Florida law and expect the question to draw an immediate objection.

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[7]The prosecutor had already implied that Dr. Eisenstein's conclusions were unreliable, because Mr. Walker had not previously killed anyone, despite his mental illness. (T. 2112)

[8]*Accord* ***Miller v. State,*** 373 So. 2d 882, 886 (Fla. 1979); ***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); ***Grant v. State,*** 194 So. 2d 612, 613-15 (Fla. 1967).

Contrary to appellee's assertion, the prejudice to the defense was not diminished by the fact that Dr. Eisenstein did not answer. Short of an outright assertion that Mr. Walker would kill again, there could be no more effective means of planting the issue of future dangerousness in the jurors' minds than asking the question, drawing an objection, and leaving the jurors with the further impression, as noted in the initial brief, at 52-53, that the defense did not want the jury to hear the answer. ***See Fischman*** v. ***Suen,*** 21 Fla. L. Weekly D1039 (Fla. 4th DCA May 2, 1996) (noting that objections may suggest that crucial evidence is being concealed from jury). Indeed, from the prosecution's hasty assertion, in opposition to the motion for mistrial, that the question had not been answered, (T. 2114-15), one could infer that the prosecution intended all along to inject the improper issue but avoid a mistrial on the ground that the question was unanswered. This tactic was expressly condemned in ***Molina*** v. ***Stute, 447 So.*** 2d 253,256 (Fla. 3d DCA 1983) (Pearson, J., concurring), ***review denied,*** 447 So, 2d 888 (Fla. 1984).

As discussed in the initial brief, at 53, a curative instruction would have been utterly ineffective. It could only have emphasized the issue further and reinforced the impression that information was being withheld from the jury, effectively allowing the prosecutor to benefit twice from his misconduct.[9] ***See Rimes*** v. ***State,*** 645 So. 2d 1080 (Fla. 2d DCA 1994) (reversal required where prosecutor's question invited improper testimony and curative instruction would have accentuated error). Given the powerful and persistent effect of the question "do you think . . . he may kill again" and the prosecutor's emphasis in closing argument on the uncertainty of consecutive sentences being imposed, it is impossible to say beyond a reasonable doubt that the prosecutor's misconduct in this case did not contribute to the jury's narrow 7 to 5 recommendation of death, by causing at least one juror to improperly consider future dangerousness either as an

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[9]The standard penalty phase instruction, informing the jurors that "[t]he aggravating circumstances that you may consider are limited to any of the following that are established by the evidence, " (T. 2285), was similarly insufficient to diminish the harm to the defense. The fact that this Court has been compelled to reverse trial judges, who are presumed to know the law, for improperly considering future dangerousness belies the state's contention that jurors would necessarily understand the standard instruction to preclude such consideration. See ***Huckaby, 343 So.*** 2d at ***33; Miller, 373 So.*** 2d at 885-86.

independent aggravating circumstance or to negate the mitigating effect of the defendant's mental illness and organic brain damage.

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

Appellee first answers that all of appellant's arguments on this point are predicated on the need to respond to the prosecutor's improper interjection of future dangerousness into the sentencing proceedings and that "[n]o such argument was presented" below.[10] Answer Br. at 59.

The entire premise of the defense motion, however, which was filed and initially argued before Dr. Eisenstein's testimony, was that the defense should be able to address jurors' concerns about incapacitation by informing them that the alternative to the death penalty in this case would, as a practical matter, be life without possibility of parole. (R. 400-15) Defense counsel also reiterated in argument on the motion that Mr. Walker should not be sentenced to death based on jurors' fears that he would be released in only 25 years or less, when that would not realistically be the case. (T. 1637-38) By asking Dr. Eisenstein whether Mr. Walker might kill again, the prosecutor exploited the very concerns that had been cited as grounds for the motion -- he made

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[10]The point on appeal includes several interrelated but distinct claims: (1) the improper injection of future dangerousness into the penalty proceedings, addressed in part V.A.; (2) denial of due process by (a) denying the defense the ability to rebut the prosecutor's future dangerousness argument and (b) creating artifical uncertainty regarding alternatives to the death penalty by postponing their determination until after the jury's recommendation; and (3) violation of the eighth amendment by (a) precluding the jury from considering relevant mitigating evidence and (b) undermining the reliability of the sentencing proceeding. Only the first aspect of the due process argument depends on the rebuttal theory that the state claims is unpreserved. However, since both the denial of the defense motion and the prosecutor's improper question were preserved, these issues must be considered "both individually and collectively" in assessing their effect on the jury. ***Jackson v. State,*** 575 So. 2d 181, 189 (Fla. 1991) (quoting ***Alvord v. Dugger,*** 541 ***So.*** 2d ***598,*** 601 (Fla. 1989), ***cert. denied, 494*** U.S. 1090, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990)); ***see also State v. Townsend,*** 635 So. 2d 949, 959-60 (Fla. 1994) (cumulative effect of both preserved and unpreserved errors deprived defendant of a fair trial).

the "silent aggravating circumstance" explicit.[11] Nevertheless, when the pending motion was called up at the charge conference, after Dr. Eisenstein's testimony, it was summarily denied. While defense counsel did not specifically identify the prosecutor's improper question to Dr. Eisenstein as a separate reason to grant the motion, the necessity of responding to jurors' fears and misapprehensions about the defendant's release from prison was fully presented to and rejected by the trial court.

Appellee's further contention that ***Simmons v. South Carolina,*** ___ U.S. ___, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), is inapplicable because the prosecutor in this case did ***not*** inject the issue of future dangerousness into the proceedings is, as discussed in the preceding section, untenable. The prosecutor plainly raised the implication that Mr. Walker might kill again if released from prison and then emphasized in closing argument that the jury could be certain only that Mr. Walker would be required to serve a life sentence with a 25 year minimum mandatory. Appellee's claim that appellant has taken liberties with the prosecutor's closing argument is belied by placing the remarks in the context of the argument that preceded it:

> The defense will ask for a recommendation of life. They will tell you that the defendant will be sentenced to at least 25 years before he is eligible for parole as part of a life sentence for either one of these crimes. The defendant could be sentenced, will be sentenced to that, there is no doubt about that. That is the least sentence he will get. ***They will suggest to you that he will or could be sentenced to 50 years because they will suggest to you that the Judge could give a consecutive time for each murder, life with a minimum mandatory of 25 years for the murder of Joann Jones, life with 25 years minimum mandatory for the murder of Quinton.***
>
> ***They will tell you that any such sentence is in effect a death sentence but the truth is, ladies and gentlemen, the truth is, the only sentence the defendant must receive is life with a 25 year minimum mandatory. Beyond that the rest is up to the judge. And the only thing that is certain in life is death and taxes. . . .***

(T. 2254-55) Thus, while the prosecutor did go on to argue that "justice" required imposition of the death penalty, he plainly exploited the uncertainty of consecutive sentences being imposed in

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[11] 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) (Jurors' concerns about parole "operate[ ] as a 'silent aggravating circumstance' in many capital sentencing proceedings, and often may be the decisive factor underlying a jury's decision to sentence a defendant to death.")

order to negate the mitigating effect of the defense counsel's anticipated argument. The prosecutor *in Simmons* was, if anything, more oblique. Indeed, the dissenters argued vigorously that the prosecutor's remarks in that case did *not* amount to an implication that the defendant would be released on parole. *Simmons,* 114 S.Ct. at 2203 (Scalia, J. and Thomas, J., dissenting).

Appellee further submits that Mr. Walker received all that he was entitled to under *Simmons* and *Jones v. State, 569* So. 2d 1234, 1239-40 (Fla. 1990), because he was allowed to argue "the possibility" of consecutive life sentences with consecutive minimum mandatory terms being imposed. Answer Br. at 60-61. The gravaman of defendant's motion, however, was that arguing about merely "possible" sentences was not sufficient. Unless the the defendant's parole ineligibility was resolved in advance, the prosecution could thwart the mitigating effect of any alternative sentence argument, as it ultimately did, by emphasizing that uncertainty.[12] The defense therefore stressed the independent due process principle that it is arbitrary and unfair to postpone determination of the defendant's alternative sentences until after the jury's recommendation when the court could easily determine in advance the sentences for the noncapital offenses and whether the capital sentences would be consecutive or concurrent. [13]

Appellee has failed to identify any state interest whatsoever in deferring this determination. The procedure the defense requested is consistent with Florida's long-standing policy of accurately

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[12] Appellant does not dispute that the prosecutor's argument was technically correct regarding this uncertainty, but it was correct only because the prosecution had successfully opposed any effort to resolve the uncertainty prior to closing argument.

[13] Appellee also argues that, notwithstanding the written motion and supporting memorandum of law, the request for determination of the noncapital sentences was not presented to the trial court with sufficient clarity because defense counsel did not specifically address it in oral argument on the motion. Answer Br. at 58, 61-62. The record discloses, however, that the trial judge was fully aware that the defense was also requesting sentencing on the noncapital convictions. First, the trial judge's remarks when he first raised the motion for discussion indicated that he had read it. (T. 1636) Moreover, with regard to whether a presentence investigation report would be required, one of the prosecutors stated, "*This is on the other offenses [--] what the defendant is asking you to do, is make your decision as to the other known [sic-non] capital offenses* and decide without a PSI what you would impose on those sentence[s]. " (T. 1639) The trial judge responded, *"I understand that* but for purpose[s] of [this motion] he is waiving most of these, he is waiving presentence investigation." (T. 1639)

instructing capital sentencing juries on the defendant's parole ineligibility and is not prohibited by any statute or rule of criminal procedure.[14] By the close of the penalty phase evidence, the trial judge has *more* information than he or she would ordinarily have in deciding whether to make sentences consecutive or concurrent or in imposing sentences for noncapital offenses. Moreover, the determination need not be predicated on the jury returning a life recommendation because the judge decides whether to make the sentences consecutive or concurrent, whether the sentence imposed is life *or* death.[15] The real reason for the state's opposition to the defense motion is simply that a jury is less likely to impose the death penalty if it knows that the alternative is life without possibility of parole.[16] See William Bowers, ***Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions, 27*** L. & SOC. REV. 157, 164 (1993) (while 84 percent of Floridians in a 1985 survey favored capital punishment, 70 percent preferred life without parole, plus restitution, over the death penalty). This, however, is not a proper reason to withhold from the jury relevant, non-speculative information about the alternative to the death penalty. ***See Turner v. State, 573 So.*** 2d 657, 675 (Miss. 1990), ***cert. denied,*** 500 U.S. 1910, 111 S.Ct. 1695, 114 L.Ed.2d 89 (1991).

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

Appellee's response to the harmless error analysis is to disparage the mitigating evidence

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[14] Florida Rule of Criminal Procedure 3.720, which governs noncapital sentencing, provides simply that a sentencing hearing be held "as soon as practicable" after the determination of guilt. Neither section 921.141, Florida Statutes, nor Rule 3.780, which apply to capital sentencing, require that the noncapital sentencing hearing be held *after* the capital sentencing.

[15] Thus, the judge made the death sentences in this case consecutive. (R. 584) Since the defendant cannot be executed twice, the purpose of this determination is apparently to ensure that the sentences would be consecutive if ever reduced to life -- precisely the same advance determination the defense was requesting.

[16] Life without parole is now the only alternative to a death sentence for first degree murder. Ch. 94-228 $1, at 1577, Laws of Fla.

presented below.[17] Echoing the trial prosecutor, appellee asserts that Mr. Walker's personality disorder is "not uncommon. " Answer Br. at 64. Paranoid personality disorder, to which Dr. Bergman was referring,[18] is found in only .5 to 2.5 percent of the general population; borderline personality disorder, which was the primary diagnosis of doctors Eisenstein and Toomer, occurs in only 2 to 3 percent of the general population. 2 KAPLAN & SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1434, 1439 (6th ed. 1995). Consequently, while these disorders may not be "uncommon" within a psychologist's clinical practice, it is extremely misleading to suggest that they are widespread in the general population.

Appellee also asserts that Mr. Walker's personality disorder "essentially boiled down to nothing more than difficulty in dealing with stressful situations."[19] Answer Br. at 64. This

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[17] Since the prosecution elected not to present expert testimony at trial, appcllee's response to the mental mitigation must rely on the trial prosecutor's cross-examination of the defense witnesses. This, however, consisted largely of badgering the defense witnesses and ridiculing their methods in a generalized attack on the field of psychology. For example, the prosecutor selected individual questions on the MMPI -- the most widely used and researched instrument for objective personality assessment -- to make fun of them. (T. 1961-62) His cross-examination of Dr. Toomer was peppered with sarcastic and inappropriate comments, such as asking Dr. Toomer , "Do you have any problem with sensory motor perception yourself?" (T. 1950) Similarly, in closing argument he made fun of the Halstead-Reitan neuropsychological battery administered by Dr. Eisenstcin, suggesting it was not scientifically accepted, (T. 2240-41, 2246), although it is undisputedly a standard instrument used by most neuropsychologists to detect brain damage. (T. 2067) However effective this may have been as a trial strategy, it should not be accepted on appeal as the equivalent of rebuttal testimony by a qualified expert.

[18]Dr Bergman's agreement on cross examination with the prosecutor's assertion that paranoid personality disorder is "not an entirely uncommon phenomena [sic]" (T. 1814) is the only evidentiary basis for this proposition.

[19]Appellee elsewhere implies that Dr. Toomer's and Dr. Eisenstein's diagnoses are unreliable because Mr. Walker's elevated score on the "lie" or "L" scale of the MMPI indicates that he was manipulating the test to feign mental illness. Answer Br. at 23. The L scale does not, however, measure "faking bad, " Rather, as Dr. Toomer explained,it measures a patient's attempt to present himself as less impaired than he really is. Thus, any problem with the validity of the MMPI in this case was in its tendency to *understate* the severity of Mr. Walker's psychological problems. (T. 1952, 1964) Appellee also states erroneously in the statement of facts that Mr. Walker had only one score that exceeded a clinical significance level of 66; in fact, there were three scores "that are elevated over 66. " (T. 1963) Finally, any suggestion that Mr. Walker was feigning mental illness, that he had developed his symptoms only during his incarceration, or that Doctors Toomer and Eisenstein were overstating the severity of his problems is totally contradicted by the testimony of two psychologists who saw him five years ***before the*** crime, as discussed *infra*.

trivializes the characteristics of borderline personality disorder -- corroborated in this case by the testimony of lay witnesses -- that cause severely dysfunctional behavior.

Studies suggest "that patients with borderline personality disorder have a high frequency of early parental loss or traumatic separations or both. Their intense attachment needs have been stimulated and frustrated in ways that often lead to a search for maternal substitutes." 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1439. James was neglected and abandoned by his natural mother at a very young age. (T. 1823, 182627) He did not learn until his early teens that his stepmother, Ann Chambers, was not his natural mother, and soon thereafter his father and Ann separated. (T. 216566) James became severely depressed and had a "nervous breakdown" requiring medical attention. (T. 2172) James also formed a strong attachment to Betty Ann Phinaze, Ann Chamber's niece, who grew up in the Walker household. (T. 2034-44, 2045) He believed for a time that Betty was his mother and was terrified when she went to her high school prom because he was afraid she was getting married and leaving him. (T. 2042, 2045) James asked to live with Betty when his father and Ann Chambers divorced. (T. 2044-45)

The families of patients with borderline personality disorder "are also frequently flawed by disruptive behavior, alcoholism, and, most specifically, physical or sexual abuse, which occurs in well over half of the patients," 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 143940. While the state contends that the "worst that could be said of the familial relationships was that the father was not a particularly nice man," Answer Br. at 64, the evidence below established that James Walker Sr. was psychologically and physically abusive to his wife, Ann, sending her to the hospital on at least one occasion, and to both James and Betty. (T. 1833-34, 2036-38, 2040) The household was so permeated with tension and the threat of violence that both James and Betty spent much of their time closeted in their rooms and were afraid to be alone with James, Sr. (T. 1835, 2038-39, 2045, 2184) James was sexually abused as a teenager by a neighborhood handyman. (T. 2173) This can hardly be considered a "stable" childhood as appellee suggests.[20]

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[20]Appellee also states erroneously that Mr. Walker's grandmother. Cora Walker, lived continuously with him and his father following his father's divorce. Answer Br. at 64. In fact,

Answer Br. at 64.

Contrary to appellee's implication, Answer Br. at 65, experiences of childhood abuse do not remain compartmentalized in the past. Rather, they are echoed in the dysfunctional relationships and behavior of borderline patients in adulthood:

> The relationships of persons with borderline personality disorder tend to be unstable, intense, and stormy. Contributing to that instability and storminess are sudden and dramatic shifts in their views of others; the views may alternate between extremes of idealization and devaluation or of seeing others as beneficent supports and then as cruelly punitive. Such shifts often reflect disillusionment with a caretaker whose nurturing qualities had been idealized or by whom the patient expects to be abandoned. , . .

2 **COMPREHENSIVE TEXTBOOK OF PSYCHIATRY** 1440.[21] Borderline patients may attain greater stability in their 30s and **40s,** but "they often experience profound dysfunction in many important aspects of life: they interrupt or do not complete their education, lose their jobs, and fail in relationships and marriage, " Id. In adulthood, Mr. Walker had two very brief and impulsive marriages before he married Vanessa Walker and had relationships with several other women, both between his marriages and overlapping them. (T. 1841-42, 2176-77, 2177) Yet Dr. Bergman noted that Mr. Walker was extremely mistrustful of women, believing that they wanted to take advantage of him. (T, 1812) He blamed his most recent ex-wife for his problems. (T. 18 12) His rather brief marriage to Vanessa was unstable and punctuated by separations and reconciliations. (T. 2178-79) Mr. Walker also had obvious difficulties in the workplace, which prompted his employer, Judge **Barad,** to send him to a psychologist. (T. 2016)

Borderline patients are usually dysphoric, their mood consisting of depressed affect and "a mixture of chronic anger, loneliness, and emptiness. The chronic dysphoria is often

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Mr. Walker's father moved out, without prior notice, when he became convinced that Cora Walker was poisoning him, He later took Mr, Walker to live in Ft. Lauderdale and forbid him to have contact with the rest of the family. (T. 2170-71, 2184-85)

[21]*See also Santosky* ***v. Kramer, 455*** U.S. 745, 787, 102 **S.Ct.** 1388, 1412, 71 **L.Ed.2d** 599 (1982) **(Rehnquist,** J., dissenting) ("It requires no citation of authority to assert that children who are absued in their youth generally face extraordinary problems developing into responsible citizens. ")

interrupted by periods of intense anger, panic, or despair, but it is rarely relieved by periods of well-being or satisfaction, " They often need to justify their anger as externally provoked and may turn to self-destructive acts if their defenses are not successful. 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1440. Mr. Walker was described as depressed since childhood; as an adult, he continued to suffer bouts of depression and became withdrawn and uncommunicative in response to social stressors. (T. 2183-84) He threatened to commit suicide on at least one occasion. (T. 1695-96) Dr. Haber, who saw Mr. Walker at the request of his employer, a Dade Circuit Court judge, found him to be irritable and unhappy and was particularly concerned by his impulsiveness and violent ideations toward his ex-wife and possibly others. (T. 2016-17) Believing that Mr. Walker required immediate treatment, Dr. Haber referred him to Dr. Bergman, (T. 2017-18), who similarly found that Mr. Walker was experiencing deep internal rage, which was only slightly visible on the surface. (T. 1812)

Most of the observable features of borderline personality disorder "are highly sensitive to interpersonal stress":

> [W]ithin the context of a supportive relationship (or within a structured holding environment), appealing, waiflike, dy sthymic features are evident. Yet the perception of the impending loss of such a relationship or structure can produce sudden rage, devaluative or paranoid accusations, and self-destructive acts designed to provoke protective responses. In the absence of a relationship, dissociative episodes, substance abuse, and desperate impulsive behavior can occur.
> . . . .
>
> Stressful experiences -- often the absence of a relationship or external structure -- can result in a variety of transient, psychoticlike cognitive and perceptual distortions, such as a feeling of not existing, dissociative experiences, ideas of reference, hypnogogic phenomena, and unrealistic accusations of mistreatment. .

2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1440. Dr. Bergman found that Mr. Walker tended to misperceive the motives and behavior of others and frequently felt mistreated and misunderstood. (T. 1810) He tended to make mountains out of molehills and frequently experienced interpersonal difficulties. (T. 1810) Approximately a week before the homicides, Mrs. Walker discovered that Mr. Walker had an illegitimate child with Joanne Jones when she

found check stubs indicating that the child support was being deducted from his **pay.**[22] As noted in the initial brief, at 62, even a psychologically healthy person would likely experience these events as far more than ordinary "stress. " For someone suffering from borderline personality disorder, and paranoid tendencies, these events would be overwhelming. The volatility of borderline personality disorder, which can lead to **"desperate[ly]** impulsive behavior," ***id.*** was exacerbated in this case by Mr. Walker's paranoia, organic brain **damage**[23] and limited intellectual **abilities,**[24] which further impaired his ability to make rational decisions in the face of social stressors. (T. 2073-75)

The evidence below clearly established the existence of the two statutory mental mitigating factors as well as the existence of substantial non-statutory **mitigation.**[25] At least five jurors were

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[22] Mrs. Walker indicated that she learned about the paternity action by Ms. Jones when she went through his bags approximately a week before the crime and discovered check stubs indicating that the child support payments were being withheld from his pay. (T. 1211, 1221, 1223) This corresponds to the effective date of the court order. (R. 266-69)

[23]**With** respect to organic brain damage, appellee erroneously asserts that Dr. Eisenstein's diagnosis was "based, in large part" on "highly subjective tests" administered by Dr. Toomer. Answer Br. at 64. The only test Dr. Toomer performed related to organic brain damage was the Bender-Gestalt, which he used as a screening tool to determine whether a referral to a neuropsychologist, such as Dr. Eisenstein, was appropriate. (T. 1766, 1781) Dr. Eisenstein's conclusion that Mr. Walker suffered organic brain damage was based on his own testing, including the Halstead-Reitan neuropsychological battery, which is widely accepted and used by most neuropsychologists, (T. **2066-67),** the Boston naming test (T. **2089),** and other measures of motor skills, sensory perception, and memory, **(T. 2055),** which are accepted methods of neuropsychological assessment. **See** 1 **COMPREHENSIVE TEXTBOOK OF PSYCHIATRY** ***564-78.***

[24]**While** appellee emphasizes that Mr. Walker struck other witness as being of average or slightly above average intelligence, Answer Br. at 64, the results of the IQ test administered by Dr. Eisenstein were unrebutted. Moreover, the fact that Mr. Walker completed high school and served in the military and as a bailiff is not inconsistent with his low IQ, since he obviously developed strategies to mask his limitations. For example, Stan Samuel's brother helped Mr. Walker complete his application form for the bailiff position because he was unable to do so himself. (T. 2182)

[25]**Contrary** to appellee's assertion, Answer Br. at 23, Dr. Toomer did not state affirmatively that Mr. Walker was able to conform his conduct to the requirements of law or that this mitigating factor was inapplicable. Rather, he stated that he could not conclude to a reasonable psychological certainty that it applied but believed that the characteristics of Mr. Walker's personality profile, which included bizarre behavior and transient psychotic symptoms, would interfere with his ability to conform his conduct to the requirements of law. (T. 1793, 1984-85, 2010)

persuaded that this evidence outweighed the aggravating circumstances -- all of which related to this crime. Mr. Walker had no prior criminal history. The prosecution, however, exploited the double-edged nature of the mental mitigation by raising the specter of future dangerousness, suggesting that Mr. Walker's mental illness would cause him to kill again if he was ever released from prison. At the same time, the trial court refused the defense request to determine and inform the jury of the length of Mr. Walker's parole ineligibility, which would have assuaged the jurors' fears and could have caused at least one additional juror to recommend life. In these circumstances, the errors asserted herein cannot be deemed harmless beyond a reasonable doubt.

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

Appellee answers first that Dr. Williams' penalty phase testimony regarding the process of drowning could not have been prejudicial because he had already given similar testimony at the guilt phase. Dr. Williams' guilt phase testimony, however, was more than two months prior to his penalty phase testimony, (T. 1020, 1654), and was offered to explain the cause of death, not to establish the victims' conscious suffering for purposes of HAC. Appellee also asserts that "every single piece of evidence adduced at the penalty phase" need not satisfy the reasonable doubt standard. Answer Br. at 66. The victim's consciousness is an essential element of the HAC aggravating circumstance, however, and must be proven beyond a reasonable doubt. See, *e.g., DeAngelo v. State,* 616 So. 2d 440, 442-43 (Fla. 1993) (trial court properly declined to find HAC aggravator where victim's consciousness not proved beyond a reasonable doubt); see *also In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Jackson v. State,* 575 So.2d 181, 188 (Fla.1991).

Appellee further argues that Dr. Williams' testimony was admissible, even though he could not say to a reasonable medical certainty that Ms. Jones was conscious, because there was other

evidence from which the jury could infer consciousness -- specifically the blood and tissue found under the Ms. Jones' fingernails and the fact that some of the tape had come loose from her feet and legs. Answer Br. at 67. There is no basis for assuming that the blood and tissue under Ms. Jones' nails resulted from an attempt to free herself after she was in the water, Indeed, appellee subsequently cites the same evidence as indicating that Ms. Jones resisted being bound ***before*** she was put in the water, Answer Br. at 85. Nor is there any basis for concluding that the tape had come loose from Ms. Jones' feet, (T. 939-40), as a result of a struggle to extricate herself rather than as a result of being in the water for an extended period of time. Tape had similarly come loose from Quinton's body while in the water, (T. 1718, 1733). Given Dr. Williams' candid admission that he could not say whether the victims were conscious and the equally if not more plausible explanations for the other "evidence" of consciousnes, it is apparent that the state failed to present sufficient evidence to allow the jury to find that the victims were conscious 'when they placed in the water. *Cf. Doby* v. *Griffin,* 171 So. 2d 404, 408 (Fla. 2d DCA 1965) (summary judgment for defendant proper on issue of pain and suffering in survival action where plaintiff's witness "simply did not know" whether victim survived impact). The trial court therefore erred in allowing Dr. Williams' graphic description of drowning.

Moreover, contrary to the state's argument, this error cannot be considered harmless. Since Dr. Williams' testified that Ms. Jones' injuries were consistent with her having been rendered unconscious within a matter of seconds by strangulation, (T. 1727, 1736-37), the jury could very well have found that the HAC aggravating circumstance did not apply, absent this inflammatory testimony. Moreover, because the trial court refused to instruct the jury that events after unconsciousness are not relevant to HAC, there is a very substantial danger that the jury considered the improperly-admitted evidence even though it was legally irrelevant. ***Cf. Dobbs*** v. ***Griffith,*** 70 So. 2d 317,318 (Fla. 1954) (error to deny defendant in survival action instruction that plaintiff bore burden of proving that decedent consciously suffered pain prior to death).

VII.

THE PROSECUTOR'S CLOSING ARGUMENT, IN WHICH HE ATTACKED DEFENSE COUNSEL, THE DEFENSE EXPERTS, 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

With respect to the prosecutor's attack on defense counsel and witnesses and on the legitimacy of the mitigating evidence, appellee answers that the nature of the error asserted on appeal is different from the objection made below and is thus unpreserved. Answer Br. at 68-69. This argument is without merit. Although there were not separate objections to each of the prosecutor's remarks denigrating the defense experts and the legitimacy of the mitigating evidence, defense counsel argued specifically that the prosecutor "has at length been ridiculing the defense experts on mitigation as not legitimate" and had now added the implication that defense counsel had colluded with unethical experts to fabricate mitigating evidence. (T. 2250) Thus, the objection below, like the argument on appeal, stressed the cumulative effect of the prosecutor's improper arguments, The issue is therefore properly preserved for appeal.[26] (T. *225* 1) *See* ***Whitton*** *v. State,* 649 So. 2d 861, 865 (Fla. **1994),** cert. *denied,* U.S. ___, 116 **S.Ct.** 106, 133 **L.Ed.2d** 59 (1995).

The prosecutor's fmal accusation of fraud -- which appellee properly makes no attempt to defend -- placed a sinister gloss on his prior arguments. Having already leveled unsupported attacks on the methods employed by the defense **experts,**[27] repeatedly dismissed the mitigating

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[26]As appellee acknowledges, the trial court understood defense counsel's objection to include a motion for mistrial. Answer Br. at 68. The trial court's directive to the prosecutor to "clear it up" by clarifying that he intended his remarks to relate to the defense witnesses rather than defense counsel was insufficient to cure the prejudicial effect of the prosecutor's remarks. *See, e.g.* , ***Redish*** *v. State,* 525 So. 2d 928, 931 (Fla. 1st DCA 1988) (curative instruction insufficient to dissipate prejudicial effect of repeated misconduct).

"Contrary to appellee's assertion, the prosecutor did not **confine** himself to fair comments on the evidence with respect to the purported "problems" with the defense experts' methods.

evidence with the remark "big deal," and asserted that the mitigating evidence could not "excuse" the crimes, the prosecutor equated mental mitigation with false claims of "whiplash," fabricated by dishonest doctors and defense lawyers. The obvious improper purpose and combined effect of these arguments was to invite the jury to disregard the mental mitigation "as a subterfuge employed by [the defendant] to evade justice." ***Rosso*** v. ***State,*** 505 So. 2d 611, 613 (Fla. 3d DCA 1987). In a case where the jury was so closely divided between a recommendation of life and death, this argument cannot be deemed harmless beyond a reasonable doubt.

Appellee concedes that the prosecutor's plea for the jurors to put themselves in the shoes of the victims was improper but contends that only one of the five improper remarks identified in appellant's brief was preserved for appeal because (1) defense counsel failed to object to two of the remarks and (2) with regard to his two additional objections, did not state the grounds. . Answer Br. at 71. Both contentions are without merit.

Once counsel objects to an improper line of argument, identifies the grounds for the objection, and the objection is overruled, counsel need not repeat the objection or the grounds therefor every time the improper argument is renewed. ***Leretilley v. Harris, 354 So.*** 2d 12 13, 1214 (Fla. ***4th*** DCA), ***cert. denied,*** 359 So. 2d 1216 (Fla.1978); ***accord Webb v. Priest,*** 413 So. 2d 43, 46 (Fla. 3d DCA 1982); ***Donaldson v. State, 369*** So. 2d 691, 694 (Fla. 1st DCA 1979). Appellee's assertion to the contrary is particularly absurd in this case, because the two purportedly unobjected to remarks followed almost immediately the trial court's overruling of defense counsel's objection. (T. 2220-21, 2253) It would be the height of futility to require a new objection when the prosecutor ***resumes*** a line of argument to which defense counsel has just objected unsuccessfully. Similarly, defense counsel's two additional objections were to remarks

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Answer Br. at 70. Rather, he resorted to pure ridicule, For example, the prosecutor's argument regarding the Bender-Gestalt test included the following: "Bender Gestalt. Ability to draw these little pictures. Well, frankly I submit he did pretty good with them. You can decide for yourself. Do you you really believe that is worth anything, those little drawings?" (T. 2240) The prosecutor then turned to the Halstead-Reitan neuropsychological battery, "the other really great highly technical scientific tests that Dr. Eisenstein offered to tell you about that man who couldn't make good judgments or decisions; like finger tapping, (indicating)," (T. 2240-41; see ***also*** T. ***2246-47)***

that were plainly in the same vein as those to which he had previously objected as improper "Golden Rule" argument. (T. 2253, 2256) Further, defense counsel requested a side-bar when he made the second objection, and the judge denied the request, thereby preventing further argument. (T. 2253) Defense counsel sought repeatedly and without success to curb the prosecutor's improper argument. The issue is therefore properly preserved.

Appellee also attempts to minimize the significance of the prosecutor's impropriety, suggesting that his only error was in choosing the word "imagine" rather than "consider." Answer Br. at 70. This error, however, was not merely an isolated instance of poor word choice but a sustained effort to inflame the passions of the jury. As noted in the initial brief, the prosecutor's arguments in this case bear an uncanny resemblance to those in *Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988),[28] which this Court held to be "an example of what constitutes egregious conduct" warranting reversal, but were far more extensive and were not subject to curative instructions by the trial court.[29] The cumulative effect of the prosecutor's improper arguments denied appellant a fair and reliable sentencing determination.

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

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

Appellee's contention that this Court may not consider the prosecutor's argument in assessing the harmfulness of denying the requested jury instruction is contrary to the rule that

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[28] See *Molina*, 447 So. 2d at 255-56 (Pearson, J., concurring) (prosecutor may not evade prior rulings of appellate court by slightly rephrasing improper question).

[29] The prosecution in *Garron* was also seeking to establish the HAC aggravating circumstance.

harmless error analysis must be based on the record as a whole, *Lee,* 531 So. 2d at 137-38.

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

Appellant submits that this issue is properly preserved, as written instructions and objections were submitted to, and rejected by, the trial court and defense counsel objected both to the standard instructions as given and to the denial of the requested instructions. (R. 438, 442, 487; T. 2291)

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

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**

Appellee's argument that the facts of this case *per se* establish the HAC aggravating circumstance is addressed in section XIII.A.2. below.

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**

Appellant acknowledges that, since the initial brief was filed, the definition of "cold" in *Jackson v. State,* 648 So, 2d 85 (Fla. 1994), has been reapproved but nevertheless submits that the standard instruction is unconstitutionally vague and improperly relieves the state of its burden of proof.[30]

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[30] In the initial brief, at 82 n. 104, appellant referred to a draft of the Criminal Jury Instruction Committee's proposed revision to the CCP instruction, which was circulated early in 1995, and was unaware that the final proposal had apparently been changed.

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

This Court has held expressly that: "This aggravating circumstances applies only where the murder is an integral step in obtaining some sought-after specific gain. " Chaky v. ***State,*** 651 So.2d 1169, 1172 (Fla. 1995) (internal quotations omitted). The inconsistent language in ***Allen v. State,*** 662 So. 2d 323, 330 (Fla. 1995), ***cert. denied,*** U.S. ___, 116 S.Ct. 1326, L.Ed.2d (1996), and ***Finney v. State, 660 So.*** 2d ***674, 680*** (Fla. 1995), ***cert. denied,*** ___ U.S. ___, 116 S.Ct. 823, 133 L.Ed.2d 766 (1996), on which appellee relies can hardly have been intended to overrule this standard ***sub silentio***.

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

Relying on ***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), appellee answers that, just as a circumstantial evidence instruction is no longered required at the guilt phase, it is not required at the penalty phase. As stressed in the initial brief, at ***84-85,*** however, ***Pietri*** holds that it is not error to refuse a circumstantial evidence instruction ***when the jury is instructed on the burden of proof and the definition of reasonable doubt.*** The jury in this case was given neither instruction at the penalty phase. Consequently, because the sufficiency of the state's circumstantial evidence to prove the HAC, CCP, and pecuniary gain aggravating factors was disputed at trial, it was harmful, reversible error for the trial court to deny the requested circumstantial evidence instruction.

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

Again, appellee's contention that the combined effect of any two errors appearing in the record may not be considered unless specifically linked at trial is contrary to the rule that harmless error analysis must be based on the record as a whole. ***Lee,*** 531 So. 2d at 137-38.

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

A. Aggravating Factors

1. Pecuniary Gain

Appellee's contention that this aggravating circumstance requires proof of only "a pecuniary motivation" for the murder is addressed in section X.C. above,

***2.* HAC**

Appellee asserts that "the mere acts of strangulation and/or smothering, when committed on a conscious victim" are presumed to establish the HAC aggravating circumstance. Answer Br. at 86. Appellee ignores the testimony of the medical examiner in this case that the injuries to Ms. Jones' neck and hyoid bone were consistent with her having lost consciousness within "a matter of a few seconds." (T. 1727, 1736-37) While "strangulation creates a prima facie case" for a finding of HAC, ***Orme v. State,*** 21 Fla. L. Weekly S195 (Fla. May 2, **1996),** it does not and cannot create an irrebuttable presumption without regard to the facts of a particular case. Here, the state failed to establish beyond a reasonable doubt that either victim consciously suffered for a substantial period of time and therefore failed to prove the existence of the HAC aggravating circumstance. As set out in the initial brief, the trial court's findings on this factor are not supported by the record. Initial **Br.** at 93.

c. CCP

With respect to appellee's argument regarding the evidence of a careful, advance plan, Mrs. Walker did ***not*** testify that she saw Mr. Walker carrying duct tape a week before the murders. She testified that ***in 1991*** -- over a year before the murders -- she had seen some duct

tape in a beige bag that Mr. Walker kept in the trunk of his car.[31] (T. 1210-11) On a separate occasion, the week before the murders, she saw a pair of rubber work gloves in a bag that Mr. Walker also carried "from time to time." (T. 1211) Although Mrs. Walker was home when Mr. Walker and his brother Quinton left the house on August 21, 1993, she never testified that she saw them take the blue bag with them. (T. 1213) The evidence therefore does not establish that the duct tape and gloves were "procured" for the murder. Answer Br. at 88.

With respect to the defendant's mental state negating the "coldness" aspect of CCP, appellee implies that the expert opinions of doctors Toomer and Eisenstein were divorced entirely from the circumstances of the crime, Answer Br. at 90. Both testified that they were given materials regarding the facts and circumstances surrounding the crime. (T. 1792, 2072) Both were aware of the background of Mr. Walker's relationship with Ms. Jones and the child support order (T. 1992, 2110) Dr. Eisenstein emphasized that the events preceding the crime would be tremendous stressors, given Mr. Walker's poor relationships with women and the "very, very emotionally latent [sic-laden]" nature of his relationship with Ms. Jones. (T. 2112-13, 2117) Dr. Toomer similarly emphasized the emotional volatility of Mr. Walker's disorder, as did doctors Haber and Bergman.[32] (T. 1791, 1812, 2010, 2017-18) Under these circumstances, even if there was some planning, the crime itself was triggered by the emotional volatility of Mr. Walker's personality disorder and fueled by his inability to reason logically and assess the consequences of his conduct, particularly in response to significant social stressors. (T. 2073-74, 2121-22) The testimony regarding Mr. Walker's mental condition is therefore inconsistent with the "coldness" element of CCP.

Finally, if this Court does find the evidence insufficient to support CCP, it would be inappropriate to consider the Westfield evidence, discussed below, for the first time on appeal as

[31]Mrs Walker said she had later seen duct tape (apparently around the house) sometime after 1991 but could not say when. (T. 1226)

[32]With regard to Dr. Toomer's definition of "extreme," he was simply trying to explain that, in his view, behavior need not be psychotic to be "extreme." (T. 1978)

appellee suggests. Mr. Westfield never actually testified in court, so this evidence was never subject to cross-examination, rebuttal, or assessment of credibility.

B. Mitigating Circumstances

With respect to the substantial impairment mitigating circumstance, appellee again erroneously states that Dr. Eisenstein's opinion was not based on the events of the murder itself. As also noted above, Dr. Toomer's testimony was *not* inconsistent with Dr. Eisenstein's, since he believed that all of the characteristics of the Mr. Walker's disorder were consistent with his being unable to conform his conduct to the requirements of law. (T. 2010) Appellee's mischaracterization of the childhood abuse evidence is addressed in section V.C. above.

Appellee also maintains that defense counsel failed to adequately identify the nonstatutory mitigating circumstances to be considered by the trial court because the sentencing memorandum submitted to the judge incorporated by reference a requested jury instruction listing non-statutory mitigators. Answer Br. at 94-95. This is not a case in which defense counsel left the trial court to guess which nonstatutory mitigating circumstances to consider. Rather, appellee is asking this Court to presume that the trial judge did not read the sentencing memoranda submitted nearly two weeks prior to entry of his final sentencing order. (R. 559, 584)

ANSWER TO CROSS-APPEAL

XIV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE PROFFERED TESTIMONY OF MR. WESTFIELD OR IN MERGING THE CCP AND PECUNIARY GAIN AGGRAVATING FACTORS.

The state cross-appeals, asserting that the trial court erred in excluding the testimony of Donald Westfield at the penalty phase. Mr. Westfield, a criminal defense lawyer who knew Mr. Walker in his capacity as a bailiff, would have testified to a conversation he had with Mr. Walker approximately three weeks before the crime, in which he had described the facts of a first-degree murder case in which the victim was duct-taped and drowned. (R. 283-98) The defense filed a pretrial motion in limine to exclude this evidence on the ground that it was irrelevant and its probative value was outweighed by the danger of unfair prejudice. (R. 113) The trial court

granted the motion and subsequently declined to alter its ruling. (T. 863, 1668, 1739)

A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. ***E.g., Heath v. State,*** 648 So.2d 660, 664 (Fla. 1994), ***cert. denied,*** U.S. ___, 115 S.Ct. 2618, 132 L.Ed.2d 860 (1995). The prosecution argued below that the evidence was relevant to premeditation and to establish HAC and CCP, because, as a result of his conversation with Mr. Westfield, Mr. Walker "became cognizant of a way to kill the victim in which she would greatly suffer," (T. 852)

The trial judge properly expressed skepticism that Mr. Westfield's testimony was relevant to establish that "you can duct tape somebody and asphyxiate someone." (T. 852)[33] He also unsuccessfully pressed the prosecution to identify anything about the defendant's conduct with respect to the conversation that was indicative of premeditation. (T. 852) Mr. Westfield said in his sworn statement there was nothing unusual about Mr. Walker's behavior and that it was routine for him to discuss his cases with courthouse personnel. (R. 292-93) His statement therefore did not indicate that Mr. Walker had shown any peculiar curiousity about or eagerness to learn the details of the killings.[34] Mr. Westfield had volunteered the information, in the course of a routine courthouse conversation. Consequently, Mr. Westfield's testimony would have had limited probative value with respect to premeditation or heightened premeditation.

On the other hand, it posed a substantial danger of unfair prejudice and confusion of issues. See § 90.403, Fla. Stat. Appellee argues that the evidence would have established that "Mr. Westfield fully apprised the defendant of the protracted terror and suffering of a victim who

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[33]While appellee characterizes the manner of the killings as "highly unusual," Answer Br. at 98, defense counsel noted at trial that there were two other other cases going on in the courthouse involving duct tape. (T. 854)

[34]Contrary to the state's implication, Answer Br. at 97, Mr. Walker did not ask Mr. Westfield to describe the manner of the killings. Rather, as Mr. Westfield was describing the manner of killings, Mr. Walker at one point remarked "so they killed her in the water," and Mr. Westfield said "no," and went on to provide further details. (T. 290) Mr. Westfield remarked that the case "really bothered" him, and Mr. Walker, apparently surprised to hear a defense attorney speak in these terms, asked him why. (T. 290) Mr. Westfield then explained that it was because the victim had suffered. (R. 292)

was bound . . . and thrown into water to drown. " Answer Br. at 98. Thus, the state intended to elicit from Mr. Westfield a detailed description of the conscious suffering of Bridgett Gibbs. As it made clear below, the state further intended to elicit from Mr. Westfield "how even as an experienced criminal defense attorney in capital proceedings, how very, very much it bothered him, how much the victim suffered" and how, after Mr. Walker was arrested, Mr. Westfield "became **increasing[ly]** bothered . . . emotionally himself that he may have contributed in some fashion" to these crimes. "[35] (T, 1667-68)

Mr. Westfield is not a medical examiner and would not have been qualified to render a medical opinion about the process of drowning. Even if offered only to show the defendant's state of mind, Mr. Westfield's opinions would have confused the issues in this case. There were important factual distinctions between this case and the Gibbs case, in that the Medical Examiner could not say whether Ms. Jones was conscious when she was put in the water. Finally, Mr. Westfield's own strong feelings about the Gibbs case and his opinions or fears about the relationship between the two cases were plainly inadmissible. Allowing Mr. Westfield's testimony would therefore have posed a substantial danger that the jury would consider Bridgett Gibbs' suffering, and Mr. Westfield's feelings about it, in applying the HAC aggravating circumstance to this case.[36] The trial court therefore did not abuse its discretion in excluding this testimony.

The state also argues on cross-appeal that the trial court improperly merged the pecuniary gain and CCP aggravating factors. In his sentencing order, however, the trial judge relied on Mr.

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[35]The state sought once more to admit Mr. Westfield's testimony, arguing that the defense had implied that Ms. Jones was accidentally smothered in the car. (T. 1737) Defense counsel responded, correctly, that his cross-examination had established that the medical evidence was consistent with Ms. Jones having been strangled during a struggle in the car and duct taped after being unconscious -- not that she had been accidentally smothered. (T. 1730-31, 173839) The trial court again refused to admit the testimony. (T. 1739)

[36]*Suggs* ***v. State,*** 644 So. 2d 64, 69 (Fla. 1994), ***cert. denied,*** U.S. ___, 115 S.Ct. 1794, 131 L.Ed.2d 722 (1995), on which the state relies, is distinguishable. There, the state introduced a book, found in the defendant's apartment, depicting wounds similar to those inflicted on the victim; it did not seek to introduce a subjective and inflammatory description of another victim's suffering or the witness' own feelings and opinions about it.

Walker's purported pecuniary motive to support the CCP aggravating factor and concluded that the motive of "[r]idding oneself of child support" was what made the murders "cold-blooded and immoral to the highest degree. " (R. 579) In this case, any evidence of heightened premeditation and advance planning was purely circumstantial, The facts the trial judge relied on included (1) the presence of Mr. Walker's brothers, (2) the use of duct tape, and (3) that Mr. Walker had arranged to meet Ms. Jones at the movie theater. (R, 579) These facts, as argued in the initial brief, at 93-94, do not exclude a reasonable hypothesis that the killings followed a heated argument. Mr. Walker's purported, pre-existing financial motive was thus the dispositive factor from which the trial judge inferred the existence of a prearranged plan, the "coldness" of the killings, and heightened premeditation. Because a defendant's "pecuniary motive at the time of the murder . . . constitutes only one factor" which may be properly considered by the sentencer, the trial judge properly merged the CCP and pecuniary gain aggravators in this case. *Provence v. State,* 337 So. 2d 783, 786 (Fla. 1976), *cert. denied,* 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977).

Echols *v. State,* 484 So. 2d 568, 575 (Fla. 1986), *cert. denied, 479* U.S. 871, 107 S.Ct. 24 1, 93 L. Ed.2d 166 (1986), should not be construed to preclude the merger of these two aggravating circumstances where, as here, *they* have been *applied* "to the same essential feature of the crime or of the offender's character."[37] With respect to the avoiding arrest and disrupt or hinder law enforcement aggravators, for example, this Court has stated that "application of both of these aggravating factors is error *where* they are based on the same essential feature of the capital felony. " *Bello v. State,* 547 So.2d 914, 917 (Fla. 1989) (e.s.). In other words, where two

[37]In each of the cases cited by appellee, there was substantial evidence, apart from the defendant's pecuniary motive, to support a finding of CCP. *Echols, 484 So.* 2d at 570-71 (defendant hired to kill victim and flew to Florida to carry out plan after previous attempt aborted); *Fotopolous v. State,* 608 So. 2d 784, 793 (Fla. 1992) (defendant's motive was to obtain insurance proceeds *and* he "carefully coreographed" the murder to make it appear that it had occurred during a burglary), *cert. denied,* 508 U.S. 924, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993); *Rutherford v. State,* 545 So, 2d 853, 854 (Fla.) (defendant told witness he was planning to force victim to write check then stage an "accidental" death), *cert. denied, 493* U.S. 945, 110 S.Ct. 353, 107 L.Ed.2d 341 (1989).

aggravating circumstances do not ***necessarily*** apply to the same aspect of the offense, they will nevertheless be found duplicative if, on the facts of the particular case, they are supported by the same aspect of the offense.

CONCLUSION

For the foregoing reasons, and those state in appellant's initial brief, 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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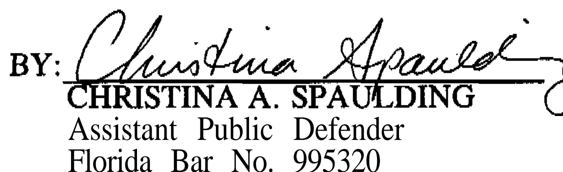
BY: 
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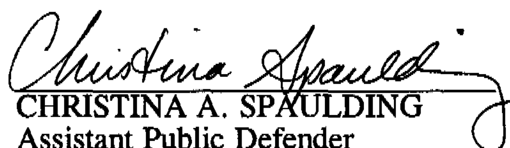
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General,FARIBA KOMEILY, 401 N. W. Second Avenue, Post Office Box 013241, Miami, Florida 33101 this 15th day of May, 1996.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