IN THE SUPREME COURT OF FLORIDA

EDDIE WAYNE DAVIS, :

Appellant, :

vs. : Case No. 86,135

STATE OF FLORIDA, :

Appellee. :

_____.

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
Assistant Public Defender
FLORIDA BAR NUMBER 234176

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The first 769 pages of the record on appeal herein consist of copies of documents from the circuit court file and transcripts of various hearings that were held in this cause. References to this portion of the record will be designated by "R," followed by the appropriate page number(s). The remainder of the record, some 3,052 pages, is comprised of the transcript of Appellant's jury trial--guilt and penalty phases. References to this portion of the record will be designated by "T," followed by the appropriate page number(s). References to the appendix to this brief will be designated by "A," followed by the appropriate page number(s). In addition to the above, there is a manila "evidence" envelope containing lists of exhibits that were admitted at the suppression hearing held in this cause and at Appellant's trial, as well as copies of some of the exhibits that were admitted. Items in said envelope have not been paginated. References to specific exhibits will be designated by the exhibit number(s).

STATEMENT OF THE CASE

On April 7, 1994, a Polk County grand jury returned a four-count indictment against Appellant, Eddie Wayne Davis. (R 3-5) The first count charged that between March 3 and 4, 1994, Appellant committed first degree premeditated murder of Kimberly Waters by strangling and/or suffocating her. (R 3) Count Two charged Appellant with burglary of the residence of Beverly Schultz, during which he made an assault or battery upon Kimberly Waters. (R 3-4) Count Three alleged kidnapping of Kimberly Waters. (R 3) The final

count charged that Appellant committed a sexual battery upon Kimberly Waters, who was less than 12 years of age. (R 4-5)

Among the pretrial motions Appellant filed, through counsel, were two motions to suppress Statements and admissions he made to personnel from the Polk County Sheriff's Department. (R 6-8, 290-291) The State filed a written response to the first motion (R 11-12), which dealt with statements Appellant made on March 18, 1994, and a hearing on the motion was held before the Honorable Daniel True Andrews on January 6, 1995. (R 14-150) Judge Andrews heard the second motion to suppress, which dealt with statements Appellant made on May 26, 1994, on April 21, 1995. (R 418-470) Both motions were denied. (R 478-479)[1]

This cause proceeded to a jury trial with Judge Andrews presiding on May 22-26, 30-31 and June 1 and June 6-9, 1995. (T 1-3,052) On June 1, 1995, Appellant's jury found him guilty of all four offenses charged in the indictment. (R 529-530, T 2157-2158) At the conclusion of the subsequent penalty phase, after receiving additional evidence from both the State and the defense, the jury recommended that Appellant be sentenced to die in the electric chair. (R 590, T 3046)

Sentencing was held on June 30, 1995. (R 694-727) Judge Andrews sentenced Appellant to death for the murder, finding the

---

[1] Undersigned counsel has only been able to locate in the record on appeal a written order denying the second motion to suppress. (R 478-479) However, Judge Andrews did sign a written order denying the first motion to suppress on February 6, 1995, and a copy thereof has been appended to this brief. (A 1-7) [The order is erroneously dated February 6, 1994. The date should be February 6, 1995.]

following aggravating circumstances to apply (R 700-706, 740-744): (1) the capital felony was committed by a person under sentence of imprisonment; (2) the capital felony was committed while Appellant was engaged in the commission of, or flight after committing, the crimes of either burglary and/or kidnapping and/or sexual battery; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and (4) the capital felony was especially heinous, atrocious ok cruel. The court found the statutory mitigating circumstance of extreme mental or emotional disturbance to apply (R 706-710, 744-747), but rejected the statutory mitigator of impaired capacity. (R 710-713, 747-749) The court also found several nonstatutory mitigating circumstances applicable, but rejected others proposed by the defense. (R 713-723, 749-756) On Count Two, burglary with assault or battery, and Count Three, kidnapping, the court sentenced Appellant to 19 years in prison on each count. (R 724-725, 728, 733, 734, 757) On Count Four, sexual battery on a child under 12 years of age, the court sentenced Appellant to life in prison with a minimum mandatory of 25 years without parole. (R 724, 728, 735-736, 757) The court also found Appellant to be "a sexual predator under Chapter 775.21, Florida Statutes." (R 725, 739, 757)

On July 14, 1995, Appellant timely filed his notice of appeal to this Court. (R 762)

STATEMENT OF THE FACTS

Suppression Hearing of January 6, 1995

Five witnesses testified at the suppression hearing held before Judge Andrews on January 6, 1995. (R 14-150)

Martha McWaters was a homicide detective with the Polk County Sheriff's Office in March of 1994. (R 18-19) She became involved in the investigation into the death of Kimberly Waters, and was the "case agent" or "team leader" as of March 18. (R 19, 46) Prior to March 18, 1994, Appellant was twice questioned at the police station and thereafter allowed to leave. (R 20) On March 18, however, law enforcement personnel had obtained DNA evidence which led them to believe that Appellant was the primary suspect, and had used this information to obtain an arrest warrant for him. (R 21) Detectives Smith and McWaters went to Appellant's house around 5:00 and asked him to come to the station again, because they needed "to go over some stuff again." (R 21, 45) They implied that Appellant would be able to go him when they were finished with him. (R 37) When they brought Appellant to the station, they "[w]anted to, and...did, create in his mind that he was not under arrest, it was a noncustodial interview." (R 56, 66)

At the substation, Appellant said that he was not involved in the homicide. (R 22-23, 53-54) McWaters then told Appellant about the DNA evidence they had, and, when Appellant indicated that he thought she might be making this up, she allowed Appellant to read the FDLE report. (R 23-24, 54) Appellant was then placed under arrest. (R 24) He said they had better keep looking, they had the

wrong guy. (R 24, 54) He then said, "'Can I call my mom to get me a lawyer, and can 1 smoke a cigarette, they won't let me smoke in the jail.'" (R 24, 54) At that point, McWaters discontinued the interview, because she was "just being careful not to violate anything, and once he made reference to lawyer at all [they] decided to discontinue the interview." (R 24) Appellant expressed concern about obtaining some protection when he went to the jail; he wanted to be put into isolation, (R 42, 68-69) McWaters handcuffed Appellant and placed him in a holding cell. (R 25) He was crying. (R 40)

About 10-15 minutes later, or less, Detective Primeau came into the "Barney Miller" room where McWaters was sitting and said, "Wayne's confessing to the major." (R 25-26, 40)

Major Grady Judd, commander of the west region of the Polk County Sheriff's Office, had come into contact with Appellant prior to March 18 when Appellant consented to a search of his residence. (R 78) Appellant was "very cooperative and very friendly..." (R 79)

On March 18, Judd went to see Appellant after he was placed in the holding cell. (R 80-81) Appellant made eye contact and Judd said, "Wayne, I'm disappointed in you." (R 81-82, 113) Appellant then said something Judd could not understand. (R 82) Judd opened the door and said something to the effect of, "I didn't understand what you said," or "Would you repeat that." (R 82) Appellant said, "I told you last week you need to look at Beverly," referring to Kimberly's mother. (R 82, 113-114) Lieutenant Schreiber had

informed Judd of Appellant's exercise of his right to counsel, and so Judd said, "Eddie, it's my understanding that, you know, you've requested an attorney or you've requested your mother to get you an attorney, and I can't discuss this with you because you want an attorney. The only way that I can talk to you is if you reinitiate conversation. You know, I can't talk to you anymore." (R 82, 104, 114) Appellant then said that he wanted to talk to Judd and Schreiber. (R 82-83) He was "real emotional and on the verge of tears." (R 83) Judd asked for Lieutenant Schreiber, undid Appellant's handcuffs, and offered him a cigarette (even though the building was a "no smoking" building), which Appellant accepted. (R 83, 93, 114-115) Appellant started crying and said, "I can't afford an attorney anyway." (R 83, 115) Judd told Appellant that he did not have ta be able to afford an attorney; the State would provide one for him. (R 83, 115) By that time, Lieutenant Schreiber was coming in. (R 83) Appellant was saying words to the effect of, "'I'm hung, I'm hung, I did it. You got DNA, sometimes it's wrong, but you got me, I did it." (R 83, 105) Appellant went on to say, with Judd and Schreiber questioning him, that he kidnapped and sexually battered and murdered Kimberly Waters. (R 84-85, 94, 106, 117) It was obvious to Judd that Appellant was distraught and upset. (R 87) After talking to Appellant for 15 or

20 minutes,[2] Judd asked him if he would be willing to talk to detectives about the matter, and he said he would. (R 86, 96)

About 10 minutes later, according to McWaters, Detectives Smith and McWaters conducted a taped interview with Appellant. (R 27) [Smith estimated that 15 to 30 minutes elapsed from the time Appellant and Major Judd finished talking to the time the tape was started. (R 70)] Detective Smith talked to Appellant about his previous statement that he wanted his mother to obtain a lawyer; Appellant did not indicate that he did not want to talk to the detectives, or that he wanted to try to get a lawyer or talk to his mother. (R 27-28, 64) During the taped interview, Appellant was "still obviously distraught," but "the initial shock was over," and he "wasn't sobbing." (R 28) Neither Detective McWaters nor Detective Smith read Appellant his Miranda rights until they began taking his taped statement, at which time Smith "went over Miranda with him on the tape." (R 27-28, 55, 60, 64)

On May 26, 1995, Lieutenant Schreiber received a message from the jail that Appellant was requesting to talk to detectives. (R 119) Detectives Deborah Hamilton and John Harkins went to talk with Appellant. (R 119) Appellant said that he understood that he had a lawyer, but he did not want his lawyer there, he just wanted to talk to the detectives. (R 119-120) Appellant told them that

---

[2] Lieutenant Rebecca Schreiber estimated the length of the conversation at 20-30 minutes. (R 107) At the suppression hearing, Detective McWaters testified that she thought it lasted 15 to 20 minutes (R 41), but at Appellant's trial she said it was "quite lengthy...probably an hour and a half. (T 1862) Detective Craig Smith estimated its length as 30 to 40 minutes. (R 59)

Beverly Schultz was not involved in the offenses in any way. (R 120)

Suppression Hearing of April 21, 1995

Three witnesses testified for the State at the suppression hearing held before Judge Andrews on April 21, 1995. (R 418-470)

Jimmy Ellis Smith was a sergeant with the Department of Detentions, Polk County Sheriff's Office. (R 422-423) In May, 1994, he was second in charge at the old jail. (R 423) Smith received an inmate interview request form dated 5-24-94, bearing the name Eddie Davis. (R 423-427) It indicated that the person who signed the document wanted an interview with Detectives Gilbert and M. McWaters of the sheriff's office, and said, "I would like to speak to them about information concerning the Waters case." (R 427, 440)[3] On May 24, Smith called the west region division headquarters to notify them that the inmate desired an interview. (R 428, 431) Lieutenant Rebecca Schreiber of the sheriff's office received the phone message on May 25 or May 26. (R 431, 434) Detective Debbie Hamilton had taken over the case from Detective Martha McWaters, and Schreiber contacted Hamilton and had her and Detective John Harkins call Assistant State Attorney John Aguero for instructions regarding how to handle the inmate's request. (R 431, 436-437, 440, 455-456)

Detective Hamilton was aware that Appellant had an attorney, Mr. Trogolo, and that he had been indicted, and had been in jail

---

[3] A copy of the inmate interview request form was admitted into evidence at the hearing over defense objections that the document was not sufficiently authenticated. (R 425-426, 441-442)

for a couple of months on the instant charges. (R 437, 456) She also knew that he had given a confession at the west region substation on March 18 after initially requesting counsel. (R 454-455) When she called the state attorney's office for legal advice, Hamilton was advised to record the conversation with Appellant, and to tell him that she was aware that he had an attorney, and to ask him if he was willing to talk to them without an attorney present. (R 437-438)

After Hamilton spoke with the assistant state attorney, she and Detective Harkins proceeded to the Polk County Jail, where they made contact with Appellant in the attorney booths. (R 442-443) Appellant asked if McWaters or Gilbert were present, and Hamilton explained that McWaters no longer worked for the sheriff's office, that Gilbert had been reassigned, and that she (Hamilton) had been assigned to the case. (R 443) Appellant agreed to talk to them, and Hamilton turned on the tape recorder she had brought. (R 443-444) Hamilton said, "Eddie, we received a message that you initiated that you wanted to talk to us, to detectives from the sheriff's office; is that true?" (R 445) Appellant answered, "Yes, ma'am." (R 445, 447) Hamilton said, "We realize that you have counsel and we need to know because since you initiated this conversation if you're willing to proceed without the advice of your counsel." (R 445) Appellant responded, "Yes, ma'am, I am." (R 445, 447) After a few more questions, Appellant requested that the tape recorder be turned off, and it was. (R 447-448) These was some discussion between Appellant and the detectives while the

recorder was turned off. **(R 449-452)** When taping resumed, the following questioning took place (R **448**):

> MS. HAMILTON: Okay. This is Detective Debra Hamilton. And the time is approximately **10:05** a.m. And we have been talking to Mr. Eddie Wayne Davis on tape. And he has indicated that he has legal counsel that he would wish to talk to us without the advice of that legal counsel. Is that true, Eddie?
>
> THE DEFENDANT: Yes, ma'am.
>
> MS. HAMILTON: Okay. And you're wanting to get things off your chest and set the record straight; is that correct?
>
> THE DEFENDANT: Yes, ma'am.

Appellant went on to say that Kimberly Waters' mother, Beverly Schultz, was not involved in the crimes against her daughter, and to describe what had happened in some detail. (R **448-453)**

Hamilton's contact with Appellant on May **26** lasted from approximately 9:55 a.m. to approximately **10:20** a.m. (R **454)** With regard to his demeanor, initially, Appellant was "fine," but as he related the events that had occurred, he started shaking, and he was crying off and on during the interview. (R **453, 459)**

At no time did Hamilton read Appellant his Miranda rights. (R **452)**

Trial--Guilt Phase

Appellant was a former boyfriend of Beverly Schultz. (T **1372)** Their relationship lasted off and on for about six months. (T **1372)** Appellant had lived with Schultz, but moved out when the relationship ended in July or August, 1993. (T **1372-1374, 1380)** Appellant continued **to** live near Schultz, and they saw each other occasional-

ly. (T 1374-1375, 1380-1382) They had sexual intercourse three times after Appellant moved out. (T 1383) It seemed to Schultz that their sex was rougher toward the end; there was no gentleness left. (T 1375-1376, 1385-1387)

Schultz had two daughters. (T 1348) Crystal was 13 at the time of the offenses in question, and Kimberly was 11. (T 1348, 1359, 1391) Appellant never did anything to abuse the children, nor did he show any sexual interest in either girl. (T 1383-1384)

Appellant knew that Schultz kept money in her living room under a clock. (T 1385) One time before they broke up, Appellant took a five dollar bill from there. (T 1385)

Schultz worked as a licensed practical nurse at a nursing rehabilitation center, the Arbors of Lakeland, which was about a 10-20 minute drive from her residence, depending on the traffic. (T 1346-1348) On Thursday, March 3, 1994, she was working the 3:00 to 11:00 shift. (T 1347, 1406, 1412) Because the Arbors was short two certified nursing assistants for the overnight shift, Jackie Conrad, the charge nurse, asked Schultz if she would stay and work the 11:00 to 7:00 shift as well. (T 1348-1350, 1405-1407) Although reluctant at first, Schultz agreed to work until 6:00 a.m., if she could first go home to check on her girls. (T 1349-1350, 1366-1367, 1407-1408, 1412) She did so at a little after 11:00. (T 1361) Crystal, who was a very heavy sleeper, was in her bed, asleep. (T 1361-1362, 1366) Kimberly was in Schultz's waterbed, which was not unusual. (T 1363-1365) The front door was not locked when Schultz arrived home, but she locked it before she returned to work. (T

1365) The door could easily be opened from the outside without a key. (T 1354, 1365-1366, 1402-1403) She also turned on some lights, including the porch light. (T 1365) Schultz was only at home for a few minutes, then returned to work. (T 1365, 1408)

Crystal got up once during the night. (T 1393) She turned on the heater, checked on Kimberly, who was still in their mother's bed, and turned off some lights inside the house. (T 1393, 1395) She also checked the front door, and found it to be locked. (T 1402)

When Schultz arrived home the next morning at 6:04, she could hear the alarm on the electric clock going off. (T 1367-1368) The porch light was off; it had been unscrewed. (T 1368, 1371)[4] Kimberly was not in Schultz's bedroom, or anywhere else in the house. (T 1368-1369) Schultz woke Crystal up and asked her where her sister was, but she did not know. (T 1369) Schultz went to a neighbor's house, but they had not see Kimberly. (T 1369) Eventually, Schultz called 911 from a neighbor's telephone. (T 1370)[5] She also called Jackie Conrad and told her that Kimberly was missing. (T 1409) Schultz was "overexcited and very hard to understand." (T 1409) The whole nursing staff went to Schultz's residence that morning. (T 1410) The police were already there. (T

---

[4] Schultz testified that she had a friend named Charlie Smith who used to unscrew the light bulbs when they would sit on the porch and talk and that Appellant had never unscrewed the light bulb on the front porch. (T 1379-1380)

[5] A tape recording of the 911 call was admitted into evidence near the end of the State's case over Appellant's objections. (T 1830-1833, 1927-1948) See Issue II.

1410) Schultz was "just flitting from one room to another, extremely nervous, unable to talk." (T 1410)

On March 4, 1994, Deputy Terry Storie of the Polk County Sheriff's Office was dispatched to a missing persons call at Schultz's residence, arriving there at about 6:37 a.m. (T 1428-1430) Schultz was "extremely upset, she was crying and so forth." (T 1431) Storie checked the residence for signs of forced entry, but found none. (T 1431, 1450-1451) Thereafter, a massive search for Kimberly Waters was conducted that included mounted police officers, bicycle officers, canine officers, and a helicopter. (T 1432-1433, 1446) By the end of the day, virtually everybody in the west region of the Polk County Sheriff's Office who was on duty was involved in the effort. (T 1552-1553) That afternoon, two girls who knew Kimberly, 15-year-old Leigh Ann Snell and 14-year-old Rhanda Stevens, were looking for her in the vicinity of the Moose Lodge on Lake Parker Drive in Lakeland when they noticed blood on a sidewalk that went over a canal. (T 1414-1419, 1422-1427) They flagged down a policeman who was driving by. (T 1419-1420, 1425-1426)[6] Deputy Storie was dispatched to the area and made contact with the girls, who showed him the blood spots. (T 1434-1436) At about 4:35 p.m. Storie and another deputy, Lallu, looked into a dumpster at the Moose Lodge and found Kimberly Waters' body inside. (T 1441, 1446, 1458)

---

[6] The testimony of Snell and Stevens was the subject of a motion in limine filed by defense counsel. (R 527-528)

Dr. Alexander Melamud, an associate medical examiner, went to the scene that night and observed the body in the dumpster. (T **1703-1706)** He performed an autopsy the next morning. (T **1710-1711)** Dr. Melamud found various injuries to Kimberly Waters during his external and internal examinations, including bruises to the face caused by blunt trauma. (T **1717-1727)** "The posterior wall of the vagina, the perineum, including skin, subcutaneous tissue and muscles, were lacerated up to the anus. **..**" (T **1733)** These injuries could have resulted from "forceful intercourse," or from the insertion of some foreign object into the vaginal opening. (T 1734) Dr. Melamud concluded that Kimberly Waters' death resulted from "manual asphyxia of the neck." (T **1727)** Although "[t]he clinical time of asphyxia is about five minutes[,]" in reality, the time of death varies from situation to situation. (T **1741)** If there was pressure on a certain nerve, a person could die right away; essentially, the functioning of the heart would be interrupted, causing very rapid death. (T **1741)** And a person being asphyxiated would lose consciousness very rapidly before she actually died. **(T 1741-1742)**

On March **3, 1994,** Appellant and Jacqueline "Susie" Stewart had been living together for about eight months, **and** were planning to get married one day. (T **1488-1489)** They were in the process of moving from a trailer to a small house nearby. (T **1488-1490)** That morning around 9:00 or **10:00,** Stewart's mother, Sarah "Toni" Luna, **came** to her house because Stewart's father had suffered a stroke, and her mother needed help. (T **1490-1491, 1519)** Luna drove Stewart

and two of her children and Appellant to Luna's home in Alturas. (T 1491-1492, 1519)[7] That night between 10:00 and 10:15, Stewart dropped Appellant off at their residence in Lakeland, because he was going to work with his father, who was a roofer, the next day. (T 1492-1493, 1519-1520) When Stewart dropped Appellant off, he was wearing cowboy boots. (T 1496) Stewart then returned to Alturas, (T 1493, 1505, 1520) Appellant called Stewart from a pay phone around midnight to ask how her father was doing and how Stewart and her mother were holding up. (T 1493, 1505) He only had a small amount of money that night, perhaps ten dollars. (T 1494-1495, 1505)

Appellant came into the Siesta Lounge in Lakeland between 10:00 and 10:30 on the night of March 3, 1994. (T 1665, 1668) He drank a pitcher and three or four mugs of beer. (T 1665, 1668) The mugs held about nine or ten ounces, and the pitcher contained six and one-half to seven mugs of beer. (T 1668-1669) Appellant stayed at the Siesta Lounge for between two to two and one-half hours; one of the bartenders, Sarah McKay, noticed that he was gone between 12:30 and 1:00. (T 1666, 1669) The bar closed at 2:00 that night. (T 1665-1666, 1667) Appellant did not appear to McKay to be intoxicated when she served him the last beer. (T 1673-1674)

The next day, Friday, March 4, 1994, Appellant went to work

---

[7] On cross-examination of Stewart, defense counsel attempted to question her regarding whether Appellant was drinking with Stewart's uncle, Sam, while he was in Alturas, but a State objection that this was beyond the scope of direct was sustained. (T 1502-1504) Stewart testified during a proffer that Appellant and her uncle were drinking beer that day, and Appellant drank quite a few. (T 1510-1511)

with his father, Eddie Arnold Davis. (T 1632-1634) According to Sandy Davis, who was married to Appellant's father, Appellant "was acting very weird" that morning. (T 1653) Appellant mentioned that there were police at Beverly Schultz's residence, and wondered aloud what they were doing there. (T 1636-1637, 1655-1656) On the job, Appellant was "doing pretty good" for two and one-half or three hours, but then his father noticed that he "started slacking down." (T 1637) Appellant was "pretty well whooped" that day. (T 1644) Davis asked his son what his problem was, and Appellant explained that he had been up the previous night, partying and drinking with Sarah, the bartender at the Siesta. (T 1640, 1643, 1649-1650)[8] Appellant also told his father that "he didn't do it." (T 1641) When Eddie Arnold Davis took his son home that afternoon, he noticed quite a few beer cans in the living room. (T 1642-1643, 1650)

Sandy Davis learned that Kimberly Waters was missing around 1:30 or 2:00 Friday afternoon. (T 1657) Later, she heard on the news that a body had been found at the Moose Lodge. (T 1658) When Davis gave the news to Appellant that evening when she went to pick him up at the job site, there was no reaction, "just point-blankness.'' (T 1659)

When Sandy Davis asked Appellant where he was the previous night, he said he was home in bed asleep, and that "he did not do it." (T 1660, 1662) He remarked that he wished he had been on the

---

[8] Sarah McKay testified that she did not leave with Appellant and go to his house that night. (T 1666)

streets that night, because he probably could have stopped it. (T 1660) Appellant also asked, "Why Kimberly?" He said, "It's Crystal that I hate." (T 1662) He said he thought Beverly [Schultz] was off Wednesday and Thursday nights, and she should never have left those girls alone. (T 1662)

According to Jacqueline Stewart, when Appellant learned that Kimberly's body had been found, he was "broken up. He was very upset, he was crying....He just kept saying, Why Kimberly, she was the best one of the family; why Kimberly, she was so sweet." (T 1507)

Polk County Sheriff's Detective Ricky Wilson attempted to contact Appellant several times on March 4, but was unable to locate him at the address Beverly Schultz had supplied. (T 1457) However, Wilson and Deputy William Gilbert did speak with Appellant at his residence the following morning. (T 1460-1461, 1761-1762) Appellant was nervous, trembling, avoided eye contact. (T 1466, 1762) Appellant denied any knowledge of the incident involving Kimberly Waters. (T 1762) In response to the deputies' questions, Appellant said that after his girlfriend brought him home around 10:00 p.m., Appellant walked to the Siesta bar. (T 1463) He left around midnight to make a telephone call, then went back to the bar and stayed there until approximately 2:30 a.m., at which time he walked back to his residence, where he drank some beer. (T 1463, 1465) Appellant said that he had at least a pitcher at the Siesta, and had drunk nearly a 12-pack earlier in the day. (T 1770, 1860)

After speaking with the deputies on Saturday, Appellant went

to work with his father, who described Appellant as being "in good shape" that day. (T 1644, 1661-1662) In mid-afternoon the deputies went to the job site, where Appellant was up on roof working, and picked him up to take him to the west region command to be interviewed. (T 1467-1468, 1644-1645, 1762-1763) Deputy Gilbert and Detective Martha McWaters questioned Appellant concerning his whereabouts on the night of March 3, early morning of March 4. (T 1764, 1827) Appellant told them he had spent the bulk of the day (March 3) in Alturas with his girlfriend's family. (T 1827) She returned him to Lakeland around 10:00. (T 1764, 1827) He walked to the Siesta Lounge, where he had a few beers, then walked back home. (T 1764, 1827) At one point he called his girlfriend in Alturas. (T 1764) When he was specifically asked whether he had come into contact with Kimberly Waters, Appellant said he had not. (T 1766, 1828) Gilbert and McWaters asked Appellant if he would provide a sample of his blood to law enforcement, and he agreed. (T 1767, 1828) They transported him to Polk General Hospital, where blood was drawn. (T 1767) Appellant was then taken back to the police station, where he maintained his previous representations regarding his whereabouts during the time frame in question. (T 1767-1768, 1828) However, he stated that he only had four or five beers at his girlfriend's uncle's house. (T 1865)

That night, while Appellant was still at the substation, Detective Wilson returned to the residence Appellant shared with Jacqueline Stewart to ask if she minded if he looked around. (T 1468-1469, 1475-1476) At Appellant's former residence, the trailer

he and Stewart were moving from, Wilson found a pair of cowboy boots that appeared to have blood on them. (T 1470-1471) Wilson had Crime Scene Technician Cynthia Holland come to the trailer and seize the boots. (T 1470-1472, 1801, 1804)

Subsequent DNA testing by the Tampa Regional Crime Laboratory of the Florida Department of Law Enforcement using the DQ-Alpha system of the polymerase chain reaction (PCR) method, which was less discriminating than the RFLP (or DNA fingerprinting) method, revealed that blood on the right boot was consistent with the DNA of Kimberly Waters. (T 1801, 1870, 1877, 1880-1882, 1889-1892, 1904-1905) Material from fingernail cuttings and scrapings taken from the victim at autopsy was consistent with a mixture of Kimberly Waters' DNA and Appellant's DNA. (T 1792, 1892, 1906-1907) Blood drops taken from the sidewalk in the area of the crime scene where the body was found were consistent with Kimberly Waters' blood. (T 1785, 1892, 1907-1908)

On March 18, 1994, Appellant agreed to go with Detectives Craig Smith and Martha McWaters to the west region command to answer some more questions. (T 1525-1527, 1834-1835) By that time, the sheriff's office had already secured a warrant for Appellant's arrest. (T 1834) They arrived at the substation around 5:00 p.m. (T 1526, 1835) Appellant recounted the same explanation concerning his whereabouts on March 3-4 that he had given previously. (T 1528, 1835) He was calm and cooperative. (T 1528, 1835-1836) When McWaters advised him of the DNA test results, he became, according to Smith, angry and upset. (T 1528) McWaters described his

demeanor as "inquisitive." (T 1836) She showed him the lab report concerning the DNA results. (T 1836) Appellant kept repeating, "You've got the wrong guy." (T 1836) Appellant said he wanted to contact his mother so she could get him an attorney, and he wanted to smoke a cigarette. (T 1836) The interview was terminated, Appellant was placed under arrest, and taken to a holding cell. (T 1528-1529, 1836-1837) Major Grady Judd, who was division commander of the west region of the Polk County Sheriff's Office, approached the holding cell. (T 1555) He had been told that Appellant had invoked his rights and wanted to call his mother for an attorney. (T 1579, 1584-1585) Appellant was standing up, looking back at him. (T 1555) Judd called Appellant "Eddie" or "Wayne," and said, "I'm disappointed in you." (T 1555-1556, 1953) Appellant responded, but Judd could not understand what he said. (T 1556) Judd opened the door and asked him what he was saying. (T 1556) Appellant said, "You need to look at Beverly." (T 1558) Judd told Appellant that because he had asked his mother to call an attorney, Judd could not talk to him unless he reinitiated the conversation. (T 1558) Appellant said he wanted to talk to Judd and Lieutenant Schreiber. (T 1558-1559) Judd asked someone to get Lieutenant Schreiber to come in, and Appellant said, "I'm hung, I'm hung, I did it, you got me. There's DNA, but maybe it doesn't work, but you got me." (T 1559, 1585, 1956) Appellant was visually upset, crying. (T 1559) Judd asked if he wanted a cigarette. (T 1559) He accepted one, and they took his handcuffs off. (T 1559-1560) Major Judd sat down with Appellant and put his arm around him. (T 1575,

1595) Appellant started crying even harder. (T 1575-1576) He said that his mother could not afford an attorney anyway. (T 1576) Judd responded that if his mother could not afford an attorney, the State would provide him with one. (T 1576, 1955) Appellant then confessed, while Detective Hamilton sat outside and took notes. (T 1560-1562, 1604, 1952-1953, 1992-1993)[9] Appellant also agreed to give a tape-recorded statement to detectives Smith and McWaters, at which Lieutenant Schreiber was present as well. (T 1529-1530, 1568-1569, 1577, 1840, 1855-1856) Detective Smith read Appellant his Miranda rights, and Appellant executed a form which stated that he understood his rights and wished to talk to the detectives. (T 1530-1533, 1841, State's Exhibit No. 75) Appellant's recorded interview with the detectives was played for the jury at his trial. (T 1839-1855) Appellant said that Kimberly's mother, Beverly, had offered him some "serious money" to beat up, molest, and leave Kimberly injured where she could be found the next day. (T 1562-1563, 1587, 1842-1843, 1956) She mentioned a figure of $500. (T 1843) Beverly did not mention insurance, but she had some kind of "scam" in which she was going to get a lot of money. (T 1843) She gave him $10 on Thursday night. (T 1843-1844) Appellant had been drinking in Alturas that day. (T 1842)

After drinking a pitcher and more at the bar and getting drunk, Appellant called his girlfriend about midnight. (T 1843-

---

[9] Before any of Appellant's inculpatory statements were admitted into evidence, defense counsel renewed their objections thereto, and were given a standing objection. (T 1531-1532) They later renewed their objections. (T 1954-1955)

1844) He went back to his house and sat around, then went back to the bar for another beer. (T 1844) At about 2:00 in the morning, Appellant approached Beverly's house, unscrewed the front porch light bulb, and walked in the front door, which Beverly had told him would be unlocked. (T 1562, 1845) He put a piece of cloth or silk, a rag or T-shirt that he found at the house, over his head to hide his identity. (T 1563-1564, 1845, 1956, 1994) He found Kimberly Waters asleep in her mother's waterbed. (T 1563-1564) He woke her up, told her to be quiet or he would hurt her, and put his hand over her mouth. (T 1564, 1846) He stood her up and walked her to the front door, where he put a rag that he found in the residence aver her mouth, and walked her outside. (T 1564, 1846) Appellant walked Kimberly to the Moose Club, where pulled the rag out of her mouth and laid her down on the concrete and sat on her. (T 1565-1566, 1847-1848, 1959) The covering came off his face, Kimberly recognized him, and called his name, Wayne. (T 1566, 1847-1848) Appellant became scared; he penetrated Kimberly's vagina hard three to five times with two fingers. (T 1566-1567, 1848, 1854, 1957-1958) She was thrashing around, and told him to quit it. (T 1567) He put the rag back into her mouth. (T 1848, 1850, 1959) Appellant stood up, hit her in the face OF head several times with his fist. (T 1567, 1849, 1957, 1959) She was still conscious. (T 1567) Appellant found a piece of white plastic bag and held it over her face. (T 1567, 1850-1851)[10] She was fighting

[10] According to Detective Hamilton, Appellant said that he choked Kimberly Waters (T 1957, 1997), but this was not mentioned by Major Judd in his trial testimony, nor was it mentioned during

with him and thrashing around. (T 1568)[11] Appellant was scared, and doing his best to stop her. (T **1568**) When she stopped moving, he picked Kimberly up and threw her in the dumpster. (T 1568, **1851-1852**) He went home, washed up, and drank some beer. (T **1568**, **1852**) He tossed the rag that had been in Kimberly's mouth, which he used to wipe the blood off his hands, onto the roof of his house. (T 1853)[12] Appellant said that things had just gotten out of hand. (T **1995**) He liked kids, and never meant to hurt or kill Kimberly. (T **1997**) He was sorry about what had happened. (T **1998**)

On or about May **25**, 1994, Jimmy Smith, a correctional office at the Polk County jail, received an inmate interview request form which indicated that Eddie Davis wished to speak with Detectives Gilbert and McWaters about the Waters case. (T **1755-1759**) He called the region to which the two detectives were assigned to pass the request along. (T **1757-1758**) On May **26**, Lieutenant Schreiber discovered a telephone message in another law enforcement officer's box, which stated that Eddie Davis wanted to talk to a detective in reference to the Waters case. (T **1590-1591**) She contacted Detective Debbie Hamilton, who had assumed the role of lead detective in this case, and told her that she needed to contact the

---

the taped interview.

[11] According to Detective Hamilton, Appellant said that Kimberly Waters was clawing at the plastic (T1959), but Major **Judd** did not testify to this, nor does it appear in the taped interview.

[12] Crime Scene Technician Holland recovered a T-shirt from the roof of Appellant's residence on **March** 18, 1994. **(T 1805-1807)** There was no reaction when the FDLE Lab attempted to do DNA testing on the shirt. (T **1908-1910**)

state attorney's office about proceeding with the request. (T 1591-1593, 1951) Hamilton called Assistant State Attorney John Aguero, following which she and Detective John Harkins went to the jail and talked with Appellant. (T 1960-1961) Hamilton told him that she knew that Appellant had a lawyer, and asked if he was willing to talk to them without his lawyer present, to which Appellant answered, yes. (T 1961) The detectives began taping their conversation with Appellant, but turned the recorder off at his request. (T 1961-1962) Appellant said that he had been lying in bed feeling guilty about what he had told law enforcement originally, and wanted to set the record straight, and not take somebody else down for something they did not do. (T 1962) He said that Beverly Schultz was not involved, and he had only implicated her to get back at her. (T 1962-1963) He then provided details of the offenses. (T 1963-1965) He had been drinking in Alturas, and returned home around 10:30 p.m. (T 1963-1964) After changing pants, he went to the Siesta Bar and drank. (T 1964) He started walking home, but ended up at Beverly's house. (T 1964) Beverly usually did not work on Thursday nights and, because her car was gone, Appellant thought she was not home. (T 1964) He unscrewed the light bulb on the front porch and entered the house through the unlocked front door to look for money to buy more beer at the bar. (T 1964) He went into Beverly's room, because that was where she usually hid money in a drawer. (T 1964) He turned on the bedroom light and saw Kimberly lying in Beverly's bed. (T 1964) Before he could turn off the light, she saw him. (T 1964) He put his hand

over her mouth and told her not to holler, that he wanted to talk to her. (T 1964) He told Kimberly to come with him, but did not tell her why, (T 1964-1965) In the living room, Appellant picked up a rag and put into her mouth so that she could not yell. (T 1965) Kimberly did not say anything, because Appellant told her he did not want to have to hurt her. (T 1965) They went out the front door and jumped a fence into the next trailer park. (T 1965) They went into trailer number five, where Appellant had been living, and he molested Kimberly. (T 1965) At that point in his statement, Appellant began to cry. (T 1965) Hamilton asked him what he meant by molesting Kimberly, and he continued to cry. (T 1965) Hamilton asked if Appellant was willing for her to turn the tape back on so that he would not have to repeat his statement, and he agreed. (T 1965)

The taped interview with Appellant was played for the jury at his trial. (T 1971-1986) At the beginning, Appellant indicated that he wanted to talk to the detectives about the Kimberly Waters case, and was willing to proceed without the advice of his counsel. (T 1971-1972) He said that Kimberly's mother, Beverly Schultz, did not have anything to do with the case. (T 1973) Appellant recounted again that he had been drinking in Alturas, his girl-friend brought him home around 10:30, he changed pants, went to the bar, started drinking, and had a lot of beer, (T 1973-1974) He left the bar and called Susie, then started walking home, but found himself on Beverly's porch. (T 1974) He thought there was nobody home, because Beverly's car was gone, and she did not usually work

on Thursday nights. (T 1974) Appellant unscrewed the light bulb and entered the house through the unlocked front door to look for some extra change to buy more beer. (T 1974) He did not have anything covering his face. (T 1983) He went into Beverly's room, because she usually had money there in a drawer, and turned an the light. (T 1974) Kimberly was in the bed, and before Appellant could turn the light off, she saw him. (T 1974) Appellant rushed around the side of the bed, put his hand over her mouth, and said, "Please don't holler. I just want to talk to you. You come with me." (T 1974) They walked into the living room, where Appellant picked up a rag and put it in her mouth so she could not yell. (T 1975) He told Kimberly not to "holler," and said he did not want to have to hurt her. (T 1975) They went outside and jumped the fence into another trailer park. (T 1975) They went into trailer five, where Appellant "molested" Kimberly. (T 1975)[13] He tried to put his penis in her, but it would not go, and so he pushed two fingers in her forcefully as far as they would go. (T 1977-1978) Kimberly started "crying real bad," and said she was hurting. (T 1977-1978) Appellant told her to get dressed, and took her from there to the Moose Lodge. (T 1975, 1977)[14] She was calling his name and asking where they were going. (T 1975) She wanted to go

---

[13] Crime Scene Technician Holland found what appeared to be blood on a table in the trailer, and two areas in the bedroom and one in the living room reacted to Luminal. (T 1801-1803, 1817-1818)

[14] Over defense objections, Dr. Melamud, the associate medical examiner, was permitted to testify that if the victim was standing upright and walking for a significant period of time, blood would have run down her legs, and he saw no indication that this had occurred. (T 1681-1695, 1748)

home; she was tired and wanted to go to bed. (T 1978-1979) Appellant told her they were going for a walk. (T 1979) He was scared and did not know what to do. (T 1975-1976) He did not want anybody to know he had done something like that. (T 1975) He hit Kimberly one time in the forehead with his fist to get her to lie down on the concrete walkway. (T 1976, 1979-1980) He put a piece of plastic over her mouth. (T 1976) She ripped the plastic with her fingers, but Appellant held it over her nose and mouth for a couple of minutes until she stopped moving. (T 1976, 1980-1981) He picked her up and put her in the dumpster and left. (T 1976) He did not know if she was dead, but thought maybe she was just passed out. (T 1976-1977) If nobody found her for a couple of days, Appellant could get away, using money he would earn working for his father. (T 1977) Appellant went home, drank some more beer, and went to bed. (T 1981-1982) He went to work the next morning. (T 1982)

Appellant was calm when the detectives first saw him at the jail on May 26, but he became emotional as he discussed the events in question. (T 1988-1989) He was crying and shaking throughout the interview. (T 1988-1989)

After the State rested, Appellant moved for a judgment of acquittal on counts one through three of the indictment, which the court denied. (T 2003-2005)

The defense presented no evidence. (T 2003, 2010-2011)

Trial--Penalty Phase

State's Case

Alicea K. Riggall, a control release officer with the Department of Corrections, testified for the State that Appellant was released from prison on control release on October 20, 1992, and was still under control release supervision on March 3, 1994. (T 2270-2271)

Defense Case

Eddie Wayne Davis was born in Bartow on September 12, 1968. (T 2451, 2453, 2526) His mother, Glenda Sue Davis, was 14 or 15 when she married his father, Eddie Arnold Davis, and Appellant was born a few months later. (T 2452, 2503-2504, 2632) Glenda Sue was in the eighth grade, and she did not finish school. (T 2633) Eddie Arnold Davis made it to the seventh grade. (T 2451)

A number of Appellant's relatives had problems with alcohol and drugs, problems with the law, psychological problems, and learning disabilities. (T 2466, 2484-2485, 2566, 2768, 2828-2829) For example, his maternal grandparents were both alcoholics. (T 2464, 2635) The parents of his aunt, Cecilia Smith, were alcoholics, and her father was violent and mentally abusive toward her mother, who also became violent. (T 2501-2503) Smith's oldest sister, Frances, had a bad alcohol problem, and was in a very abusive relationship. (T 2503) Smith herself suffered periods of depression and anxiety. (T 2503) Eddie Arnold Davis' brothers and sisters had all "been in trouble, and they always been drinking and on drugs." (T 2484-2485, 2768) About eight or nine of his

relatives had learning disabilities; they could not "hardly read or spell." (T 2466) He had a brother "doing forgery, swiping cars, forging [his] name[,]" and another brother that was in racketeering. (T 2466) His brother, Grady, who could not read or write and had alcohol or drug problems, had been in prison numerous times. (T 2485, 2768) Another brother, Louis, could not read or write, developed an alcohol problem, and constantly acted violently. (T 2767) Another brother, Curtis, had a severe alcohol problem, and could only read a little bit. (T 2464, 2768) Jeff Davis, another brother, could not read or write. (T 2768) A sister, Jackie Davis, had an alcohol and drug problem and could not read or write. (T 2767-2768) Another sister, Margaret, stayed on alcohol and drugs for a long time, suffered from depression, and was murdered by being shot five times. (T 2464, 2466, 2484) One of Appellant's cousins, Louis, was in prison for child molesting, and another cousin was "up for murder." (T 2485) Although Eddie Arnold Davis denied that he himself had a drinking problem (but he "wished [he] had"), there was testimony that he drank heavily, and could be very, very violent when drunk. (T 2312, 2464, 2482-2483, 2711, 2834)

Appellant's parents were not together very much after he was born. (T 2454, 2635-2636) [According to Appellant's father, he raised Appellant, with the help of his parents, for five years. (T 2453-2454) Appellant's mother had taken up with another man. (T 2454) However, Appellant's maternal grandmother, Frances Snyder, and two aunts, Linda Gibson and Cecelia Smith, testified that it

was Appellant's father who was not around much. (T 2511-2512, 2634-2635, 2763) Smith said that Eddie Arnold Davis was incarcerated when Appellant was around two, and that was the "end of him." (T 2505, 2512)] Eddie Arnold Davis did not get to *see* his son from the time he was 11 until he was 17, nor did he have contact with him again after that until he was 23 or 24. (T 2461-2462)

Eddie Arnold Davis testified that when Appellant had just turned five, Glenda Sue kidnapped him, and Eddie Arnold did not see his son for a couple of years. (T 2456) Eddie Arnold found out where Appellant was, and took him out of school one day to Orlando. (T 2457) Appellant remained with his father for about a year, but Appellant was "[k]ind of tore between" his parents, and Eddie Arnold eventually took him back to his maternal grandmother's house and left him. (T 2458)

When Appellant was little, his mother would often go to her mother's house to eat. (T 2643) She would pull a wagon with Appellant in it across a viaduct to Frances Snyder's house, because Eddie Arnold Davis would not buy food for them. (T 2511-2512, 2643-2644)

Eddie Arnold Davis and Glenda Sue Davis were divorced when Appellant was about seven. (T 2454-2455) Prior to that, however, Glenda Sue began living with a man named Bradford Hudson, who was very big and husky. (T 2636-2638, 2776) Their residence was filthy, and so were the children who lived there. (T 2764) They had financial problems as well; once when Linda Gibson visited the house, they did not have any electricity. (T 2310, 2765) Hudson

drank a lot, and was very mean, hostile, and belligerent when he was drinking. (T 2306, **2312, 2314, 2507, 2514-2515, 2640-2641, 2787, 2834)** On one occasion when he was involved in argument with Frances Snyder's husband, Hudson kicked him and broke his arm with a baseball bat. (T **2636-2637)** On another occasion when he thought Appellant's girlfriend, Susie Stewart, was cheating on Appellant, Hudson said he would not think twice about having the house that Stewart and her three children lived in blown up; and Stewart believed him capable of that. (T **2787-2788)**

Hudson mentally and physically abused Appellant and the other children in his household, as well as Glenda Sue. (T **2306-2308, 2311, 2314, 2638-2640, 2514-2517, 2766)** Hudson treated Appellant worse than the other children, because he was the oldest. (T **2641, 2786)** He would hit the children with a hose, broomstick, or electrical cord. (T **2314, 2638)** Frances Snyder had seen bruises on Appellant's arms, legs, and back. (T ***2639)*** When Appellant was three or four, Linda Gibson witnessed Hudson hit or slap him hard "[u]pside the head," knocking him to the floor, without adequate provocation. (T **2764, 2773, 2775)** Cecelia Smith had seen Hudson backhand Appellant for no apparent reason. (T **2515)** He once "whacked" Appellant several times with a droplight cord. (T 2515) Another time, he hit Appellant with a piece of garden hose. (T **2515-2516)** Every **time** Smith visited their house, something would happen. (T **2516)** After he beat the children, Hudson would lie on the roof with a gun to make that nobody left the house to get help. (T **2642)** Hudson would speak to Appellant in a very sarcastic,

belittling voice, constantly reminding him that "his daddy didn't love him, his daddy didn't want him, so nobody else did either." (T 2516) Hudson always condemned Wayne, told him that he was stupid and that he would be just like his father, just like the Davises. (T 2766, 2786)

A number of reports were made to HRS about the abuse of Appellant, but they were all determined to be "unfounded." (T 2308, 2314, 2431, 2435, 2590)

With regard to Hudson's treatment of Glenda Sue, it was "one thing after another." (T 2517) Cecelia Smith had seen Hudson "throw stuff at her" and beat her with his fist. (T 2517) One time when Hudson was angry, he lunged at Glenda with both feet, but she moved, and he knocked a big hole in the wall. (T 2517)

Before Hudson entered the picture, Appellant was a happy child, active child who played carefree. (T 2510, 2635) He was the center of his mother's attention, and everything revolved around him. (T 2512) After she met Hudson, however, Hudson had to be in control and the center of attention. (T 2311, 2514) When Hudson was around, Appellant became "very timid, intimidated, almost scared to grin, almost scared to move." (T 2511, 2635) He "seemed to be depressed quite a bit about stuff[.]" (T 2642-2643) Appellant ran away countless times, often going to his father's house or his grandmother's house. (T 2308, 2418, 2431, 2460-2461, 2519-2520, 2551, 2553, 2638, 2641, 2683, 2728, 2831, 2911) He also began drinking at a very early age; Hudson introduced him to beer when he was seven, and Eddie Arnold Davis alsa gave Appellant

alcohol when he was very young. (T 2308-2309, 2312, 2419-2420, 2565, 2832, 2838-2839, 2903)

Appellant did poorly in school. (T 2320) He failed first and fourth grades, and was diagnosed as having a learning disability, and placed in special education when he was 11. (T 2320-2321, 2330-2331, 2553-2554) He discontinued his education in seventh grade, but later earned his GED in prison. (T 2331, 2339)

When Appellant was between 10 and 11, his father tried to kill Bradford Hudson. (T 2458) Eddie Arnold Davis took a shot at Hudson one night after finding out "that he mistreating [Davis'] young'un, and he was badly beating his mother." (T 2459) Davis went to prison for five years for that and having a stolen car in his possession. (T 2459)

Appellant began to steal things as a youth, one time stealing a gun because he was very depressed and wanted to kill himself, and first went into an institution when he was between 10 and 12. (T 2334-2335, 2426, 2520, 2644, 2849) He would steal to buy alcohol. (T 2740) He did well in structured environments. (T 2332, 2339-2340, 2383, 2441-2442, 2571-2572, 2575-2576, 2730, 2843) Appellant first went to adult jail when he was under 18. (T 2333, 2521) He was placed on psychotropic medication. (T 2334-2335, 2342, 2598-2599) At one point he attempted suicide and was placed in a psychiatric hospital within the Department of Corrections. (T 2335) He was physically and sexually abused in prison, and was glad when he got out, but also scared, because he did not know how to live "on the street." (T 2337, 2521-2522, 2575, 2606, 2620, 2719, 2732,

2788-2789, 2846-2848, 2912-2913) He had spent so much time in detention centers that they were like home. (T 2788) He had trouble finding a job because of his ex-con status, but was a very hard worker when he was able to work. (T 2465, 2486, 2488, 2645-2646)

Linda Gibson used to live next door to Beverly Schultz when she lived with Appellant. (T 2770) She never witnessed any problems between Appellant and Schultz or her children. (T 2771) Kimberly Waters and Appellant got along very well, and she loved him. (T 2772, 2775)

The night Kimberly was found, Appellant was very upset, crying. (T 2779) He asked, "Why Kimberly? She was the best one of the bunch." (T 2779)

Appellant treated his girlfriend, Susie Stewart, very well, and treated her children as if they were his own. (T 2777-2778, 2790-2791) There was nothing he would not do for the kids; he played with them and helped the oldest girl with her homework. (T 2790-2792) Stewart's son had allergies and asthma, and Appellant took the time to learn the different medications he needed, and learned to give him his breathing treatments. (T 2792)

Appellant was insecure in many areas; he was afraid of losing Susie and the kids, and this made him depressed at times. (T 2793)

Appellant was "most respectful" to his stepmother, Sandy Davis, except when he was under the influence of alcohol. (T 2481-2482) He had violent tendencies when he was drinking. (T 2471-2476)

On March 3, 1994, when he was in Alturas drinking with Susie Stewart's uncle, Sam Murray, Appellant had at least nine or ten beers or more. (T 2492, 2785) When he left Alturas to return to Lakeland, he had a "pretty good buzz going" and was "high already." (T 2784, 2492) He drank more beer on the trip back to Lakeland. (T 2785)

Dr. Harry Krop was a clinical psychologist who reviewed various depositions and other documents pertaining to Appellant and this case, listened to the tape recordings of Appellant's interviews with law enforcement personnel, interviewed several people (family members or extended family members), and consulted with another psychologist, Dr. McClane. (T 2290-2294, 2394-2395) Additionally, Dr. Krop saw Appellant on twa occasions, for three and one-quarter hours on March 3, 1995, and for two and one-quarter hours on May 4. (T 2295) He interviewed Appellant to obtain a history, and conducted psychological testing. (T 2295) Dr. Krop found Appellant competent to stand trial, and had no evidence to suggest that Appellant was not sane at the time of the offenses. (T 2297-2300)

Dr. Krop found that Appellant was raised in "an extremely dysfunctional family from day one." (T 2304, 2309) He noted that Appellant came into the world with certain predispositions as a result of the history of learning disabilities in his family, the history of alcohol abuse, and the extensive criminal history, which included involvement with the criminal justice system on the part of both Appellant's biological father and stepfather. (T 2304,

2306, 2312) Dr. Krop also found significance in the fact that Appellant's biological father was an "absentee father," from whom Appellant received very little, if any, affection, attention, or nurturance, and a lot of the influence that his alcoholic "common-law stepfather [Brad Hudson] provided was "basically negative influence." (T 2306, 2310) Eddie Arnold Davis "essentially taught Wayne how to be a criminal. He had Wayne steal for him." (T 2312)

Appellant met the criteria for being a "battered child." (T 2315) His school and HRS records revealed that he had feelings of inadequacy, low self-esteem, poor impulse control, low frustration tolerance. (T 2322-2323, 2334) His IQ at age 10 was 91--"the lowest scored to be viewed as average intelligence." (T 2379) Other evaluations showed scores of 83, and 87, and 89, all within the lowest 10th to 15th percentile of the population. (T 2393-2394)

Dr. Krop testified that family members described Appellant, when he was not drinking, as "good-natured, polite, respectful; basically a nonviolent individual who trie[d] to avoid violence whenever possible." (T 2338-2339) Even his father, "who was very critical of Wayne," said that he would "give people the shirt off his back." (T 2338, 2365) It was only when Appellant was drinking that he would have problems with his temper and could become violent. (T 2338-2339, 2365) Testing showed that Appellant was an alcoholic. (T 2413)

Appellant was suffering, in Dr. Krop's opinion, from dysthymia, or chronic depression, alcohol abuse, post-traumatic stress disorder, specific learning disability (which he appeared to have

overcome), borderline personality disorder, and antisocial personality disorder. (T **2341-2345, 2372)** [One trait which Appellant had which was **not** typical of antisocial personalities, and which was very unusual in the people Dr. Krop evaluated, was that Appellant basically accepted responsibility for what he did. (T **2339-2340, 2345-2346)** He also displayed genuine remorse for his actions, crying when he discussed the incident with Dr. Krop. (T 2346-2347)] Appellant was **also** emotionally immature. (T **2349)** He had "tremendous repressed hostility," which culminated in these offenses, which were really out of character. (T **2349-2352, 2359, 2523, 2770)** To **a** certain extent, Appellant had been able to control his repressed rage and anger, but it sometimes came out when he was drinking as alcohol diminished his control mechanisms. (T **2349-2352)**

The psychosexual evaluation Dr. Krop performed did not reveal any kind of sexually deviant propensities; no fantasies or thoughts of violence toward children. (T **2350-2351)**

Dr. Krop opined that Appellant "was suffering with a serious emotional disorder at the time that this incident occurred," and was under the influence of an emotional or mental disturbance. (T **2358-2359)**

On cross-examination, Dr. Krop acknowledged that when Appellant was **12** years old, he reported to a Virgil Carr, who examined him, that Appellant got along well with his stepfather, felt that they liked each other, and they worked on cars and went fishing together. (T **2372-2373)** There was **also** a report **from 1983**

in which Appellant stated that he enjoyed football, soccer, kickball, swimming, and riding his bike. (T 2386) Dr. Krop also acknowledged that in her deposition Appellant's sister stated that their daddy had not abused the children, rather, Appellant was disciplined for what he did. (T 2376) Although there was some data that contradicted abuse, it was "very little data." (T 2376)

Dr. Henry Dee was a clinical psychologist who reviewed the materials gathered by the police and the state attorney in investigating this case, as well as many depositions. (T 2539, 2545-2546) He also examined records pertaining to Appellant and his life and spoke with his mother, and listened to the tape-recorded statements Appellant gave to the police. (T 2546-2547, 2549) Dr. Dee spent approximately three and one-half hours interviewing Appellant on two different occasions, and gave him a complete battery of neuropsychological and psychological tests. (T 2547-2549) He found Appellant's developmental history and family life to have been "extremely dysfunctional." (T 2550-2551) He did not have adequate role models to show him how to behave. (T 2551-2552) Appellant's relationships with other people were "relatively distant." (T 2551) He was a "very reserved person" who rarely developed any close interpersonal relationships. (T 2551)

Dr. Dee referred to the probably that, in addition to the other abuse he had suffered, Appellant had been sexually abused as well. (T 2551-2552)

Dr. Dee's testing showed Appellant's full-scale IQ to be about 80, dull normal, which would be exceeded by about 83 or 84 percent

of the population. (T 2556) The tests also revealed that Appellant suffers from mild to moderate organic brain damage, (T **2557-2560, 2562)** Brain damage typically is associated with impairment in memory and impulse control, as well as increased irritability. (T **2560-2561)**

Dr. Dee believed Appellant suffered a borderline personality disorder, and an organic affect disorder. (T **2561)** Although Appellant showed some antisocial traits, he did not meet the criteria for antisocial personality disorder. (T **2561-2562)** He also **suffered** from major depression at times, had very low self-esteem, and was an alcoholic. (T **2563-2565, 2586)** At the time of the crimes, Appellant was under the influence of a moderate to severe mental or emotional disturbance. (T **2576-2577)** His ability or capacity to conform his conduct to the requirements of law at that time was moderately to severely impaired, and his ability or capacity to appreciate the criminality of his conduct was "impoverished." (T **2578)**

Dr. Thomas McClane was a psychiatrist who reviewed the discovery in this case, listened to recordings of the taped statements by Appellant, reviewed various other documents and depositions, taped statements from a large number of people, and conducted two clinical interviews with Appellant. (T 2818, **2824-2826)** He also consulted briefly by telephone with Drs. Dee **and** Krop. (T **2827)**

Dr. McClane described Appellant's family as "very dysfunctional" and "extremely dysfunctional." (T **2828,** 2830) Appellant

reported to the doctor that he had repressed memories of being repeatedly sexually abused by his stepfather beginning when he was about 11 or 12 and last occurring when he was 13 or 14. (T 2829, 2831, 2834-2836, 2875, 2906, 2947-2948) Appellant developed insecurity, a low self-concept, diminished self-esteem as a result of the way he was treated. (T 2831, 2854-2855)

Appellant was not significantly involved in organizations outside the home, such as church or school or social organizations, and did not "seem to have the usual network of peer support that youngsters have." (T 2841-2842)

Dr. McClane diagnosed Appellant as suffering from rather severe chronic alcohol dependence, and noted that he was intoxicated at the time of the offenses. (T 2849-2850) Dr. McClane also diagnosed posttraumatic stress disorder (which was the primary major diagnosis), borderline intellectual functioning (Dr. McClane put his IQ as between 71 and 84) with a specific learning disability in the area of reading and spelling, borderline personality disorder, antisocial personality disorder, and major depression. (T 2851-2852, 2864, 2914) Appellant had the intellectual functioning of an early teenager, and the emotional maturity and coping mechanisms of a child substantially younger than that. (T 2855-2856) His judgment and impulse controls were impaired, particularly when Appellant was drinking. (T 2856, 2938) He had developed a great deal of suppressed rage as a result of being victimized and feeling victimized in his earlier years. (T 2857-2858)

Dr. McClane opined that Appellant was under the influence of extreme mental or emotional disturbance at the time of the offenses. (T 2858-2860) His ability to appreciate the criminality of his conduct was impaired, and his ability to conform his conduct to the requirements of law was substantially impaired. (T 2860-2861)

Dr. McClane prepared a chart which he used to explain to the jury how the various facts about which he testified interacted to result in the instant offenses. (T 2862-2870) He said that when Appellant was panicked when he turned on the light in Schultz's residence and realized that Kimberly was there and would recognize him; it was "the shock of discovery." (T 2868-2869) When they arrived at the trailer, Appellant suddenly felt "angry and a desire to hurt her," without understanding why. (T 2869) "All that early rage was triggered by a sexualized situation in a scantily clad young girl, unfortunately Kimberly, which liberated this, and he blasted out in violent acts that he has no idea why or what was going on." (T 2869-2870) With regard to what happened at the Moose Lodge, when Kimberly began yelling at Appellant, "[i]n his compromised state, for these various reasons, he became angry, slash, panicked; again wanted to stop that noise any way he could; grabs a randomly available piece of plastic and puts it over her to stop the yelling; and, tragically, she dies." (T 2870) That was the way Dr. McClane saw "the rage, the lack of controls, and the panic coalescing to cause the second violent act." (T 2870)

Craig Smith of the Polk County Sheriff's Office was involved

in the investigation in this case. (T **2274)** He testified that, because of the injuries to Kimberly Waters, it was determined that the penis of the perpetrator might have been injured. (T **2275)** On March **6,** 1994, Smith and Detective Gilbert went to Appellant's residence and asked to inspect his penis. (T **2275)** Appellant was cooperative, and Smith observed no obvious signs of injury. (T **2275)**[15]

Ted Yeshion, a senior forensic serologist at the Tampa Regional Crime Laboratory of the Florida Department of Law Enforcement, who testified as the State's DNA expert at guilt phase (T **1870-1911),** testified that he tested the panties, nightgown, sweater, white sleeveless undershirt, and oral, anal, and vaginal swabs in this case, and did not detect the presence of semen. (T **232-2329)**

Bailiff **Bruce** Starling testified that he had not noticed any disruptive behavior in the courtroom by Appellant; Appellant had been very attentive to the court, and there had been no problems. (T **2629)** Nor did Starling have any problems with Appellant when he was escorting him to and from the courtroom. (T **2629)**

State's Rebuttal

Dr. Sidney Merin was a clinical psychologist and neuropsychologist. (T **2656-2758)** He interviewed Appellant after he **was** found guilty, and reviewed various documents, including Dr. Krop's

[15] Defense counsel had attempted to elicit this testimony duringthe guilt phase on cross-examination of Detective Smith, but the trial court sustained a State objection that it was beyond the scope of direct. (T **1544-1547, 1605-1606)**

report, Dr. Dee's report, some materials from Dr. McClane, and some material about the crime, but he had not reviewed any police reports related to the offense, had not reviewed any depositions except those of Drs. Dee, Krop, and McClane, and had not reviewed transcripts of Appellant's statements or listened to the tapes of the statements. (T **2661-2662, 2703-2706)** **Dr.** Merin **also** administered some tests to Appellant. (T **2662-2667)** He concluded that Appellant did not suffer from any mental or emotional disorder, but did diagnose a behavior disorder, namely, antisocial personality disorder, with some borderline and schizoid features. (T **2667-2668)** Appellant did have low self-esteem, trouble controlling his impulses, emotional instability, and anxiety, but was able to understand what appropriate behavior was and what the law was, but simply disregarded it. (T **2676, 2750)** Appellant also had significant repressed rage behavior and anger, which gave him the potential for violence. (T **2707-2708)** Dr. Merin agreed that Appellant came from a dysfunctional family and had a deprived childhood psychologically as well as economically. (T **2711-2713)** He did not have "a good, healthy, normal, warm, stable, gentle, approving, and encouraging family." (T **2713)** The positive parental guidance he received was "minimal, nonexistent, or warped." (T **2717)** The males in his life were very poor role models. (T 2718) Dr. Merin also agreed that Appellant suffered from a substance abuse disorder, that is, alcohol dependence, that **was** of moderate severity. (T 2733, 2738) Appellant had probably been depressed

throughout his life history. (T 2750-2751) His insight and judgment were markedly poor. (T 2752)

SUMMARY OF THE ARGUMENT

The statements Appellant made to sheriff's deputies on March 18 and May 26, 1994 should have been suppressed. On March 18, despite not having been advised of his Miranda rights while he was being questioned at the substation, Appellant invoked his right to counsel. This right was violated when Major Judd approached Appellant and spoke to him as he sat in the holding cell, which violation also tainted the subsequent taped statement. Under these circumstances, Appellant's purported waiver of rights, after Miranda was finally given prior to the taped statement, was ineffective; the written waiver was not witnessed by two people who attested its voluntary execution, as required. By the time of his May 26 encounter with law enforcement, Appellant had acquired even greater protections because his Sixth Amendment right to counsel had attached (in addition to his Fifth Amendment/Miranda rights), and he had actually been appointed counsel. He had also exercised his rights in writing at first appearance by signing a "Notification of Exercise of Rights." It is in this context that one must view his purported initiation of contact with the police, and whether he could at that point waive his rights without the participation of counsel and without being advised of his full Miranda rights. It is important to note that the police employed a deliberate strategy, in consultation with the assistant state attorney who tried Appellant, of not providing Appellant with a

complete Miranda warning when they went to see him at the jail, and that the interview turned into another full confession, whereas Appellant had merely sought to set the record straight regarding Beverly Schultz's lack of participation in the offenses. In light of the paucity of other evidence against Appellant, admission of his statements cannot be deemed harmless error.

The tape recording of the 911 call Beverly Schultz placed when she discovered her daughter missing was inadmissible hearsay, and the State failed to establish an adequate predicate for its admission into evidence. It was not admissible to show Schultz's state of mind at the time, **because** her state **of** mind was not an issue in this case. Nor **was** it admissible under the hearsay exception for "spontaneous statements," as Schultz had ample time for reflection before placing the call. Appellant was prejudiced by the jury hearing how (in the prosecutors' words) "extremely agitated and upset" Schultz was on the morning her daughter was missing; irrelevant emotionalism was injected into the proceedings.

The State's raising of irrelevant matters and improper arguments, as well as emotional displays by at least two State witnesses which the prosecutor exploited, denied Appellant a fair trial. There was no legitimate reason for the jurors to be informed that Kimberly Waters had a learning disability. The victim's mother and the sheriff's deputy who found the body both cried on the witness stand, and the prosecutor referred to the latter's emotional display in his argument to the jury. The prosecutor also made a "Golden Rule" argument, referred to one of

Appellant's statements to law enforcement as a "bald-faced lie," and characterized this case and the perpetrator of the offenses as "a vicious, brutal case committed by a vicious, brutal person'' to which there was no defense. The cumulative effect of all these incidents was to deny Appellant a reliable determination as to his guilt and the penalty he should receive.

Florida's standard jury instruction on reasonable doubt is inadequate to pass constitutional muster, as it impermissibly essentially equates "reasonable doubt" with "substantial" or "real" doubt, and allows the jury to convict if they have an "abiding conviction of guilt" even if they also entertain a reasonable doubt as to the defendant's guilt. The instruction on premeditated murder is also defective, because it relieves the State of its proper burden of proving that the accused had, prior to the killing, a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, and that at the time of the execution of this intent the accused was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequences of carrying such purpose into execution.

Appellant's constitutional rights were violated when he was forced to submit to a mental health examination by the State's expert, Dr. Merin, after he was convicted. The presentation of mental mitigation in a capital case is unlike the presentation of an insanity defense at guilt phase. The State can rebut the defense case for mitigation without the need for its expert to examine the defendant. Such a compelled examination violated

Appellant's rights not to incriminate himself, to have the effective assistance of counsel for his defense, and to be free from cruel and/or unusual punishment, as well as his right to due process.

The penalty recommendation of Appellant's jury was rendered unreliable by a number of occurrences at penalty phase that included improper cross-examination of defense mental health experts, Drs. Dee and McClane, admission of an irrelevant photopack containing Appellant's picture, refusal to permit Appellant to present relevant testimony to rebut the State's attempts to discredit his mitigating evidence, and improper prosecutorial argument to the jury.

The trial court should have given Appellant's proposed penalty phase jury instructions on specific mitigating circumstances, and that unanimous agreement was not required for the consideration of mitigating factors. The denial of these instructions created a substantial risk that the jury conducted its deliberations on mitigating circumstances improperly, which rendered the jury's recommendation of the death sentence constitutionally unreliable.

The evidence failed to show that the only or dominant motive for the homicide was to avoid or prevent a lawful arrest; it may be that events merely got out of hand. The avoid arrest aggravating factor therefore should not have been submitted to the jury nor found by the court. Furthermore, it was submitted to the jury upon an inadequate instruction, which failed to inform the jury of the limiting construction placed upon the aggravator by this Court.

The "under sentence of imprisonment'* aggravating circumstance was not applicable to Appellant, who was on control release at the time of the homicide, and should not have been submitted to the jury or found by the court.

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

ARGUMENT

ISSUE I

THE LOWER COURT ERRED IN REFUSING TO SUPPRESS THE STATEMENTS APPELLANT MADE TO LAW ENFORCEMENT AUTHORITIES, WHICH WERE OBTAINED IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO COUNSEL, HIS PRIVILEGE NOT TO INCRIMINATE HIMSELF, AND HIS RIGHT TO DUE PROCESS OF LAW.

Statements taken March 18, 1994

In his order denying Appellant's first motion to suppress, the trial court stated that there was "no issue at bar concerning the initial interview. Defendant made no incriminating statements, therefore the fact that he wasn't given his Miranda warnings is

moot. " (A 2) Appellant takes exception with the court's conclusion for several reasons. The first is that, obviously, the sheriff's deputies were required to advise Appellant of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) before they began questioning him at the stationhouse. He was in custody at that time; the deputies had secured an arrest warrant and had no intention of letting him go, nor did they tell Appellant that he was free to go. See Drake v. State, 441 So. 2d 1079 (Fla. 1983). They had no way of knowing beforehand whether or not Appellant was going to incriminate himself; they clearly hoped that he would, and the warnings needed to be given. Moreover, there was testimony, albeit brief, about Appellant's initial statements of March 18 at Appellant's trial. Even though the statements were not inculpatory in and of themselves, by introducing the exculpatory statements in juxtaposition to the inculpatory statements, the State was implicitly demonstrating to the jury that Appellant had to be lying; in that sense, the exculpatory statements Appellant made did tend to incriminate him by the mere fact that they were inconsistent with his other, inculpatory ones. Furthermore, Miranda itself proscribes use of even exculpatory unwarned statements:

> the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

16 L. Ed. 2d at 706 (emphasis supplied).

The authorities were also obliged to advise Appellant of his right to counsel pursuant to Florida Rule of Criminal Procedure 3.111(c)(1) upon his commitment to custody. The rule provides for the booking officer to immediately advise the defendant of the right to counsel, and that if he is unable to pay a lawyer, one will be provided immediately at no charge. The rule was violated in this case.

Nor did the authorities comply with subsection (a) of Rule 3.111, which reads as follows:

> (a) When Counsel Provided. A person entitled to appointment of counsel as provided herein shall have counsel appointed when the person is formally charged with an offense, or as soon as feasible after custodial restraint, or at the first appearance before a committing magistrate, whichever occurs earliest.

Although Appellant was in custody, and was formally charged by way of arrest warrant, the deputies made no effort to ascertain whether Appellant was entitled to appointment of counsel pursuant to the rule (as an indigent), or to have counsel appointed if he was so entitled.

The trial court did correctly conclude that, prior to his encounter with Major Judd, Appellant unequivocally asserted his right to counsel, despite never having been advised of that right by law enforcement authorities, when he asked if he could call his mother to get him a lawyer, or words to that effect. (A 2) Although the prosecutor below attempted to cast doubt upon this matter by asserting that Appellant's request for counsel was somehow equivocal, and that the police could therefore continue to

question him pursuant to Davis v. United States, 512 U.S. ___ 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), the prosecutor's argument was unavailing for at least three reasons. Firstly, the request simply was not equivocal in any manner. All the sheriff's deputies with whom Appellant came into contact on March 18 felt that he was invoking his right to counsel; that is why they terminated the initial interrogation. Appellant's statement was not like that of Bobby Joe Long, who said, "I think I might need an attorney[,]" which this Court found to be a merely ambiguous request for counsel. Long v. State, 517 So. 2d 664 (Fla. 1987)©. (After an equivocal request, the only permissible additional inquiry by the police is to clarify the request. Long; Drake; Slawson v. State, 619 So. 2d 255 (Fla. 1993).) Appellant here clearly wanted to contact his mother so that he could obtain a lawyer. Secondly, as the court recognized in State v. Levva, 906 P. 2d 894 (Utah Ct. App. 1995), Davis only applies in the situation where a person makes an ambiguous request for counsel after he has waived his Miranda rights. The Court in Davis stated its holding as follows: "We therefore hold that after a knowing and voluntary waiver of Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." Davis, 512, 114 S. Ct. at 2356 (emphasis supplied). Appellant had not waived his Miranda rights--indeed he had not even been informed of these rights--prior to telling the police that he wanted to obtain a lawyer. Finally, under the Florida Constitution, an ambiguous invocation of the right to counsel will not entitle the police to

do any further questioning beyond what is necessary to clarify the ambiguity, even after Davis. Kiss v. State, 668 So. 2d 214 (Fla. 2d DCA 1996); Deck v. State, 653 So. 2d 435 (Fla. 5th DCA 1995); see also Travlor v. State, 596 So. 2d 957 (Fla. 1992); State v. Owen, 654 So. 2d 200 (Fla. 4th DCA), review granted, 662 So. 2d 933 (Fla. 1995); Halliburton v. State, 514 So. 2d 1088 (Fla. 1987).

Once Appellant indicated his desire for a lawyer, certain additional provisions of Rule 3.111 came into play which, again, were ignored. Subsections (c)(2) and (3) provide as follows:

> (2) If the defendant requests counsel or advises the [booking] officer he or she cannot afford counsel, the officer shall immediately and effectively place the defendant in communication with the (office of) public defender of the circuit in which the arrest was made.
>
> (3) If the defendant indicates he or she has an attorney or is able to retain an attorney, the officer shall immediately and effectively place the defendant in communication with the attorney or the Lawyer Referral Service of the local bar association.

These provisions place an affirmative duty upon the police to assist a defendant who expresses his desire for a lawyer. The sheriff's deputies here did nothing whatsoever to help Appellant fulfill his expressed desire for counsel.

The central holding of Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378, 386 (1981) is that an accused who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police." The trial court erroneously concluded in his

order denying suppression that Appellant initiated the conversation with Major Judd, and, therefore, Edwards was not violated. (A 4) While Edwards "does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities[,]" Minnick v. Mississippi, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), such is not the case before this Court. In no sense did Appellant initiate Major Judd's contact with him. It was Judd who approached Appellant and made contact, not vice versa. It was Judd who spoke first, not Appellant. When Judd told Appellant that he was disappointed in him, Judd engaged in the functional equivalent of questioning. Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); Tallev v. State, 596 So. 2d 957 (Fla. 1992). See also Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) (the famous "Christian burial speech" case). Surely he did not expect Appellant remain silent in the face of this rather inflammatory statement; he must have known it was likely to elicit a response, and that that response might be incriminating. And when Judd opened the door to the holding cell and asked Appellant to repeat what he had said that Judd was unable to hear, the questioning moved beyond the realm of functional equivalency to actual questioning. The fact that Judd told Appellant that he could not talk to him unless Appellant reinitiated the conversation is essentially irrelevant. At that point, Judd had already breached the legal wall that Appellant attempted to erect between himself

and the police by invoking his right to counsel, and was, in effect, encouraging Appellant to talk, in much the same way the police did in the cases dealing with subtle interrogation via the functional equivalent of questioning.

Even if Appellant had initiated the conversation with the police, Kight v. State, 512 So. 2d 922 (Fla. 1987) indicates that he should have been given his Miranda warnings before he was interviewed in the holding cell. Kight was initially arrested on a robbery charge, invoked his right to remain silent, and questioning ceased. At first appearance the next day, counsel was appointed on the robbery charge. One week after his arrest, while still in custody on the robbery charge, Kight was given his rights and questioned about a murder. He waived his rights and said he had no knowledge of the murder. Three days later, a detective accompanied Kight from his cell to the property room in order to seize his clothing for the purpose of testing for the murder victim's blood. While outside the property room, Kight said that he was "not afraid of the chair," whereupon the detective inquired, "What chair are you talking about?" 512 So. 2d 922 (Fla. 1987) Kight then said the electric chair, because another man, Hutto, stabbed the victim and cut his throat and still had the man's watch. Kight was then read his Miranda rights and made additional inculpatory statements. This Court found no Edwards violation with regard to Kight's initial statement that he was not afraid of the chair, because Kight initiated the conversation outside the property room. 512 So, 2d at 926. However, this Court did rule

that he "was entitled to a fresh set of warnings" before the detective asked "what chair?" and Kight's initial response to that interrogation should have been suppressed. 512 So. 2d 926. Although the trial court considered Appellant's statement to the deputies in the holding cell to have been a "narrative," he did acknowledge that some questions were asked of Appellant. (A 5) Pursuant to Kight, Appellant was entitled to have a rights warning before these questions were asked.[16] In Oregon v. Bradshaw, 462 U.S. 1039, 1043, 103 S. Ct. 2830, 2834, 77 L. Ed. 2d 405 (1983) the Supreme Court similarly noted that

> even if a conversation taking place after the accused has "expressed his desire to deal with the police only through counsel," is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation.

With regard to the taped statement, taken after Appellant was advised, for the first time, of his Miranda rights, this followed closely upon the heels of the previous inculpatory statements; it was, in effect, a continuation of them, or a recapitulation of what Appellant has already said. The cat was already out of the bag, so to speak, and the taped statement was tainted fruit of the earlier violation of Appellant's rights. The Edwards Court wrote that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-

[16] But see Christmas v. State, 632 So. 2d 1368 (Fla. 1994), which does seems to be inconsistent with Kight.

initiated custodial interrogation even if he has been advised of his rights. [Footnote omitted.]" 68 L. Ed. 2d at 386. Once a suspect had asserted his right to counsel if, as here,

> the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.

McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158, 167-168 (1991). The lower court's reliance upon Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985) to justify admission of the taped statement was misplaced. Elstad indicated that an initial failure of law enforcement officers to administer Miranda warnings, without more, does not necessarily taint subsequent admissions made after adequate warnings and a waiver of rights. That is quite a different situation from that in existence here, where there was not only the technical violation of an initial failure to warn, but an unequivocal invocation of the right to counsel, followed by a violation of that right. Under these circumstances, Appellant's statements must be "presumed involuntary and therefore inadmissible" under McNeil, not admissible under Elstad. See also State v. Madrusa-Jiminez, 485 So. 2d 462 (Fla. 3d DCA 1986) and Pope v. Zenon, 69 F. 3d 1018 (9th Cir. 1995) condemning police tactic of "softening up" suspects or establishing a "beachhead" by getting suspects to make unwarned statements before administering Miranda rights and obtaining further statements.

With regard to the written waiver that was purportedly executed by Appellant, which was admitted at the suppression hearing as State's Exhibit Number 1, it did not comply with the provisions of Florida Rule of Criminal Procedure 3.111(d)(4), which requires waivers of counsel made out of court to be "in writing with not less than 2 attesting witnesses," who "shall attest the voluntary execution thereof." The waiver in question bears the signature of only one person (other than Appellant) who signed as the "person advising Miranda Warning," but did not attest to the voluntary execution of the waiver by Appellant.

Craig v. Singletary, 9 Fla. L. Weekly Fed. C1041 (11th Circ. April 19, 1996) involved facts somewhat similar to the instant case with regard to the statements that were made. The facts, as stated in the opinion, were as follows:

> Junior Richards was robbed and killed by a shotgun blast. Detective Nelson of the Metro-Dade Police Department received an anonymous tip that Craig and Henry Lee Newsome participated in the killing. Nelson, along with Detective Singer, located Craig at a Miami residence and asked him to go to the police station for questioning. He agreed to go. The detectives notified Craig that he was not under arrest, but advised him of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Detective Singer falsely told Craig that police officials had discovered his fingerprints inside Richards's car, and Craig explained that he was a friend of Richards.
>
> When Craig arrived at the police station, he was again advised of his Miranda rights, which he waived. Craig explained that he had known Richards for three or four months and was with him the previous night at a disco, and that they were together in Richards's car. Craig left Richards after Richards reported that he was going to visit his girlfriend.

Craig stated that he later heard a shot and saw Henry Lee Newsome and Rodney Newsome running from Richards's car. He reported that Henry Lee appeared to be carrying a shotgun.

Detective Singer told Craig that he did not believe his story, so Craig offered to take a polygraph examination. Craig underwent two examinations, during which he would only give evasive answers. Craig was not placed under arrest but was escorted to the lieutenant's office at about 6:00 p.m.

At about 5:30 p.m. Henry Lee confessed and stated that Craig shot Richards. He explained that he and Craig approached Richards's car where he was sitting with his girlfriend. Craig ordered Richards out of the car, beat him, and attempted to drive away in his car. Richards began to protest and Craig shot him.

At trial Craig testified that he overheard Newsome confessing. Approximately two hours after Craig heard Newsome implicate him, Craig, still not under arrest, asked to speak with Detective Fandry whom Craig had previously worked with as a confidential informant. Fandry met with Craig, but did not question him about the incident or mention any possible evidence the police had against him. Craig told Fandry, "I really messed up. All I wanted to do was rip the guy." Craig also told Fandry that after Singer told him that the police had evidence against him, Craig had said "well if you got that against me, you might as well get me a lawyer."

Without seeking a lawyer for Craig, Fandry called Singer back into the room. Singer told Craig that he still was not in custody, but told him that his version of the facts did not make sense. Craig then admitted to participating in the robbery, but insisted that he did not shoot Richards and that Henry Lee had fired the gun. Craig was again advised of his Miranda rights. Without requesting a lawyer Craig gave a formal written statement which concluded at about 9:50 p.m. Craig was placed under arrest, and was kept alone in a room awaiting transportation to jail.

At 11:30 p.m. Craig asked to speak with Singer. Singer met with Craig, but did not question or interrogate him. Craig confessed that he had shot Richards. This confession

was transcribed as an addendum to the initial confession.

9 Fla. L. Weekly Fed. at C1041. Appellant must first note that the Miami police were more observant of Craig's rights than were the Polk County deputies here; they read Craig his rights before he was questioned, even though that may not have been required, because Craig may not have been in custody; Appellant's rights were not read until after he confessed. The 11th Circuit rejected the State's argument that Craig's request for a lawyer was equivocal, and that, pursuant to Davis, the police were not required to cease questioning. Appellant's request for counsel here was at least as unambiguous as Craig's, and was made under similar circumstances, that is, after being confronted with certain evidence against him. The 11th Circuit also ruled that Craig's initial confession was inadmissible, because the detectives questioned Craig after he requested assistance of counsel by virtue of his statement to Detective Fandry, in violation of Edwards. From the opinion, however, it appears that the only "questioning" that took place to elicit the incriminating statements was Singer's comment that Craig's story did not make sense. (Compare this with Major Judd's remark that he was disappointed in Appellant.) Although the lower court, Florida's Third District Court of Appeal (this Court had denied discretionary review) had concluded that the addendum confession was admissible under Edwards because Craig voluntarily reinitiated contact with the detectives, the 11th Circuit ruled the addendum inadmissible as well, because it was the fruit of an arrest made without probable cause. (Thus the 11th Circuit did not

reach Craig's argument that his request for counsel rendered the addendum confession inadmissible.) The opinion did not directly address the issue of whether the fresh administration of Miranda warnings after Craig's initial admission to being involved in the robbery cured any problems with the earlier violation of Craig's right to counsel, but was implicitly rejected in the 11th Circuit's ruling.

Statements taken May 26, 1994

The statements Appellant made at the Polk County Jail on May 26, 1994 were very much a product of the earlier statements that were taken in violation of his Miranda rights. He made the latter statements essentially to correct the earlier statements, to let the police know that, contrary to what he said initially, Beverly Schultz was not involved in the offenses against her daughter. The taint from the March 18 statements was remained on the statements of May 26. See Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Furthermore, at the time of the May 26 statements, Appellant had executed a written "Notification of Exercise of Rights" at his first appearance hearing, which put law enforcement on notice that he did not consent to be interviewed about any matter without the presence of his attorney, and exercised any and all of his rights against self-incrimination. (A 8)[17]

[17] Although this document should have been in the circuit court file, undersigned counsel has been unable to locate it in the record on appeal, but intends to move this Court for leave to supplement the record with it. Appellant has placed a copy of the Notification in the Appendix to this brief.

In evaluating Appellant's claim that the State failed to sustain its burden of showing that Appellant initiated the conversation with the authorities on May 26, and that the statements should have been suppressed in any event, it is important to keep in mind that by that time Appellant had not only a Fifth Amendment right to counsel and right to remain silent, as discussed in Miranda, but a Sixth Amendment right to counsel as well. This right attached at least as early as the filing of the indictment against him on April 7, 1994, and may have attached as early as March 18 when he was served with the arrest warrant. See Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972); Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) (right to counsel granted by Sixth and Fourteenth Amendments arises when judicial proceedings have been initiated by way of formal charge, preliminary hearing, indictment, information or arraignment).[18] The protections afforded to the accused are, if anything, greater once the right to counsel under the Sixth Amendment has attached than they are before the person has been charged, when only the Fifth Amendment is applicable. Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986) Not only did Appellant have a Sixth Amendment right to counsel, but counsel had actually been appointed for him, which was known to law enforcement. At that point the police were not permitted to interfere with the efforts of Appellant's attorney to act as a

[18] However, United States v. Gouveia, 467 U.S. 180, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984) indicates that the right may not attach at the time of arrest.

medium between Appellant and the State. Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)

> Once the right to counsel has attached and been asserted, the State must of course honor it. [Footnote omitted.] This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek his assistance. We have on several occasions been called upon to clarify the scope of the State's obligation in this regard, and have made clear that, at the very least, the prosecutor and police have an affirmative obligation no to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.

Maine v. Moulton, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985) The right to counsel does not depend upon a request by the defendant, and a waiver of the Sixth Amendment right to counsel cannot be presumed, but the State must prove an intentional relinquishment or abandonment of a known right or privilege by the accused. Brewer v. Williams. Courts indulge every reasonable presumption against waiver. Id., 51 L. Ed. 2d at 440. Once the right to counsel has attached and, as here, the defendant has affirmatively asserted his desire to communicate with the state only through counsel, he must use that medium to waive his right to counsel's assistance. Otherwise, the right to counsel is meaningless. See Brewer v. Williams (no waiver of right to counsel found where defendant consulted with counsel before turning himself in, counsel advised him not to make statements and assured him that the police would not question him, and defendant asserted right to counsel by having attorneys, acting as his agents, make clear to

police that no interrogation was to occur during transport). It is in the context of these principles that this Court must consider defense counsel's argument that the State did not carry its burden of persuasion to show that Appellant in fact initiated contact with the police (R 464), and that, even if he did, his rights were violated.

This Court should be particularly concerned about two aspects of what took place on May 26. The first is the deliberate employment of a stratagem on the part of the police, in direct consultation with the assistant state attorney who tried this case, not to provide Appellant with full Miranda warnings, but only to make a reference to his previous desire for counsel, thus circumventing Miranda's bright-line protections. The second is the wide-ranging nature of the interview that took place at the jail. If Appellant did initiate contact with the police, it was for the obvious and limited purpose of absalving Beverly Schultz of any responsibility for what happened to Kimberly Waters. Yet he ended up giving complete details of what happened, going through everything he had been through with the police before (although his May 26 statement was not entirely consistent with his previous statements). This expansion of the conversation beyond what Appellant originally intended must have been at the behest of the deputies who came to see him, who exploited the opportunity to talk to Appellant to obtain another full confession. Under these circumstances, even if Appellant did write a note asking to speak to detectives about the Waters case, it cannot be said that he

initiated the conversation such that this case is taken out of Edwards and Miranda. He did not knowingly and voluntarily relinquish his rights where the police turned the session from what Appellant intended into a full-blown taped confession.

Conclusion

Appellant's issue must be evaluated in light of both the United States and Florida Constitutions. Amends. V, VI, and XIV, U.S. Const., Art. I, §§ 2, 9, 16, Fla. Const. The latter provides even greater protections for its citizens in the areas of due process of law and the right not to incriminate oneself than does the federal constitution. See Kipp; Deck; Travlor v. State; Owen; Halliburton.

For the reasons expressed above, Appellant's statements of March 18, 1994 and May 26, 1994, and any and all evidence derived from those statements, should have been suppressed.

The error in failing to suppress Appellant's statement cannot be considered harmless. They formed a major portion of the State's case against Appellant; without them the State had very little evidence.

ISSUE II

THE COURT BELOW ERRED IN ALLOWING APPELLANT'S JURY TO HEAR A TAPE RECORDING OF THE 911 CALL BEVERLY SCHULTZ MADE WHEN SHE DISCOVERED THAT HER DAUGHTER WAS MISSING.

At the guilt phase of Appellant's trial, the State was permitted to introduce into evidence, over defense objections, a tape recording of the 911 call made by Kimberly Waters' mother,

Beverly Schultz, when she discovered that her daughter was missing. (T 1830-1833, 1927-1948)

Before the tape was played for the jury, the court gave the following instruction (T 1943):

> Ladies and gentlemen of the jury, at this time I want to instruct you that this tape you will be listening to--please listen to this instruction-- this tape is not being offered to prove the matter asserted or the matters asserted in the tape, but only to show Beverly Schultz' state of mind at the time of the phone call.
>
> You're not to believe what you hear in the tape, but it's only to show Beverly Schultz' state of mind at the time of the phone call.

The court then asked if everyone understood the instruction, and the record reflects that all the jurors responded affirmatively. (T 1943)

The tape was thereupon played for the jury (T 1943-1948):

> 911 OPERATOR: 911 emergency. Do you need police, fire--
>
> MS. SCHULTZ: Police.
>
> 911 OPERATOR: What's the problem, ma'am?
>
> MS. SCHULTZ: My daughter's missing, my 11-year-old daughter.
>
> 911 OPERATOR: Do you know where she could have went?
>
> MS. SCHULTZ: I came home from work and she's gone.
>
> 911 OPERATOR: Are you on 2615 Tanglewood Street?
>
> MS. SCHULTZ: 2537 Tanglewood. I'm using a neighbor's phone.
>
> 911 OPERATOR: 25371

MS. SCHULTZ: Yes, ma'am.

911 OPERATOR: Are you at lot 9?

MS. SCHULTZ: I'm at a cottage, ma'am. It's 2537 Tanglewood. It's--it's--

911 OPERATOR: Okay, but on our screen it shows Lot 9. Do you have a lot at your house?

MS. SCHULTZ: I'm using a neighbor's phone. I don't know what lot number it is.

911 OPERATOR: All right, what's the nearest cross street?

MS, SCHULTZ; If you hit Combee and you turn down Tanglewood, it's not the first dirt driveway, but the second.

911 OPERATOR: What's her name, ma'am, your daughter?

MS. SCHULTZ: Her name is Kimberly Waters.

911 OPERATOR: What's her birth date?

MS SCHULTZ: 10-14-82.

911 OPERATOR: '84? What color hair does she have?

MS. SCHULTZ: It's dark brown, curly.

911 OPERATOR: What color--

MS. SCHULTZ: It's short. It's short now, we just cut it.

911 OPERATOR: Okay, what color are her eyes?

MS. SCHULTZ: Blue.

911 OPERATOR: About how tall is she?

MS. SCHULTZ: She's four foot two, would you say, Crystal? [Crystal was Kimberly Waters' sister.] I have an Identikit somewhere. I'll have to look for it.

911 OPERATOR: And how much does she weigh?

MS. SCHULTZ: How much does she weigh?

CRYSTAL SCHULTZ: She weighs about 79 pounds.

MS SCHULTZ: About 79?

CRYSTAL SCHULTZ: (Unintelligible.)

911 OPERATOR: Okay, has she ever done this before?

MS. SCHULTZ: No, ma'am. I went to work, and they needed somebody to work a double, and my 13-year-old--I came home at 11:30 and they were both asleep. She was in my bed, and my other daughter was in her own bed, and my other daughter--I closed the--I turned the lights on and--and locked the door and went back to work.

And I got off at 5: 30 and I came straight home, and she's gone. My daughter said she got up at 3:00 and checked the house and turned the lights back off, and she was in the bed then, and the door was locked. And when I got home the door wasn't locked.

911 OPERATOR: Okay, calm down, okay?

MS. SCHULTZ: I'm trying to.

911 OPERATOR: Okay, calm down. Okay? And you said this has never happened before, right?

MS SCHULTZ: No, ma'am.

911 OPERATOR: All right, was there anybody there with the girls when she--I mean, could she have jumped out a window or--

MS. SCHULTZ: Hold on, ma'am.

911 OPERATOR: Okay.

MS. SCHULTZ: No, there's no window to jump out of. Everything in the house is undisturbed.

911 OPERATOR: Okay.

MS. SCHULTZ: The alarm clock was going off as I came in the house, because she gets up at 6:00 to go to school.

911 OPERATOR: Okay.

MS. SCHULTZ: And the alarm clock was beeping, and my other daughter was sleeping, and the door was unlocked after I'd locked it, and she's gone.

911 OPERATOR: All right ma'am, what's your name?

MS. SCHULTZ: Beverly Schultz.

911 OPERATOR: And now for sure is there anybody--nobody knows where she could have went?

MS. SCHULTZ: No, ma'am.

911 OPERATOR: Okay.

MS. SCHULTZ: I've already combed the neighborhood knocking on houses of people she knows, and she's not there. It's 6:00 in the morning.

911 OPERATOR: Okay.

MS. SCHULTZ: Where would she go? Somebody has taken her.

911 OPERATOR: Okay, do you have any broken windows in your house?

MS. SCHULTZ: There's --the front window's pried open, but it's been pried open.

911 OPERATOR: It's been pried open before now?

MS. SCHULTZ: From a break-in. I tried to fix it, but I didn't fix it too well.

911 OPERATOR: Okay, can you hold on just one second7

MS. SCHULTZ: Right in front of--

911 OPERATOR: Ma'am?

MS. SCHULTZ: What?

911 OPERATOR: Okay, we have a deputy on the way for you, okay?

MS. SCHULTZ: Thank you.

911 OPERATOR: All right.

"Hearsay" is defined in section 90.801(1)(c) of the Florida Statutes as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Although the prosecutor below attempted to take the tape recording out of the definition of hearsay by arguing that it was not being offered for the truth of the matter asserted, but rather was being offered to show the state of mind of Beverly Schultz when she discovered her daughter missing (T 1831-1832, 1927, 1936-1937), Schultz's state of mind was totally irrelevant to any issues in the case, and so the admissibility of the tape was not justified on this basis. The State's position was that, because Appellant had initially told the sheriff's department personnel that Schultz was involved in the crimes against her daughter, it was necessary for the State to rebut this by demonstrating how upset Schultz was when she came home and found that her daughter was not there. Of course, Appellant later retracted his allegations against Schultz, acknowledging that she had nothing to do with what happened to Kimberly Waters. Furthermore, the defense at no point made any argument that attempted to cast blame upon Schultz for what happened to her daughter; any issue regarding Schultz's involvement was raised by the prosecutor by virtue of his decision to introduce Appellant's statements into evidence.

Finally, even if the jury believed that Schultz was partly responsible for what happened to Kimberly, this would in no way negate Appellant's guilt. Therefore, there was no justification for the prosecutor to try to prove Schultz's state of mind when she found her daughter gone. See Heath v. State, 648 So. 2d 660 (Fla. 1994) and Royster v. State, 643 So. 2d 61 (Fla. 1st DCA 1994) regarding inadmissibility of testimony going to state of mind where this is not a legitimate issue in the case.

The prosecutor also made a rather half-hearted attempt to justify admission of the tape as a "spontaneous statement" pursuant to section 90.803(1) of the Florida Statutes. (T 1930) In Ware v. State, 596 So. 2d 1200, 1201 (Fla. 3d DCA 1992), the Third District Court of Appeal did uphold the admission of a tape recording of a 911 call because it contained "excited utterances and spontaneous statements."[19] However, in Ware, the appellant admitted that portions of the tape were "admissible as an excited witness exception to the hearsay rule..." 596 So. 2d at 1201. Moreover, in the instant case, Beverly Schultz did not make the 911 call immediately upon discovering that Kimberly was missing; she called only after she had "combed the neighborhood" looking for her daughter. Therefore, while Schultz was undoubtedly still upset when she placed the call, sufficient time for reflection had passed such that her statements during the call cannot be considered "spontaneous" within the meaning of the Evidence Code. See J.M. v.

[19] The Second District Court of Appeal followed Ware in Allison v. State, 661 So. 2d 889 (Fla. 2d DCA 1995).

State, 665 So. 2d 1135, 1137 (Fla. 5th DCA 1996) (to be "spontaneous" under section 90.803(1), "the statement must be made without the declarant first engaging in reflective thought") and Quiles v. State, 523 So. 2d 1261 (Fla. 2d DCA 1988).

A final problem with this evidence is that the State did not establish an adequate foundation for it to be admitted. The prosecutor attempted to lay the predicate for it to come in not through questioning Beverly Schultz, who made the call, or the 911 operator who took the call (this anonymous operator did not testify at Appellant's trial), but through the testimony of Martha McWaters, who had been one of the investigating detectives. After asking the former detective whether there was a time she came into contact with Appellant, the prosecutor questioned McWaters as follows (T 1830):

> Q. To back up for just a second, before we get into that contact, as part of your duties as the lead detective, did you obtain a copy of the 911 call that came in when Kimberly was missing?
>
> A. Yes, sir, I did.
>
> Q. And have you had an opportunity to listen to that tape since you collected it to see who was on the tape, what was being said?
>
> A. Yes, I have.
>
> Q. Who made the call into 9111
>
> A. Kimberly's mom, Beverly.
>
> Q. I show you what's been marked for identification as State's Exhibit No. 86. Do you recognize what State's Exhibit No. 86 is?
>
> A. Yes.

Q. And what is that?

A. It's the type of tape that's provided by the communications center when they provide a copy for us. It's the 911 phone call.

Thereupon, the State moved the exhibit into evidence. (T 1830) There was a discussion at the bench, during which one of the objections lodged by the defense was a lack of proper predicate for the tape to be admitted. (T 1832) The prosecutor said that he was "comfortable" that he had "laid a proper foundation for the tape[,]" but elected not to press for its admission at that time. (T 1833) (It was admitted the following morning.) The prosecutor then asked two more questions of McWaters about the tape (T 1833):

Q. Ms. McWaters, as the lead detective, did you have this tape pulled by indentifying [sic] the call, the caller, and ask that this tape be recorded?

A. Yes.

Q. And then did you yourself listen to it and verify that it was Beverly Schultz calling about the Kimberly Waters case?

A. Yes, I did.

The testimony quoted above was insufficient to show that the witness had personal knowledge concerning the tape sufficient to support its admission, as required by section 90.604 of the Florida Statutes. Necessarily, McWaters must have relied upon what some unknown person or persons at the communications center told her about the tape. As she was not privy to the conversation between Beverly Schultz and the 911 operator when it took place, McWaters did not and could not testify that the tape accurately reflected the conversation. As the tape was apparently a copy of the

original recording, and thus not in compliance with the "best evidence" rule set forth in section 90.952 of the Florida Statutes, it was particularly necessary that the accuracy of the copy be established by a witness who was in a position to do so. Compare the State's meager effort here to establish a predicate with the predicate that was found satisfactory by this Court in Justus v. State, 438 so. 2d 358 (Fla. 1983) to allow a tape of the appellant's confession to be admitted. There

> one of the police detectives present at the confession identified the tapes and testified that he and another detective operated the tape recorder and that as each of the three tapes was finished he punched out little tabs on them which would prevent them from being erased, recorded over or changed. He also testified that the portions of the tapes to which he had listened accurately represented what had been said during the interview of appellant.

438 so. 2d at 365. The Court in Justus found the detective's testimony "sufficient to establish that the tapes were what the state claimed them to be[,]" as required by section 90.901 of the Evidence Code. In contrast, McWaters' testimony was wholly inadequate to satisfy the requirement of authentication or identification of the exhibit pursuant to section 90.901.

The prosecutor's own words demonstrate why admission of the irrelevant tape recording was prejudicial to Appellant's cause. The "sole reason" the tape was being offered, said the prosecutor, was that it was "very clear from the tape. ..that Ms. Schultz [was] extremely agitated and upset that her daughter [was] missing..." (T 1831) Hearing how "extremely agitated and upset" the mother was

served only to inject into the proceedings an element of emotionalism that was not proper for the jury to consider. As defense counsel below noted (T 1929), even if the tape had some marginal relevance, it was substantially outweighed by the danger of unfairly prejudicing Appellant, and should not have come in. 590.403, Florida Statutes (1995). Because it did, Appellant was denied his right to confront and cross-examine the witnesses against him, as well as his rights to a fair trial and to due process of law, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 9, 16, and 22 of the Constitution of the State of Florida. He must be granted a new trial.[20]

ISSUE III

APPELLANT'S RIGHT TO A FAIR TRIAL WAS VITIATED BY THE STATE'S INJECTION INTO THE GUILT PHASE OF IRRELEVANT MATTERS AND IMPROPER ARGUMENT, AND BY EMOTIONAL DISPLAYS BY STATE WITNESSES WHICH THE PROSECUTOR EXPLOITED.

Appellant's right to a fair jury trial, free from prejudicial matters which had no relevance to the proceedings, was impaired as early as voir dire. Prospective juror Skinner stated that she had worked with children with learning disabilities at Padgett Elementary School. (T 614) Thereupon, the prosecutor asked, "If I told you that this case involved a child with a learning disabili-

[20] An issue similar to the one Appellant raises herein regarding admissibility of a 911 call is pending before this Court in another capital appeal, Jack R. Slinev vs. State of Florida, Case Number 83,302. In Slinev, however, a transcript of the call, rather than a tape recording thereof, was admitted into evidence.

ty, would that cause you any concern with being able to be fair and impartial if you were a juror?" (T 614-615) Skinner answered, "More concern." (T 615) Defense counsel immediately objected, noting that the State was pursuing a matter that was irrelevant and could only serve to engender additional sympathy for the victim. (T 615-617)[21] The prosecutor agreed to leave that area of inquiry alone for the moment. (T 617) Subsequently, defense counsel moved to strike the panel, moved for mistrial, and moved to individually voir dire the jurors, as they had all heard the question posed by the prosecutor; the court denied all of the relief requested. (T 619-624) Although the prosecutor's theory was that Appellant had deliberately targeted Kimberly Waters because of her emotional handicap, and that his voir dire was therefore proper (T 615-616), this theme was not developed further, There was a fleeting reference during the testimony of Beverly Schultz, Kimberly Waters' mother, to the fact that her daughter had been in "the EH program" at school since the first grade (T 1360), but no indication that this fact had played any part whatsoever in the offenses that occurred. And the prosecutor asked during his guilt phase argument to the jury, "What was he [Appellant] doing taking an 11-year-old emotionally-handicapped child for a midnight stroll?" (T 2098) But there was no argument that Kimberly Waters' handicap played any role in the offenses, nor would such an argument have been

[21] Perhaps anticipating problems in this area, Appellant had filed a pretrial Motion to Exclude Evidence or Argument Designed to Create Sympathy for the Deceased (R 256-264), which the trial court took under advisement. (R 497)

appropriate, because there was no evidence to support it. As Appellant's counsel indicated, the prosecutor's "testimony" that the victim had a learning disability "necessarily engendered sympathy for her plight, and antagonism for [Appellant], depriving him of a fair trial." Rodriquez v. State, 433 So. 2d 1273, 1276 (Fla. 3d DCA 1983); Brown v. State, 593 So. 2d 1210, 1211 (Fla. 2d DCA 1992) (condemning prosecutor's "improper appeal for sympathy for the victim which would have the natural effect of creating hostile emotions toward the accused [citation omitted]").

Emotional displays that subsequently occurred during the testimony of two of the State's witnesses must have had a similar effect on Appellant's jury. The very first witness, Beverly Schultz, the victim's mother, "became somewhat upset and cried during her testimony." (T 2094)[22] When Deputy Sheriff Terry Storie, who found Kimberly Waters' body in the dumpster, was shown pictures of the girl by the prosecutor, there was an "emotional outburst" by the witness, who started to cry. (T 2094) This necessitated a "tremendous pause" in the State's questioning, and Storie twice had to be allowed to regain his composure. (T 2095) The prosecutor attempted to exploit Storie's emotionalism during his guilt phase closing argument to the jury, as follows (T 2093):

---

[22] This was not the only time during the trial when Schultz let her emotions get the better of her. At penalty phase, during the testimony of defense witness Dr. Thomas McClane, she "sort of bolted out of the courtroom." (T 2959) It appeared to defense counsel that she "was emotionally upset, or she was going to get sick, or she was going to start crying or whatever." (T 2959) The prosecutor agreed that she was "certainly having problems." (T 2960)

> What was he [Appellant] trying to do [when he initially asserted that Beverly Schultz had procured the attack upon her daughter]? The same thing that he has tried to do since the beginning of this case, minimize his involvement. Because this conduct is so outrageous that it just absolutely flabbergasts anyone that listens to it. You see these pictures, you cannot help from your gut wrenching. He knew what he'd done.
>
> Why did Mr. Davis throw this girl's body in a garbage dumpster right after he committed the crime? If his mind is befuddled, why didn't he leave her there? He threw her in a garbage dumpster so that he would hopefully never get caught. Had Terry Storie--Terry Storie, the guy that got upset thinking about this little girl--not seen this tiny little hand (indicating)--

Thereupon defense counsel objected and moved for a mistrial, based not only upon the improper argument, but upon previous happenings during the trial, including the emotional displays by the victim's mother and Deputy Storie. (T 2093-2097) As counsel noted, in his effort to play upon the jurors' emotions and sympathy for the victim, the prosecutor included an improper "Golden Rule" argument in his remarks, when he said, "You [the jurors] see these pictures, you cannot help from your gut wrenching." (T 2093--emphasis supplied) See, e.g., Davis v. State, 604 So. 2d 794 (Fla. 1992); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989);Garron v. State, 528 So. 2d 353 (Fla. 1988); Bertolotti v. State, 476 So. 2d 130 (Fla. 1985); State v. Wheeler, 468 So. 2d 978 (Fla. 1985); Adams v. State, 192 So. 2d 762 (Fla. 1966); Barnes v. State, 58 So. 2d 157 (Fla. 1952). The trial court overruled the objections and denied Appellant's motion for mistrial. (T 2096-2097)

Arguments of the type used below, appeals to jurors' passions, have no place in a criminal proceeding. See Watts v. State, 593 So. 2d 198, 203 (Fla. 1992) (prosecutorial argument was improper where it was not relevant to guilt and "only served to improperly inflame the jury's emotions"); Goddard v. State, 143 Fla. 28, 196 So. 596 (Fla. 1940); Harper v. State, 411 So. 2d 235 (Fla. 3d DCA 1982); Meade v. State, 431 So. 2d 1031 (Fla. 4th DCA 1983); Harris v. State, 414 So. 2d 557 (Fla. 3d DCA 1982). Closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." King v. State, 623 So. 2d 486, 488 (Fla. 1993), quoting Bertolotti, 476 So. 2d at 134. Regardless of the crimes with which he was charged, Appellant was entitled to a fair and impartial trial free from exhibition of prejudicial emotions. Stewart v. State, 51 So. 2d 494 (Fla. 1957) He did not receive it.

The prosecutor indulged in improper argument to Appellant's jury at least two other times during his closing argument at guilt phase. He said (T 2099-2100--emphasis supplied):

> In his [Appellant's] second confession he says, I took her [Kimberly Waters] directly from the house, right over the fence, into No. 5. All the testimony is those are right across the fence from each other. Immediately took her in there and tried to stick my penis in her. Well, now when did he form that intent, after he got out of the house? Certainly not. He absolutely intended to do that, and that's why he took her.
>
> He says, That didn't work, and then I put my fingers in her. Well, I submit to you that that's a bald-faced lie. Because if the child had been injured as you have seen in the picture of her vaginal area--

thereupon defense counsel objected and moved for a mistrial, which the trial court denied. (T 2100-2103) The prosecutor should not have been allowed to characterize Appellant's statement as a "bald-faced lie." This statement impugned Appellant's character and invaded the province of the jury to ascertain whether Appellant's confessions were truthful. See Capehart v. State, 583 So. 2d 1009 (Fla. 1991); Pacifico v. State, 642 So. 2d 1178 (Fla. 1st DCA 1994) (improper to exhort jury to convict defendant because he lied). Furthermore, it is ironic, to say the least, that the State would rely upon Appellant's statements to the police to convict him, but then pick and choose which portions of those statements to urge the jury to believe. See Northard v. State, 21 Fla. L. Weekly D1385 (Fla. 4th DCA June 12, 1996) (argument which asked jury to determine who was lying as test for deciding if defendant was guilty was impermissible); Bass v. State, 547 So. 2d 680 (Fla. 1st DCA 1989).

Perhaps even more egregious was the prosecutor's remark at the very end of his argument that "[t]his is a vicious, brutal case committed by a vicious, brutal person. There is no defense." (T 2112) Appellant immediately objected, moved for a mistrial, and asked for a curative instruction, all to no avail. (T 2112-2114)[23] "It is improper for a prosecutor to refer to the accused in

[23] Again, anticipating trouble, the defense had filed a pretrial motion in limine seeking to preclude testimony by Grady Judd or any other witnesses "expressing their opinions or characterizations of the crimes charged against Mr. Davis as being 'vicious' or the use of similarly inflammatory language," (R 525-526), which the trial court granted. (T 535-539)

derogatory terms, in such manner as to place the character of the accused in issue." Pacifico, 642 So. 2d at 1183. By telling the jury that Appellant's character was that of a "vicious, brutal person," the prosecutor below implied that he was likely, because of his character, to commit further crimes of violence, even murder. This suggestion was highly prejudicial and should never have been placed before the jury. See Teffeteller v. State, 439 so. 2d 840 (Fla. 1983) and Grant v. State, 194 So. 2d 612 (Fla. 1967) (condemning prosecutorial argument which urged the jury to recommend the death penalty because the defendant otherwise might be released from prison and kill again); Derrick v. State, 581 So. 2d 31 (Fla. 1991) (admission of evidence suggesting that defendant would kill again highly prejudicial); Pacifico, 642 So. 2d at 1183 (prosecutor should not argue that defendant has propensity to commit crime).

In Estv v. State, 642 So.2d 1074 (Fla. 1994), this Court addressed remarks made by the prosecutor that were somewhat similar to those made below. In that case, the prosecutor described Esty as a "dangerous, vicious, cold-blooded murderer" and warned the jury that neither the police nor the judicial system can "protect us from people like that." 642 So. 2d at 1079. This Court found the remarks not to be "so prejudicial as to vitiate the entire trial [citation omitted]." 642 So. 2d at 1079. However, in Esty, unlike the instant case, the trial court had sustained defense counsel's objection to the comments and given a curative instruction to the jury to disregard them. Furthermore, in the instant

case, this Court must not only consider the improper argument in isolation, but in combination with the other matters discussed above.

The cumulative effect of the events discussed herein was to deny Appellant a fair verdict not only at the guilt phase, but at the penalty phase as well.[24] See Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), in which this Court determined that isolated incidents of prosecutorial overreaching may not have warranted a mistrial, but that their cumulative effect was so overwhelming as to deprive Nowitzke of a fair trial. Appellant was likewise denied a fair trial, resulting in guilty verdicts and a penalty recommendation that did not comport with the federal and state constitutions. Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 2, 9, 16, 17, 21, and 22, Fla. Const. He must receive a new trial.

[24] Perhaps the prejudice to Appellant could have been somewhat mitigated at penalty phase if the trial court had given one of Appellant's proposed instructions which directed the jury not to consider anger toward Appellant or sympathy for the victim as a reason for recommending death. (R 543, 551-552)

ISSUE IV

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS TO FLORIDA'S STANDARD JURY INSTRUCTIONS ON REASONABLE DOUBT AND PREMEDITATED MURDER.

Through counsel, Appellant filed written objections to the standard jury instructions on "reasonable doubt" and "premeditated murder" being given. (R 151-154) The trial court overruled his objections and said he would give the standards. (T 2013-2014, 2021-2022)[25]

In considering Appellant's issue, this Court must be ever mindful that this is a capital case, in which heightened standards of due process apply. See Elledse v. State, 346 So. 2d 998, 1002 (Fla. 1977) ("special scope of review...in death cases"); Mills v. Marvland, 486 U.S. 367, 108 S. Ct. 1860, 1866, 100 L. Ed. 2d 384 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."); Proffitt v. Wainwrisht, 685 F. 2d 1227, 1253 (11th Cir. 1982) ("Reliability in the factfinding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions.); Beck v. Alabama, 447 U.S. 625, 638, 100 S. Ct. 2382 65 L. Ed. 2d 392 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg

[25] The record reflects that defense counsel propounded special requested instructions on reasonable doubt and premeditated murder. (T 2013, 2022) Undersigned counsel has been unable to locate these instructions in the record on appeal, but intends to move this Court for leave to supplement the record with these items.

v. Georgia, 428 U.S. 153, 187, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (plurality opinion) (citing cases).

An important component of the process which is due is provision to the jury of instructions as to what the State must prove in order to obtain a conviction. See Screws v. United States, 325 U.S. 91, 107, 65 S.Ct. 1031, 89 L.Ed.2d 1495 (1945) (willfully depriving person of civil rights; jury not instructed as to meaning of "willfully": "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial.*'). It is fundamental error to fail to instruct the jury correctly as to what the state must prove in order to obtain a conviction. State v. Delva, 575 So. 2d 643 (Fla. 1991), Sochor v. State, 580 So. 2d 595 (Fla. 1991).

The federal and state constitutional rights to trial by jury carry with them the right to accurate instructions as to the elements of the offense. In Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (1945), this Court wrote in reversing a conviction where there was an incorrect instruction on self-defense:

> There is much at stake and the right of trial by jury contemplates trial by due course of law. See Section 12, Declaration of Rights, Florida Constitution .... We have said that where the court attempts to define the crime, for which the accused is being tried, it is the duty of the court to define each and every element, and failure to do so, the charge is necessarily prejudicial to the accused and misleading. [Cit .] The same would necessari-

> ly be true when the same character of error is committed while charging on the law relative to the defense.

"Amid a sea of facts and inferences, instructions are the jury's only compass." U.S. v. Walters, 913 F. 2d 388, 392 (7th Cir. 1990) (refusal to give theory of defense instruction required reversal of conviction). Arguments of counsel cannot substitute for instructions by the court. Taylor v. Kentucky, 436 U.S. 478, 488-489, 92 S. Ct. 1930, 56 L. Ed. 2d 468, 477 (1978).

The trial judge is charged with the responsibility of instructing the jury upon the law of the case at the conclusion of argument of counsel. Fla. R. Crim. P. 3.390(a) Generally, he should adhere to the standard instructions, Moody v. State, 359 So. 2d 557 (Fla. 4th DCA 1978), Smith v. Mocrelvanq, 432 So. 2d 119 (Fla. 2d DCA 1983), Florida Rule of Criminal Procedure 3.985, but the existence of standard instructions does not relieve the trial judge of his duty to correctly instruct the jury on the law, and the standards are not invariably correct. See Yohn v. State, 476 So. 2d 123 (Fla. 1985); Cruse v. State, 588 So. 2d 983 (Fla. 1991).

The instructions the trial court gave to Appellant's jury on reasonable doubt and premeditated murder were not up to constitutional standards, and should not have been used.

A. Reasonable Doubt

The Constitution requires proof of the defendant's guilt beyond a reasonable doubt in criminal cases. The reasonable doubt standard is "indispensable" because it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of

the facts in issue." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

In Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), the Court unanimously reversed a first degree murder conviction and death sentence where the trial court defined reasonable doubt for the jury as follows:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain.
>
> What is required is not an absolute or mathematical certainty, but a moral certainty.

The court below read the following instructions on "reasonable doubt" to Appellant's jury during the guilt phase (T 2140-2141):

> Whenever the words "reasonable doubt" are used, you must consider the following: A reasonable doubt is not a possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt.
>
> On the other hand, if after carefully considering, comparing, and weighing all the evidence there is not an abiding conviction of guilt, or, if having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proven

> beyond very reasonable doubt, and you must find the defendant not guilty because the doubt is reasonable.
>
> It is to the evidence introduced upon this trial and to it alone that you are to look for that proof. A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in evidence, or lack of evidence.
>
> If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.

The source of Florida's standard jury instruction on reasonable doubt is unclear. Decisions of this Court preceding the promulgation of the standard instructions are contradictory and confusing. In Haager v. State, 83 Fla. 41, 90 So. 812, 816 (1922), the Court disapproved of an instruction that a reasonable doubt could not be "a mere shadowy, flimsy doubt," writing:

> Attempts to explain and define what is meant by "reasonable doubt" often leave the subject more confused and involved than if no explanation were attempted. The instruction may be given in such a manner, and with such an inflection of voice, as to incline the jury to believe that there is sufficient doubt to almost require an acquittal, and, in other instances, may be so give as to make the jury feel that they would be guilty of a dereliction of duty if they entertained any doubt of the prisoner's guilt.
>
> In the charge complained of, the court undertook to differentiate between "a mere shadowy, flimsy doubt" and "a substantial doubt." The jury may have understood the distinction, but we are unable to grasp its significance. Every doubt, whether it be reasonable or not, is "shadowy" and "flimsy," and it would be better if judges would give the usual charge on the subject of reasonable doubt without attempting to define, explain, modify, or qualify the words "reasonable doubt."

But in Smith v. State, 135 Fla. 737, 186 So. 203, 206 (1939), the Court approved of an instruction using the "shadowy, flimsy doubt" versus "substantial doubt" phraseology without analysis and without any mention of Haager.[26] In any event, as shown below, definition as a "reasonable doubt" as "a substantial doubt" (and thus not a "shadowy, flimsy doubt") is unconstitutional.[27]

Prior to Cage, in Dunn v. Perrin, 570 F. 2d 21 (1st Cir. 1978), the court, in reversing the petitioners' state court convictions, condemned the following jury instruction on "reasonable doubt":

> It does not mean a trivial or a frivolous or a fanciful doubt nor one which can be readily or easily explained away, but rather such a strong and abiding conviction as still remains after careful consideration of all the facts and arguments...

The court wrote that the instruction "was the exact inverse of what it should have been." Id. at 24. Although it is proper to instruct the jury that a reasonable doubt cannot be "purely speculative," a court is "playing with fire" when it goes beyond that. U.S. v. Cruz, 603 F. 2d 673, 675 (7th Cir. 1979). It is improper to instruct that the government needs to prove guilt "beyond all possible doubt." U.S. v. Shaffner, 524 F. 2d 1021 (7th Cir. 1975). Further, an instruction equating a reasonable doubt with "a real possibility" has been condemned because it may "be

---

[26] For whatever reason, West Publishing Company assigned no key number to the discussion in Haager, which may explain this oversight in Smith.

[27] This Court upheld the standard instruction without analysis in Brown v. State, 665 So. 2d 304 (Fla. 1990). The cases cited in Brown are also lacking in analysis.

misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense." U.S. v. McBride, 786 F. 2d 45, 51-52 (2d Cir. 1986).

Jury instructions equating reasonable doubt with substantial doubt have been "uniformly criticized." Monk v. Zelez, 901 F. 2d 885, 889 (10th Cir. 1990). It is improper to define a reasonable doubt as "substantial rather than speculative." U.S. Rodriguez, 585 F. 2d 1234, 1240-1242 (5th Cir. 1978) (affirming conviction, but noting that a trial court using such an instruction "can reasonably expect a reversal."). An instruction that a reasonable doubt is a "substantial doubt, a real doubt" has been condemned as confusing by the Supreme Court. Taylor v. Kentucky, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).

In view of the foregoing, the definition of "reasonable doubt" in the standard instructions is unconstitutional. Although negative in its terms, it essentially equates the word "reasonable" with such condemned terms as "substantial" and "real." (What else can "not a possible" mean? It is obvious from cases such as U.S. Rodriquez that "not a speculative" is equivalent to "substantial.") All doubts, whether reasonable or unreasonable, are necessarily founded on speculation and possibility. See Haager. As the Court pointed out in Winship, the Constitution requires "a subjective state of certitude" before the defendant can be convicted. The absence of such a degree of certitude necessarily involves a degree of speculation and consideration of possibilities. The standard instruction forbids a not guilty verdict on the basis of a

"possible" or "speculative" doubt, although possibilities and speculation can be reasonable and prevent the "subjective state of certitude" required by Winship.

Further, the sentence "Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt." could reasonably be taken by jurors to mean that they should convict even where a reasonable doubt is found, so long as they have "an abiding conviction of guilt." Where a jury instruction is challenged, the question is not what the court thinks the instruction means "but rather what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307, 315-316, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (emphasis supplied); Case. Since the jury could have taken the "abiding conviction of guilt" standard as supplanting the requirement of proof beyond a reasonable doubt, the standard instruction is improper on that ground also. C.f. Dunn, 570 F. 2d at 24, n. 3 (court will not expect jury to "intuit a more sensible meaning, at least not when so crucial a concept as reasonable doubt is our focus").

In view of the foregoing, the trial court gave an erroneous instruction relieving the State of its burden of proving guilt beyond a reasonable doubt.[28]

---

[28] Appellant is aware that in Estv v. State, 642 So. 2d 1074, 1080 (Fla. 1994) this Court rejected a challenge to the standard instruction on reasonable doubt, but asks the Court to reconsider the issue in light of Appellant's arguments.

B. Premeditated Murder

Section 782.04(1)(a), Florida Statutes (1993) defines murder in the first degree. It provides for two forms of the offense, murder from a premeditated design, and felony murder. The statute defines premeditated murder as: "The unlawful killing of a human being: When perpetrated from a premeditated design to effect the death of the person killed or any human being[.]" § 782.04(1)(a)1., Fla. Stat. (1993)

The murder statute, like all provisions in the criminal code, must be strictly construed, and "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021(1), Fla. Stat. (1995); see also Merck v. State, 664 So. 2d 939, 944 (Fla. 1995) This principle of statutory construction is not merely a maxim of statutory construction, but is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979) (rule "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Citations omitted.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not "'plainly and unmistakably"' proscribed. [Citation omitted.]"

In McCutchen v. State, 96 So. 2d 152, 153 (Fla. 1957), this Court construed the "premeditated design" element of first degree murder as follows (emphasis supplied):

> A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time that must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent.

See also Littles v. State, 384 So. 2d 744 (Fla. 1st DCA 1980) (quoting McCutchen). The premeditation essential for proof of first-degree murder requires "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986); Tien Wans v. State, 426 So. 2d 1004 (Fla. 3d DCA 1983) (which was cited by this Court in Wilson). In Owen v. State, 441 So. 2d 1111, 1113 n. 4 (Fla. 3d DCA 1983), the court wrote (emphasis supplied):

> "'Premeditation' and 'deliberation' are synonymous terms, which, as elements of first-degree murder, mean simply that the accused, before he committed the fatal act, intended that he would commit the act at the time that he did, and that death would be the result of the act." Sanders v. State, 392 So.2d 1280, 1282 (Ala.Cr.App.1980). Deliberation is the element which distinguishes first and second degree murder. [Citation omitted.] It is defined as a prolonged premeditation and so is

> even stronser than premeditation. [Citation omitted.]

Similarly, the Sixth Edition of Black's Law Dictionary defines "deliberation," in part, as follows at page 427:

> The act or process of deliberating. The act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means.

The instructions the trial court gave to Appellant's jury regarding premeditated murder were as follows (T 2130-2131):

> There are two ways in which a person my be convicted of first-degree murder; one is known as premeditated murder, and the other is known as felony murder. An indictment for premeditated murder will support a conviction for either premeditated murder or felony murder."
>
> I'm now going to give you the definition and the elements of first-degree murder, premeditated. Before you can find the defendant guilty of first-degree murder, premeditated murder, the State must prove the following three elements beyond a reasonable doubt:
>
> Number one, Kimberly Waters is dead; number two, the death was caused by the criminal act or agency of Eddie Wayne Davis; number three, there was a premeditated killing of Kimberly Waters.
>
> Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass before the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. Premeditated intent to kill must be formed before the killing.
>
> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of

---

[29] This sentence regarding the indictment is not part of the standard instructions. It was added at the request of the State, over Appellant's objections. (T 2071-2076)

> premeditation if the circumstances of the killing and the conduct of the accused convince you, beyond a reasonable doubt, of the existence of premeditation at the time of the killing.

The problem with the instruction given below is that it improperly relieved the State of its correct burdens of proof and persuasion as to the statutory element of premeditated design. The only attempt at defining the premeditation element was: "'Killing with premeditation' is killing after consciously deciding to do so." There was no mention of the requirement found in McCutchen that the State must prove "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation," and that "the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequences of carrying such purpose into execution."

Additionally, the instruction relieved the State of its correct burdens of proof and persuasion as to the requirement that the premeditated design be fully formed before the killing. While the instruction stated that "killing with premeditation" is killing after consciously deciding to do so, it relieved the State of its burden by creating a presumption: "It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you, beyond a reasonable doubt, of the existence of premeditation at the time of the killing." Thus the jury was told that it only needed to find premeditation at the time of the killing. Finally, the instruction did not inform the jury

that the premeditated design element, carrying with it the element of deliberation, required more than simple premeditation, and more than a mere intent to kill.

A jury instruction such as that given below which relieves the State of the burden of proof or of persuasion as to an element of the offense is unconstitutional. Francis v. Franklin, 471 U.S. 307, 105 s. ct. 1965, 85 L. Ed. 2d 344 (1985). In Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), a defendant in Maine was charged with murder, which under Maine law required proof not only of intent but of malice. The trial court instructed the jury that malice was an essential element of the crime, but also instructed that if the prosecution established that the homicide was both intentional and unlawful, malice was to be implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. The Supreme Court held that the resulting conviction was unconstitutional because the instruction relieved the State of the burden of proving the malice element. See Sandstrom v. Montana, 442 U.S. 510, 524, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (discussing Mullaney). Where, as here, a jury instruction authorizes a conviction on an improper theory of guilt, the resulting conviction is illegal. E.g. Mills v. Marvland, 486 U.S. 367, 108 S. Ct. 1860, 1866, 100 L. Ed. 2d 384 (1988).

Conclusion

The improper instructions given to Appellant's jury violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amend-

ments to the Constitution of the United States, as well as Article I, Sections 2, 9, 16, 17, 21, and 22 of the Constitution of the State of Florida. Accordingly, this Court must order a new trial.

ISSUE V

THE TRIAL COURT ERRED IN SUBJECTING APPELLANT TO A COMPELLED MENTAL HEALTH EXAMINATION BY A PROSECUTION EXPERT.

Through counsel, Appellant filed written objections to being compelled to be examined by the State's mental health expert. (R 531-532) The court below overruled Appellant's objections, and ordered him to submit to an examination after the guilt phase. (R 533) Appellant was examined by the State's expert witness, Dr. Sidney Merin, a clinical psychologist and neuropsychologist, who testified for the State at penalty phase to rebut Appellant's mental health experts. (T 2656-2758)

The entire concept of compelled mental health evaluations for penalty phase violates the United States and Florida Constitutions. The Texas Court of Criminal Appeals has explicitly held that ordering a compelled mental health evaluation, when a defendant seeks to introduce the testimony of a penalty phase mental health expert who has examined him, violates the Fifth and Sixth Amendments to the United States Constitution. Bradford v. State, 873 S.W. 2d 15 (Tex. Cr. App. 1993), cert. denied, Texas v. Bradford, U.S. ___, 115 S. Ct. 311, 130 L. Ed. 2d 274 (1994). In Bradford, the defense put on no mental health testimony as to competency or sanity. 873 S.W. 2d at 16. However, in the penalty phase, defense counsel intended to call a mental health expert (Dr.

Wettstein) who had examined the client. Id. The trial court ruled that the defense expert could not testify to any matters which were based on his examination of the defendant, unless the defendant submitted to a compelled mental examination by the prosecution's expert (Dr. Grigson). Id. at 16-17.

The Texas Court of Criminal Appeals held this procedure to be in violation of the Fifth and Sixth Amendments to the United States Constitution. Id. at 20. The Court stated:

> The Fifth Amendment to the United States Constitution provides, among other things, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend V. It is very well-settled that this protection applies to defendants facing examinations seeking to elicit evidence to prove future dangerousness under Texas capital sentencing procedures. Estelle v. Smith, supra. Thus, if appellant's statements made during the Grigson examination were compelled, then the above-quoted Fifth Amendment protection would have been violated in admitting into evidence Dr. Grigson's testimony based upon such statements....
>
> We conclude that the trial court's action in making the admissibility of portions of Dr. Wettstein's proffered testimony contingent upon appellant submitting to an examination by a State-selected expert was erroneous and such violated the Sixth Amendment to the United States Constitution. And under these circumstances the admission of Dr. Grigson's testimony based upon his examination of appellant violated appellant's Fifth Amendment right against self-incrimination.

Id. at 19-20.

The Texas Court of Criminal Appeals also explicitly rejected the State's claim that by introducing mental health testimony at the penalty phase, Mr. Bradford had waived his Fifth Amendment privilege.

> The State also cites Powell, apparently based upon its language suggesting that "it m[ight] be unfair to the State to permit a defendant to use psychiatric testimony

> without allowing the State a means to rebut that testimony[.]" Powell v. Texas, 492 U.S. at 685, 109 S.Ct. at 3149, 106 L.Ed.2d at 556. However, the Supreme Court was clearly speaking in the context of a defendant raising a "mental-status defense." Id. As noted previously, it is undisputed that the examination in the instant cause were not for the purpose of determining competency or sanity issues; thus, there was no "mental-status" defense raised and the Grigson examination was not ordered as rebuttal to such a defense.

Id. at 18-19.

Bradford correctly notes the critical distinction between the use of expert mental health testimony as to competency or sanity and its use at a penalty phase. Bradford correctly holds that conditioning use of expert mental health testimony at the penalty phase upon a compelled exam by the State's mental health expert violates the Fifth and Sixth Amendments to the United States Constitution.

Bradford's distinction between the presentation of mental mitigation and the presentation of an insanity defense is consistent with the different treatment given the insanity defense and penalty phase mitigation by the federal courts. The federal courts have consistently recognized that insanity is an affirmative defense and that the states and Congress are to be given wide leeway in the definition of insanity and the burden of proof and persuasion as to insanity. The United States Supreme Court has held that it is constitutional for a state to require a defendant to prove his insanity beyond a reasonable doubt. Leland v. Oregon, 343 U.S. 790, 72 S. Ct. 1002, 52 L. Ed. 2d 1302 (1952) This has continued to be the law despite the general rule that the burden is on the prosecution to prove each element beyond a reasonable doubt.

In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); see also discussion in United States v. Freeman, 804 F.2d 1574 (11th Cir. 1986). The Court in Leland also approved the right of the states to adopt different tests for insanity such as "right and wrong" or *'irresistible impulse." 343 U.S. at 800. Indeed, this Court has flatly stated "there is no constitutional right" to plead insanity. Parkin v. State, 238 So. 2d 817, 822 (Fla. 1970)

Mitigating evidence in a capital case is treated differently. A defendant has a constitutional right to present evidence in mitigation of his sentence at a capital sentencing hearing. Sovereignties may not limit the introduction of evidence in mitigation of sentence at a capital sentencing hearing by way of the express wording of a statute, Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), by restricted interpretations of statutes that allow such evidence on their face, Penry v. Lynaush, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), by evidentiary rule, Green v. Georsia, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979), by instructions to the jury, Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987), by jury verdict form, Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988); McCoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), or even by failure of the sentencer to give independent weight to circumstances that are presented, Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 2069, 72 L. Ed. 2d 369 (1982).

A state can put few, if any, restrictions on the presentation and consideration of mitigation. A state has far greater leeway in the restriction and definition of the insanity defense. A state can narrowly define insanity but can not so narrowly define mitigation. Compare Leland, supra with Hitchcock, supra. This supports the conclusion in Bradford, supra that a compelled mental evaluation for penalty phase violates the Fifth and Sixth Amendments. Also implicated are Appellant's rights to be free 'from cruel and/or unusual punishment, and to have due process of law before a death sentence may be imposed, in accordance with the precedents discussed above regarding the defendant's right to be present mitigating evidence.

In addition, it is possible for the State to present testimony to rebut a capital defendant's mental health evidence without the necessity of compelling the defendant to submit to an examination by the State's expert. For example, the State could retain an expert to conduct a review of the case that might include reading police reports, depositions, and other documents, interviewing friends and family members of the defendant, etc. The State's expert also might be permitted to sit in the courtroom while the defendant's witnesses pertaining to his mental state are testifying. Indeed, the new rule of criminal procedure, 3.202, dealing with testimony of mental mitigation at penalty phase, which was not in effect at the time of Appellant's trial, contemplates that the defendant may be allowed to present his mental health defense, even if he fails to cooperate with the State's expert. As a sanction

for non-cooperation, the trial court may either prohibit the defendant's mental health experts from testifying, or "order the defense to allow the state's expert to review all mental health reports, tests, and evaluations by the defendant's mental health expert." Fla. R. Crim. P. 3.202(e)(1) Thus there is implicit recognition in the rule itself that the State is not necessarily prejudiced to such an extent that a case cannot be mounted in opposition to the case in mitigation where the State's expert is unable to examine the defendant.

In ordering Appellant to submit to examination by the State's expert, the court below relied upon this Court's opinion in Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994). (R 533) However, as defense counsel noted in their objections (R 532), the rule in Dillbeck suffered from several constitutional infirmities. Not only did this rule allow the prosecution unbridled discretion in selecting an expert, but there was nothing to provide reasonable limits on the scope of the forced examination, nor did the rule provide for possible sanctions if the defendant refused to cooperate, and so the defendant was not put on notice as to what could happen if he refused to cooperate, and could not make a knowing and intelligent decision regarding what course of action to take.

Forcing Appellant to submit to the compelled mental examination by Dr. Merin violated his rights pursuant to Article I, Sections 2, 9, 16, 17, 21, and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United

States Constitution. He must therefore be granted a new penalty phase before a new jury.

ISSUE VI

THE PENALTY RECOMMENDATION OF APPELLANT'S JURY WAS TAINTED BY THE PROSECUTOR'S IMPROPER ARGUMENT, CROSS-EXAMINATION OF WITNESSES, AND INTRODUCTION OF IRRELEVANT EVIDENCE, AND BY THE TRIAL COURT'S REFUSAL TO PERMIT APPELLANT TO PRESENT RELEVANT TESTIMONY IN HIS DEFENSE.

A number of occurrences at Appellant's penalty trial tainted the recommendation of his jury, rendering it unreliable.

The first such happening occurred during the State's cross-examination of one of Appellant's mental health expert witnesses, Dr. Henry Dee, a psychologist. The prosecutor was asking Dr. Dee about complaints of physical abuse that had been made to HRS. (T 2602) The questions and answers were as follows (T 2602):

> Q. I think the last predisposition report I have to ask you about here is the one on March 24, 1981. And the portion of this report that I'm interested in is that the HRS has gone out and investigated a physical abuse--or two physical abuse reports in 1979, and they're talking about those.
>
> And I want you to read for the jury the portion that I have underlined there in red as far as what the investigation found with regard to observable injuries on this child, and the person reporting that; not the HRS worker, but the person reporting, what did they tell them?
>
> A. "The investigation revealed no bruises on the child, and the reporter stated that she had not seen bruises for five years."
>
> Q. Five years.

Thereupon defense counsel objected and moved for a mistrial. (T 2602-2604) The court overruled the objection and denied the motion. (T 2604)

The above cross-examination was improper first of all because it was not established that Dr. Dee relied upon the report in formulating his opinions. Therefore, its admission was not authorized under Muehleman v. State, 503 So. 2d 310 (Fla. 1987). The report obviously was hearsay. The Sixth Amendment right of an accused to confront and cross the witnesses against him applies to the capital sentencing process. Ensle v. State, 438 So. 2d 803 (Fla. 1983). Nonetheless, hearsay may be admitted, "provided the defendant is accorded a fair opportunity to rebut any hearsay statements." § 921.141(1), Fla. Stat. (1995). Appellant was hardly in a position to rebut the words of an anonymous person speaking to an anonymous HRS worker. See Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Gardner v. State, 480 so. 2d 94 (Fla. 1985). Appellant was prejudiced by the cross-examination because it undermined his attempt to establish his abused childhood as a mitigating circumstance.

Improper evidence was admitted during the testimony of another of Appellant's penalty phase witnesses, his maternal grandmother, Frances Snyder. During her testimony, three pictures of Appellant when he was a little boy were admitted into evidence without objection. (T 2647, Defense Exhibits Numbers 1-3) During cross-examination of Snyder, the State was permitted to introduce into evidence, over defense objections, a photopack depicting Appellant

with long hair and facial hair. (T 2648-2651, State's Exhibit Number 118) Apart from the fact that the State was permitted to introduce evidence during Appellant's case, the photopack should not have come in because it was not relevant. How Appellant looked many years later in a photopack did nothing to rebut how he looked as a child. Proctor v. State, 447 So. 2d 449 (Fla. 3d DCA 1984) is virtually right on point. The appellate court agreed with the defense contention that the trial court erred in admitting a photograph of Proctor taken at the time of his arrest, which depicted how he appeared at the time of the crime. The picture was not admissible as substantive or impeachment evidence where its "sole probative value...was to demonstrate to the jury that appearances deceive, that is, that the defendant, who at trial was dressed in a three-piece suit, bespectacled, well-groomed, and scrubbed clean as a choirboy, was not always thus." 447 So. 2d at 449.

The fact that Appellant's picture was part of a photopack was extremely prejudicial in that it suggested to the jury that he might be guilty, or at least suspected, of additional criminal activity apart from that for which he was on trial, as there was no evidence that anyone viewed a photopack in this particular case. See, for example, D'Anna v. State, 453 So. 2d 151, 152 (Fla. 1st DCA 1984) (admission into evidence, or even mere mention, of "mugshots" is error); Loftin v. State, 273 So. 2d 70 (Fla. 1973) (testimony regarding "mug shots" or "mug books" error); Straight v.

State, 397 So. 2d 903, 908 (Fla. 1981) (evidence of irrelevant collateral crimes is "presumed harmful").

Another problem with the penalty proceedings occurred during and after the testimony of Dr. Thomas McClane, a psychiatrist who was another of Appellant's mental health experts. Over defense objections, the prosecutor was permitted to question the witness about the fact that the defense lawyers did not allow Dr. McClane to ask Appellant about the crimes when the doctor was initially hired in this case, and that he was thereby handicapped to some degree in formulating his opinions. (T 2881-2891) The prosecutor also noted in questioning Dr. McClane that Appellant has sat in court for three weeks listening to the prosecutor "describe in great detail his crimes without a single outburst, without a single episode of inappropriate behavior or impulse control." (T 2922) [Dr. McClane responded that that showed him Appellant did not have "major impulse control problems usually when sober." (T 2922)] Appellant's trial counsel wished to testify so that one of them could explain to the jury the legal reasons behind their decision not to have Appellant examined by Dr. McClane until after he was convicted, namely, that they believed that, under Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994), the State could not have Appellant examined by their own doctor until after the defense had Appellant examined. (T 2882-2888, 2952-2958) Counsel also wished to take the stand to rebut the inference that Appellant had no problems controlling his impulses by letting the jury know that counsel had to tell Appellant many times during the course of the

trial to relax and calm down, and discussed with him during the breaks the handling of a particularly stressful situation, or something that he was upset about, particularly related to the area of sexual abuse. (T 2940-2942, 2953-2958) The court refused to let the attorneys testify. (T 2958)

The trial court's unexplained refusal to allow Appellant's lawyers to testify on his behalf was a violation of Appellant's constitutional rights to present witnesses on his own behalf and to establish his defense. ". ..[T]he right to present evidence on one's own behalf is a fundamental right basic to our adversary system of criminal justice, and is a part of the 'due process of law' that is guaranteed to defendants in state criminal courts by the Fourteenth Amendment to the federal constitution." Gardner v. State, 530 So. 2d 404, 405 (Fla. 3d DCA 1988), citing Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washinston v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Bovkins v. Wainwrisht, 737 F. 2d 1539 (11th Cir. 1984), rehearins denied, 744 F. 2d 97 (11th Cir. 1984), cert. denied, 470 U.S. 1059, 105 S. Ct. 1775, 84 L. Ed. 2d 834 (1985). See also Miller v. State, 636 So. 2d 144 (Fla. 1st DCA 1994) (defendant was entitled to present testimony relevant to his defense). As the Supreme Court of the United States noted in Washington v. Texas, 388 U.S. at 19:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's

> version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

See also Moreno v. State, 418 So. 2d 1223, 1225 (Fla. 3d DCA 1982). The testimony Appellant sought to present would have served to counteract the implications that arose from the State's cross-examination of Dr. McClane that Appellant was trying to hide the facts of his case from his own expert, and that Appellant had no difficulty controlling himself in the courtroom (and, hence, did not qualify for the mental mitigators).

Although there was no formal proffer of the testimony sought to be presented, it was obvious from the discussion among the court and the lawyers what the substance of that testimony would have been, and so the issue has been adequately preserved for appellate review. See Pacific0 v. State, 642 So. 2d 1178, 1185 (Fla. 1st DCA 1994).

This Court's admonition in Guzman v. State, 644 So. 2d 966, 1000 (Fla. 1994) is particularly pertinent here:

> We are. ..concerned about Guzman's contentions that the trial judge erroneously limited the testimony of two of Guzman's witnesses and refused to allow Guzman to recall one of those witnesses. We emphasize that trial iudses should be extremely cautious when denying defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant is on trial for his or her life. [Emphasis supplied.]

Another impropriety occurred during the cross-examination of Dr. McClane when the prosecutor injected the nonstatutory aggravating circumstance of future dangerousness into the proceedings. He asked the witness whether he could have predicted that Appellant would commit such an act of violence as that for which he was convicted, and Dr. McClane responded that he could not have predicted it with specificity. (T 2922-2923) The prosecutor then said, "And you can't predict from this point forward. All of these things that you've told this jury about still exist in Mr. Davis, according to you. He suffers from--" (T 2923) Thereupon, Appellant objected and moved for a mistrial. (T 2923-2925) The courtoverruled the objection and denied the motion for mistrial, but did require the assistant state attorney to rephrase his question, and said that the jury would be instructed on the only aggravators they would be allowed to consider. (T 2925) The prosecutor's "question," which was really more like testimony or argument, suggested to the jury that Appellant might commit future acts of extreme violence, even murder, if he were not sentenced to death, and so was extremely prejudicial. See Teffeteller v. State, 439 So. 2d 840 (Fla. 1983) and Grant v. State, 194 So. 2d 612 (Fla. 1967) (condemning prosecutorial argument which urged the jury to recommend the death penalty because the defendant otherwise might be released from prison and kill again); Derrick v. State, 581 So. 2d 31 (Fla. 1991) (admission of evidence suggesting that defendant would kill again highly prejudicial); Pacifico, 642 So. 2d at 1183 (prosecutor should not argue that defendant has propensity to

commit crime). Although the question was not answered, prejudice sufficient to require the granting of a new trial (or in this case, a new penalty phase) may arise from the question itself, Dawkins v. State, 605 So. 2d 1329 (Fla. 2d DCA 1992), and it did so here. The court itself seemed to recognize the impropriety in the question and the fact that it dealt with an aggravating factor not enumerated in the Florida Statutes because, although he overruled Appellant's objections, he nevertheless required the State to rephrase its question and noted that the jury would be instructed on the appropriate aggravating factors.

Finally, error occurred when the trial court failed to grant relief due to the prosecutor's improper final arguments to the jury at penalty phase. The following remarks prompted a defense objection and motion for mistrial (T 2969-2971):

> For two-and-a-half days what we have done, basically, is listen to testimony to try and make you feel sympathy for that man who's a murderer. That's what you've heard. Constantly the defense argued on their closing in guilt phase, don't feel sympathy. The judge told you in his instructions, sympathy--

The court overruled Appellant's objections and denied his motion for mistrial, but gave him a standing objection, following which the prosecutor made repeated references to "poor little Wayne Davis." (T 2971) The comments of the assistant state attorney improperly denigrated the defense Appellant was trying to establish. Sympathy and mercy for the person on trial for his life are valid concerns for a jury in the penalty phase of a capital case. Drake v. Kemp, 762 So. 2d 1449, 1460 (11th Cir. 1985). Although

mere sympathy, which has no source in the mitigating evidence, may not appropriately be the sole foundation for a jury's decision, feelings of sympathy grounded in the evidence can be considered. See California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987); Saffle v. Parks, 494 U.S. 484, 109 S. Ct. 322, 108 L. Ed. 2d 415 (1990); Valle v. State, 581 So. 2d 40, 46-47 (Fla. 1991). The prosecutor's suggestion that the defense had somehow done something improper in seeking to establish sympathy for Appellant may have misled the jury to disregard the mitigating quality of the evidence presented.

Later in his argument the prosecutor was discussing the aggravating circumstance of "under sentence of imprisonment" and what weight the jurors could give it (T 2974-2975):

> This guy [Appellant] was under a sentence of imprisonment. I think if crooks, convicted criminals under sentence of imprisonment go out and murder people, that scale's down here (indicating). I mean, this thing is--forget it. That's a good enough reason for me to impose the death penalty, and I don't even care about the rest of this stuff. You 're free to do that.
>
> You are, likewise, free to say I think it weighs about this much (indicating), or I don't think it weighs anything. You assign the weight.
>
> I submit to you that there's a reason for that being a statutory aggravating factor. When we have individuals in our society who will continue to violate the rules of our society to the extent that they murder people, then we are going to hold them accountable if when they did that--

Appellant's objection was overruled and his motion for mistrial denied. (T 2975-2977) Apart from the fact that the "under sentence of imprisonment" aggravator was not applicable to Appellant, as

discussed in Issue VIII, there are at least three problems with the State's argument. It suggested to the jury that if they found the aggravator in question compelling enough, they did not need to consider anything further; they could proceed to recommend death without even considering the mitigating evidence. Such a procedure would not fulfill the jurors' obligations under sections 921.141(2) of the Florida Statutes, and would be grossly inconsistent with constitutional requirements that all evidence in mitigation be considered before a capital sentence is imposed. The argument also suggested that Appellant could be sentenced to death if he was engaged in repeated criminal activity, which is not one of the exclusive aggravating circumstances set forth in the Florida Statutes which may be considered by the jury. The argument also raised the highly prejudicial suggestion, through the use of the phrase "murder people [plural]" that Appellant had killed more than one person, for which there was absolutely no evidence, or might kill again. See Teffeteller; Grant; Derrick; Pacifico; Garron, 528 So. 2d at 359 (where closing argument injects elements of fear and emotion into jury's deliberations, "a prosecutor has ventured far outside the scope of proper argument").

Immediately after the above-quoted remarks, the prosecutor continued his argument thusly: "These rules are made to protect us, the state. And when we have people under sentence of imprison-ment--" (T 2977) Thereupon Appellant lodged another objection and motion for mistrial. (T 2977) Mistrial was denied, but the court did require the assistant state attorney to rephrase his remarks

using the word "everybody" instead of "us," which he failed to do. (T 2977-2987) As defense counsel noted (T 2977), this last comment constituted a prohibited "Golden Rule" argument. See, e.g., Davis v. State, 604 So. 2d 794 (Fla. 1992); Rhodes v. State, 547 so. 2d 1201 (Fla. 1989); Garron v. State, 528 So. 2d 353 (Fla. 1988); Bertolotti v. State, 476 So. 2d 130 (Fla. 1985); State v. Wheeler, 468 So. 2d 978 (Fla. 1985); Adams v. State, 192 So. 2d 762 (Fla. 1966); Barnes v. State, 58 So. 2d 157 (Fla. 1952).

The cumulative effect of all these defects in Appellant's penalty phase was to deprive him of the fair sentencing determination to which he was entitled pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 2, 9, 16, 17, 21, and 22 of the Constitution of the State of Florida. His sentence of death must not be permitted to stand.

ISSUE VII

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY ON SPECIFIC NONSTATUTORY MITIGATING CIRCUMSTANCES AND THAT UNANIMOUS AGREEMENT WAS NOT REQUIRED FOR THE CONSIDERATION OF MITIGATING FACTORS.

Defense counsel requested penalty phase juryinstructionwhich listed some 24 specific mitigating factors for the jury to consider. (R 572-573) The court denied the request. (T 2210-2214, 2806-2815) The court instead instructed the jury on the statutory mitigating factors of extreme mental or emotional disturbance and substantial impairment of Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the

requirements of law, and gave the standard "catchall" instruction on nonstatutory mitigating factors. (T 3040)

The court also denied counsel's request to instruct as follows: "Unanimity is not required for the finding of a mitigating circumstance; each juror may individually determine whether he or she believes a mitigating circumstance exists." (R 544, 565, T 2220) The court instead gave the standard instruction that a mitigating circumstance need not be proven beyond a reasonable doubt, and, "If you are reasonably convinced that the mitigating circumstance exists, you may consider it as established." (T 3041)

Appellant is aware that this Court has ruled that the standard jury instructions on mitigating circumstances are sufficient and that there is no need to instruct the jury on specific nonstatutory mitigating circumstances. Ferrell v. State, 653 So. 2d 367, 370 (Fla. 1995); Walls v. State, 641 So. 2d 381, 389 (Fla. 1994); Robinson v. State, 574 So. 2d 108, 111 (Fla.), cert. denied, __ U.S.-, 112 S. Ct. 131, 116 L. Ed. 2d 99 (1991). Nonetheless, Appellant respectfully requests this Court to reconsider this issue because those decisions conflict with the principles applied by this Court in deciding other jury instruction issues and with the requirements of the Eighth and Fourteenth Amendments as construed by the United States Supreme Court.

This Court has ruled that trial courts are not bound by the standard jury instructions. Cruse v. State, 588 So. 2d 983, 989 (Fla. 1991), cert. denied, -U.S.-, 112 S. Ct. 2949 L. Ed. 2d 572 (1992). The standard instructions are intended to be "a guideline

to be modified or amplified depending upon the facts of each case." Id., quoting, Yohn v. State, 476 So. 2d 123, 127 (Fla. 1985).

In Gardner v. State, 480 So. 2d 91, 92 (Fla. 1985), this Court ruled: "A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory." Due process of law requires the court to define each element of the law applicable to the defense, just as the court is required to instruct on each element of the charged offense. Motlev v. State, 155 Fla. 545, 20 So. 2d 798, 800 (1945). The failure to properly instruct the jury on the law applicable to the defense is "necessarily prejudicial to the accused and misleading." Id.

In the penalty phase of a capital trial the defendant's proposed mitigating circumstances are his theory of defense against the death penalty, so the defendant should be entitled to instructions on the mitigating factors supported by any evidence in the trial. This Court has ruled that when "evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required." Bowden v. State, 588 So. 2d 225, 231 (Fla. 1991), cert. denied, __ U.S.__, 112 S. Ct. 1596, 118 L. Ed. 2d 311 (1992). While the issue in Bowden was whether the trial court erred in giving a state requested instruction on an aggravating factor, the plain language of the rule applies equally to defense requests for instructions on mitigating circumstances.

Since the jury acts as the co-sentencer with the trial judge in a Florida capital case, jurors must be given sufficient guidance

to determine the presence or absence of the factors to be considered in determining the appropriate sentence. Espinosa v. Florida, 505 U.S.__, 112 S. Ct. 2926, 120 L. Ed. 2d 854, 858-59 (1992). This principle must apply to mitigating factors as well as aggravating factors because the Eighth Amendment requires individualized consideration of the character and record of the defendant and any circumstances of the offense which may provide a basis for a sentence less than death. Sumner v. Shuman, 483 U.S. 66, 72-76, 107 S. Ct. 2716, 97 L. Ed 56 (1987); Woodson v. North Carolina, 428, U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

Jury instructions on mitigating circumstances which restrict the jury to the consideration of only the statutory mitigating circumstances violate the Eighth Amendment, Hitchcock v. Dugger, 481 U.S. 393, 398-99, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987), as do jury instructions which do not allow the jury to properly consider and weigh all appropriate evidence presented in mitigation. Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 934, 106 L. Ed. 2d 256 (1989). Similarly, instructions which may mislead jurors into believing that they must unanimously agree that a particular mitigating circumstance has been proven before it can be considered also violate the Eighth Amendment. Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). Each juror must be allowed to weigh every mitigating circumstance he finds to be established by the evidence. Id. As explained by the Supreme Court,

> The decision to exercise the power of the State to execute a defendant is unlike any

> other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing.

Id., 486 U.S. at 383-84. Thus, jury instructions on mitigating circumstances should be designed to implement the Eighth Amendment's requirement of heightened reliability in capital sentencing.

This Court has said that defense counsel has an obligation to identify the specific nonstatutory mitigating circumstances he wants the sentencing court to consider. Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990). This Court has ruled that the trial court's failure to expressly consider specific nonstatutory mitigating circumstances was not error when the defense failed to identify those circumstances for the court. Thompson v. State, 648 So. 2d 632, 634 (Fla. 1994). If the court, with its superior knowledge of the law and greater experience in deciding factual disputes, cannot be expected to discern the mitigating factors from the evidence presented unless defense counsel expressly identifies them, the jurors cannot be expected to find the factors to be considered without express identification.

Just as the court needs guidance from defense counsel, the jurors need guidance from the court. Allowing defense counsel to argue the existence of specific nonstatutory mitigating circumstances before the jury is insufficient "because the jury must apply the law as given by the court's instructions rather than

counsel's arguments." Gardner v. State, 480 So. 2d at 93. Arguments of counsel cannot substitute for instructions by the court. Tavlor v. Kentucky, 436 U.S. 478, 488-489, 92 S. Ct. 1930, 56 L. Ed. 2d 468, 477 (1978).

It is more likely that the jury will conduct its task properly if the court instructs the jurors to consider each of the specific nonstatutory mitigating circumstances which have been identified by the defense and are supported by the evidence, and that unanimous agreement on the existence of mitigating factors is not required. The jurors are less likely to consider and weigh specific nonstatutory mitigating circumstances if they are given only the standard instruction, which simply states that the jury may consider "[a]ny other aspect of the defendant's character or record, and any other circumstance of the offense." Fla. Std. Jury Instr. (Crim.), Penalty Proceedings--Capital Cases. The jurors are less likely to weigh any mitigating circumstance if they are not instructed that they are not required to reach unanimous agreement as to which circumstances have been established.

While the standard instruction is a correct statement of the law, see Sumner v. Shuman, 483 U.S. at 76-77, it is not a complete statement of the law. This Court has recognized a number of nonstatutory factors which must be found in mitigation when they are supported by the evidence, including, but not limited to: childhood deprivation, contribution to community or society, remorse, potential for rehabilitation, and the consumption of intoxicants on the day of the offense. See Morgan v. State, 639

So. 2d 6, 14 (Fla. 1994); Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993); Nibert v. State, 574 So. 2d 1059, 1062-63 (Fla. 1990); Campbell v. State, 571 So. 2d 415, 419 n. 4 (Fla. 1990). Jurors cannot be expected to know that such factors are legally mitigating unless the court tells them. See Espinosa.

The denial of the requested instructions cannot be found harmless under Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1965), and State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Both the United States Supreme Court and this Court have ruled that "a jury is unlikely to disregard a theory flawed in law . . . ." Sochor v. Florida, 504 U.S. __, 112 S. Ct. 2114, 119 L. Ed. 2d 326, 340 (1992); Johnson v. Sinsletary, 612 So. 2d 575, 576 (Fla.), cert. denied, __ U.S.-, 113 S. Ct. 2049, 123 L. Ed. 2d 667 (1993).

The denial of the requested instructions created a substantial risk that the jury conducted its deliberations on mitigating circumstances improperly. This, in turn, rendered the jury's recommendation of the death sentence constitutionally unreliable. Mills v. Maryland, 486 U.S. at 383-84. Because of the great weight accorded to the jury's unreliable sentencing recommendation, the death sentence imposed on Eddie Wayne Davis violated the Eighth and Fourteenth Amendments. Essinosa. That sentence must be reversed.

ISSUE VIII

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST, AND THIS FACTOR WAS SUBMITTED TO APPELLANT'S JURY UPON AN INADEQUATE INSTRUCTION.

The court below instructed Appellant's jury at penalty phase on the aggravating circumstance set forth in section 921.141(5)(e) of the Florida Statutes (T 3039), and found it to exist in his sentencing order. (R 702-704, 742-743)

In order to establish the aggravating circumstance in question where, as here, the victim was not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Bates v. State, 465 So. 2d 490 (Fla. 1985); Rembertv. State, 445 So. 2d 337 (Fla. 1984); Foster v. State, 436 So. 2d 56 (Fla. 1983); Riley v. State, 366 So. 2d 19 (Fla. 1978); Menendez v. State, 368 So. 2d 1278 (Fla. 1979). In fact, the State must clearly show that the dominant or only motive for the killing was the elimination of a witness. Robertson v. State, 611 So. 2d 1228 (Fla. 1993); Jackson v. State, 599 So. 2d 103 (Fla. 1992); Jackson v. State, 575 So. 2d 181 (Fla. 1991); Rogers v. State, 511 So. 2d 526 (Fla. 1987); Dufour v. State, 495 So, 2d 154 (Fla. 1986); Doyle v. State, 460 So. 2d 353 (Fla. 1984); Oats v. State, 446 So. 2d 90 (Fla. 1984); Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Perry v. State, 522 so. 2d 817 (Fla. 1988); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Davis3 v. State, 604 So. 2d 794 (Fla. 1992); Geralds v. State, 601 So. 2d 1157 (Fla. 1992). Even where, as here, the

victim and the perpetrator knew each, this fact alone is not enough to establish the aggravator in question. Robertson v. State, 611 So. 2d 1228 (Fla. 1993); Hansbroush v. State, 509 So. 2d 1081 (Fla. 1987); Floyd; Caruthers. See also Jackson v. State, 575 So. 2d 181 (Fla. 1981).

The evidence adduced at Appellant's trial was not sufficient to satisfy these standards for the finding of the avoid arrest aggravator. The evidence is at least as consistent with an alternative reason for the killing, that the situation with Kimberly Waters simply got out of hand, which is what Appellant asserted in his statement to Major Grady Judd. (T 1995) Appellant similarly told Dr. Thomas McClane that he was trying to stop Kimberly from screaming and yelling, to shut her up, so that he could think of what to do, and that he did not even know she was dead when he put her into the dumpster. (T 2921) Such a scenario would not prove an intended witness-elimination murder. See Hansbroush v. State, 509 So. 2d 1081 (Fla. 1987). As this Court noted in Jackson v. State, 502 So. 2d 409 (Fla. 1986), where, as here, there is more than one possible explanation for the homicide, the aggravator of witness elimination has not been proven beyond a reasonable doubt, and cannot be allowed to stand.

Doyle is particularly apposite here because of its similar facts. The victim, who was a friend and relative of the defendant, was sexually battered and strangled in a dumping area. Doyle made statements to the police in which he admitted having sex with the victim and killing her, but claimed he was intoxicated. The trial

court found that the murder was committed to avoid arrest because the victim knew her attacker and would report the rape. Even though Doyle was facing a five-year suspended sentence in another case if the rape had been reported, this Court held that the aggravator of avoiding arrest had not been proven beyond a reasonable doubt. "It is a tragic reality that the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act motivated primarily by the desire to avoid detection." 460 So. 2d at 358. This is certainly true in the instant case, particularly in light of Appellant's state of intoxication and the resulting inability to think clearly, coupled with his evident confusion as to what course of action he should take after assaulting the victim.

Furthermore, the instruction given to the jury on this circumstance was inadequate to guide them in their deliberations. Defense counsel propounded the following instruction, and accompanied it with a memorandum of law in support thereof (R 541, 584-589, T 2204-2205, 2949):

> The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.
>
> When the victim is not a law enforcement officer, the State must prove beyond and to the exclusion of every reasonable doubt that the dominant or only motive for the murder was to avoid OK prevent a lawful arrest.
>
> The mere fact that the murder victim may have been a witness who could identify the defendant as the perpetrator of a crime or crimes is not sufficient to establish this aggravating factor without proof beyond and to the exclusion of every reasonable doubt that

> the dominant or only motive for the murder was to avoid or prevent a lawful arrest.

The court below did not give Appellant's propounded instruction, but instead charged the jury as follows as to this factor (T 3039) :

> Number three; the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest, or effecting an escape from custody.

The instruction proposed by the defense was a correct statement of the law, in accordance with the cases cited above. The barebones instruction the court actually gave, which merely tracked the statutory language found in section 921.141(5)(e), was woefully inadequate to apprise the jury of what is required for the aggxavator to be proven. It utterly failed to guide and channel the jurors' consideration of this circumstance pursuant to the narrowing construction that has been placed upon it by this Court. Therefore, the instruction failed to pass muster under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17, 21, and 22 of the Constitution of the State of Florida. In Espinosa v. Florida, 505 U.S. ,____ 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), the Supreme Court condemned Florida's former standard jury instruction on the especially heinous, atrocious, or cruel aggravating circumstance and held that neither the jury nor the judge can weigh invalid aggravating circumstances. Id. at 120 L.Ed.2d 859. The Court explicitly rejected this court's reasoning in Smallev v. State, 546 So. 720, 22 (Fla. 1989) that because the jury does not

actually sentence the defendant, they need not receive specific penalty phase instructions. The logic of Espinosa compels the conclusion that the jury must be almost as informed on the law governing the penalty phase considerations as the trial judge. If it is kept ignorant on complete definitions of aggravators, then this Court cannot say the jury's recommendation is reliable. See also Jackson v. State, 648 So. 2d 85 (Fla. 1994) (condemning Florida's former standard jury instruction on the cold, calculated, and premeditated aggravating circumstance).

Where, as here, improper aggravating circumstances are submitted to the penalty phase jury for its consideration, remand for a new penalty phase before a new jury is called for. Omelus v. State, 584 So. 2d 563 (Fla. 1991); Bonifav v. State, 626 So. 2d 1310 (Fla. 1993). (This principle and these cases also apply to Issues IX and X below.)

ISSUE IX

THE TRIAL COURT ERRED IN INSTRUCTING APPELLANT'S JURY AT PENALTY PHASE THAT THEY COULD CONSIDER THAT APPELLANT WAS UNDER SENTENCE OF IMPRISONMENT AS AN AGGRAVATING CIRCUMSTANCE, AND IN FINDING THIS AGGRAVATOR TO EXIST IN HIS SENTENCING ORDER, WHERE APPELLANT WAS ON CONTROL RELEASE AT THE TIME OF THE HOMICIDE.

State witness Alicea K. Riggall, a control release officer with the Department of Corrections, testified at penalty phase that Appellant was released from prison on control release on October 20, 1992, and was still under control release supervision on March 3, 1994. (T 2270-2271) Riggall said that control release was "very similar to parole." (T 2271)

Defense counsel below disputed that Appellant's control release status would qualify him for the aggravating circumstance set forth in section 921.141(5)(a) of the Florida Statutes, that "[t]he capital felony was committed by a person under sentence of imprisonment or placed on community control[,]" and objected to the jury being charged on this factor. (T 2185-2188) However, the court submitted the circumstance for the jury's consideration (T 3039), and also found it applicable in his order sentencing Appellant to die in the electric chair. (R 700-701, 740-741)

In considering whether one who is on control release is a "person under sentence of imprisonment" within the meaning of the statute, this Court must first be mindful of its admonition in the capital case of Merck v. State, 664 So. 2d 939, 944 (Fla. 1995) that ". ..penal statutes must be strictly construed in favor of the one against whom a penalty is imposed." Moreover, in Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990), this Court specifically applied the principle of strict construction to the very aggravating circumstance at issue here, rejecting the notion that one on community control was "under sentence of imprisonment."[30] Therefore, the reach of section 921.141(5)(a) must not be expanded beyond the plain wording of the statute and the clear intent of the legislature. Any doubts in this regard must be resolved in favor of Appellant.

---

[30] The statute was subsequently amended to specifically provide that one who is under sentence of imprisonment or on community control is subject to the aggravator under discussion.

In arguing for the jury to be charged on the section 921.141-(5)(a) aggravating factor, the prosecutor cited, and the court relied upon, this Court's opinion in Halliburton v. State, 561 So. 2d 248 (Fla. 1990). (T 2186-2187, 2243, R 701, 741) Halliburton, of course, dealt not with control release, but with mandatory conditional release (MCR). This Court first noted that it had held that one who was on parole at the time he committed the murder qualified for the aggravator in question, then went on to equate MCR with parole, relying upon the MCR release statute, which provided that one who was released on MCR would be "'subject to all statutes relating to parole...'" 561 So. 2d at 252, The statute authorizing control release does not contain a similar provision subjecting a releasee to statutes relating to parole. S947.146, Fla. Stat. (1995). In fact, significantly, only inmates who are inelisible for parole can be placed on control release. §947.146-(3), Fla. Stat. (1995); Scott v. State, 641 So. 2d 407 (Fla. 1994); Dolan v. State, 618 So. 2d 271 (Fla. 2d DCA 1993). Furthermore, MCR and control release provide for release under quite different circumstances. The MCR statute provided for release of a prisoner "before the expiration of his full sentence if he has earned gain time deductions and extra good time allowances." Williams v. State, 370 So. 2d 1164, 1164 (Fla. 4th DCA 1979). Control release, on the other hand, involves release "to control prison population," Bradley v. State, 631 So. 2d 1096, 1098, footnote 1 (Fla. 1994), or "to alleviate prison overcrowding." Dolan, 618 so. 2d at 273. Unlike the broad applicability and mandatory nature of MCR, control

release is not available to inmates who have committed certain types of offenses, section 947.146(3), Florida Statutes, and "'no inmate has a right to control release.'" State v. Florida Parole Commission, 624 So. 2d 324, 327 (Fla. 1st DCA 1993) (quoting from Florida Administrative Code). Only "[t]hose inmates who are deemed to pose the least threat to society are assigned advanceable control release dates, whereas those who are perceived to be the greatest risks receive maximum dates that are not advanceable." Id. at 327. For these reasons, Halliburton does not provide controlling authority for applying the "under sentence of imprisonment" aggravator to control release.

Another important reason why control release cannot be equated with parole is that one who is paroled may be given credit for time spent on parole when that status is revoked, Coleman v. Wainwrisht, 323 So. 2d 581 (Fla. 1975); Bronson v. Florida Parole and Probation Commission, 474 So. 2d 409 (Fla. 1st DCA 1985), whereas a person is not entitled to credit for time spent on control release. Moening v. State, 643 So. 2d 1201 (Fla. 5th DCA 1994); Gant v. State, 642 So. 2d 84 (Fla. 2d DCA 1994). This is because control release does not constitute a "'coercive deprivation of liberty.'" Moening, 643 So. 2d at 1202. See also Tal-Mason v. State, 515 So. 2d 738 (Fla. 1987). If control release is not a coercive deprivation of liberty, then it is difficult to see how it cannot constitute being "under sentence of imprisonment" within the meaning of the statutory aggravating circumstance. As in Fersuson v. State, 417 So. 2d 631, 636 (Fla. 1982), in which this Court held the aggrava-

tor inapplicable to one who was serving a two-year period of probation which followed an 18-month period of incarceration, Appellant "was not confined in prison at the time [of the homicide], nor was he supposed to be. [Emphasis by this Court.]" Therefore, he was not under a sentence of imprisonment, and his sentence of death, imposed as it was in reliance upon an inapplicable aggravating circumstance, cannot be allowed to stand without violating the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States as well as Article I, Sections 2, 9, 16, 17, 21, and 22 of the Constitution of the State of Florida.[31]

ISSUE X

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

Among the pretrial motions Appellant filed, through counsel, was a motion attacking the constitutionality of the aggravating circumstance set forth in section 921.141(5)(h) of the Florida Statutes. (R 309-321) The trial court heard the motion on April

---

[31] In Peek v. State, 395 So. 2d 492, 499 (Fla. 1980), this Court had occasion to construe the phrase "person under sentence of imprisonment" as used in the capital punishment statute. However, Peek was decided long before the control release statute came into existence, and so is of limited utility in resolving the issue Appellant raises here.

21, 1995, and denied it. (R 412, 484) Counsel renewed the motion before voir dire began, and renewed it again at the penalty phase jury charge conference, to no avail. (T 34-35, 2228)

Counsel also propounded special instructions for the court to give with regard to the especially heinous, atrocious, or cruel aggravating circumstance (R 580-583, T 2205-2206), but the court instead charged Appellant's jury as follows (T 3039):

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

The trial court also found the HAC circumstance to exist in his order sentencing Appellant to death. (R 704-706, 743-744)

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

> This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system "could have standards so vague that they would fail

> adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." 428 U.S. at 195 n. 46, 49 L.Ed.2d 859, 96 S.Ct. 2909. To avoid this constitutional flaw, an aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235, 249-250 (1983) (footnote omitted). See also Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). As it has been applied, however, Florida's especially heinous, atrocious or cruel aggravating factor has not passed constitutional muster under the above-stated principles, as it has not genuinely limited the class of persons eligible for the ultimate penalty. This fact is evidenced by the inconsistent manner in which this Court has applied the aggravator in question, resulting in a lack of guidance to judges who are called upon to consider its application in specific factual settings. The standard of review has vacillated. For instance, in Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), this Court stated that application of the HAC statutory aggravating factor "pertains more to the victim's perception of the circumstances than to the perpetrator's," 578 So.2d at 692, whereas in Mills v. State, 476 So. 2d 172, 178 (Fla. 1985), the analysis concerned the perpetrator's intent: "The intent and method employed by the wrong-doers is what needs to be examined."

As this Court stated in Smallev v. State, 546 So. 2d 720 (Fla. 1989), the Supreme Court of the United States upheld the facial

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

> In State v Dixon, 283 So 2d 1 (1973), cert denied, 416 US 943, 40 L Ed 2d 295, 94 S Ct 1950 (1974), the Supreme Court of Florida construed the statutory definition of the heinousness factor:
>
> > "It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless of pitiless crime which is unnecessarily torturous to the victim." 283 So 2d, at 9.
>
> Understanding the factor, as defined in Dixon, to apply only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim," we held in Proffitt v Florida, 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960 (1976), that the sentencer had adequate guidance. See id., at 255-256, 49 L Ed 2d 913, 96 S Ct 2960 (opinion of Stewart, Powell, and Stevens, JJ.).
>
> Sochor contends, however, that the State Supreme Court's post-Proffitt cases have not adhered to Dixon's limitation as stated in Proffitt, but instead evince inconsistent and overbroad constructions that leave a trial court without sufficient guidance. And we may well agree with him that the Supreme Court of Florida has not confined its discussions on the matter to the Dixon lansuase we approved

> in Proffitt, but has on occasion continued to invoke the entire Dixon statement quoted above, perhaps thinking that Proffitt approved it all. [Citations omitted.]

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

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

Deaths by stabbing provide but one of many specific examples which could be cited of the Court's failure to apply the section 921.141(5)(h) aggravating circumstance in a rational and consistent manner. In cases such as Nkbert v. State, 574 So. 2d 1059 (Fla. 1990), Mason v. State, 438 So. 2d 374 (Fla. 1983), and Morsan v. State, 415 So. 2d 6 (Fla. 1982), the Court has approved findings of especially heinous, atrocious, or cruel where the deaths resulted from stabbings. In Wilson v. State, 436 So. 2d 908 (Fla. 1983), however, a killing that resulted from a single stab wound to the chest was held not to be especially heinous, atrocious or cruel. In Demps v. State, 395 So. 2d 501 (Fla. 1981) the victim was held down on his prison bed and knifed. Even though he was apparently stabbed more than once (the opinion refers to "stab wounds" (plural) 395 So. 2d at 503), and lingered long enough to be taken to three hospitals before he expired, this Court nevertheless found the killing not to be "so 'conscienceless or pitiless' and thus not 'apart from the norm of capital felonies' as to render it `espe-

cially heinous, atrocious, or cruel' [citations omitted]." 395 So. 2d at 506. See also opinion of Justice McDonald concurring in part and concurring in the result in Peavy v. State, 442 So. 2d 200 (Fla. 1983) simple stabbing death without more not especially cruel, atrocious, and heinous). [For other examples of how various aggravating circumstances have been applied inconsistently, please see MELLO, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowins the Class of Death-Elisible Cases Without Making It Smaller, XIII Stetson L. Rev. 523 (1983-84).] The result of the illogical manner in which the section 921.141(5)(h) aggravator has been applied is that sentencing courts have no legitimate guidelines for ascertaining whether it applies. Any killing may qualify, and so the class of death-eligible cases had not been truly limited.

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

addresses cruel and unusual punishments.) Eddie Wayne Davis' sentence of death imposed in reliance on this unconstitutional factor must be vacated.

Davis' jury also was given an improper and inadequate instruction on the especially heinous, atrocious, or cruel aggravating circumstance. The instruction quoted above was similar to the instruction approved by this Court in Hall v. State, 614 So. 2d 473, 478 (Fla. 1993), except for the trial court's substitution of the incorrect word "tortuous" in place of the correct word "torturous." The definitions of "heinous," "atrocious," and "cruel" were formulated by this Court in State v. Dixon, 283 So. 2d 1 (Fla. 1973), and were included in a former jury instruction on HAC, but were subsequently eliminated, apparently because the definition of "cruel" improperly invited the jury to consider evidence of lack of remorse in aggravation, Pope v. State, 441 So. 2d 1073 (Fla. 1983), only to be reinstated by this Court's opinion in In re Standard Jurv Instructions Criminal Cases--No. 90-1, 579 So. 2d 75 (Fla. 1990). The former jury instruction on the section 921.141(5)(h) aggravating circumstance, which defined it in terms of "especially wicked, evil, atrocious or cruel," was held by the Supreme Court of the United States in Espinosa v. Florida, 505 U.S. _____, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992) not to pass muster under the Eighth Amendment, as it was too vague to afford sufficient guidance to the jury for determining the presence or absence of the factor. Although the charge given to Appellant's jury was more detailed than the former standard jury instruction,

it was still deficient. As noted above, the Supreme Court made it clear in Sochor v. Florida that it had not approved the complete language in Dixon upon which this Court based its approval of the new standard jury instruction in In re Standard Jury Instructions Criminal Cases--No. 90-1; specifically, the Court did not approve the Dixon definitions of "heinous," "atrocious" and "cruel." Furthermore, in Shell v. Mississippi, the Supreme Court held that a limiting instruction used by the trial court to define the "especially heinous, atrocious, or cruel" factor was not constitutionally sufficient; the concurring opinion in Shellv. Mississippi explains why limiting constructions such as that attempted in Dixon are not up to constitutional standards:

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

112 L.Ed.2d at 5. In Atwater v. State, 626 So. 2d 1325 (Fla. 1993), this Court itself recognized that an instruction providing

only the Dixon definitions of terms discussed above would be inadequate. Thus, the court below read to Eddie Wayne Davis' jury definitions which have not been sanctioned by the Supreme Court, but have been held invalid to pass constitutional muster.

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

"pitiless" and "unnecessarily tortuous" are also vague and subject to overbroad interpretation; a jury could easily erroneously conclude that any homicide which was not instantaneous would qualify for the HAC circumstance. Also, this Court indicated in Pope that an instruction which invites the jury to consider if the crime was "conscienceless" or "pitiless" improperly allows the jury to consider lack of remorse in aggravation.

Appellant's counsel propounded the following instructions on HAC, which would have provided the jury with greater guidance than the instruction the court actually gave (R 581-583):

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> "Heinous" means so wicked, reprehensible and abominable that it is unmitigated in any way.
>
> "Atrocious" means the highest degree of evil or cruelty.
>
> "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.
>
> In order to be especially heinous, atrocious or cruel the crime must involve acts, which cause the crime to stand above and apart from other murders. The heinousness, atrociousness or cruelty of the acts must be exceptional and uncommon.
>
> Acts committed by the defendant to the victim after the victim was unconscious or dead cannot be considered in determining whether the murder was especially heinous, atrocious or cruel.[32]
>
> To be heinous, atrocious or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the

[32] This portion of Appellant's proposed instruction was a correct statement of the law. See Jones v. State, 569 So. 2d 1234 (Fla. 1990); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Jackson v. State, 451 So. 2d 458 (Fla. 1984); Herzog v. State, 439 So. 2d 1372 (Fla. 1983).

> intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually, consciously suffered such pain for a substantial period of time before death.[33]

Unlike the charge that the jury received, Appellant's proposed instructions would have at least given the jury a fighting chance applying the HAC aggravating circumstance in an appropriate manner, and they should have been given.

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

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

49 L.Ed.2d at 885-886. Davis' jury was not "carefully and adequately guided" in its deliberations; the inadequate jury instruction on HAC tainted the jury's penalty recommendation and rendered it unreliable. In Florida, the "capital sentencing jury's recommendation is an integral part of the death sentencing

---

[33] This portion of the instruction enjoys support in such cases as Bonifav v. State, 626 So. 2d 1310 (Fla. 1993); Kearse v. State, 662 So. 2d 677 (Fla. 1995); Stein v. State, 632 So. 2d 1361 (Fla. 1994) and Clark v. State, 609 So. 2d 513 (Fla. 1993).

process," Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987), and the trial court is required to give the jury's penalty recommendation great weight. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). See also Herzos v. State, 439 So. 2d 1372 (Fla. 1983); Riley. Thus, not only did the trial court directly weigh the invalid aggravating circumstance of HAC in his sentencing order, in according the tainted recommendation of Appellant's sentencing jury the weight he was required to give it under the law, the trial court also necessarily indirectly weighed the invalid aggravating circumstances in the sentencing process, in violation of the constitutional principles expressed in Espinosa, in which the Supreme Court noted that when a weighing state such as Florida "decides to place capital-sentencing authority in two actors rather than one [that is, in both the jury and the judge], neither actor must be permitted to weigh invalid aggravating circumstances." 120 L. Ed. 2d at 859. For these reasons, Eddie Wayne Davis' sentence of death cannot be permitted to stand.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Eddie Wayne Davis, prays this Honorable Court to reverse his convictions and sentences and remand for a new trial, for the reasons expressed in Issues I-IV. If this relief is not forthcoming, Appellant asks the Court to vacate his sentence of death for the reasons expressed in Issues V-X. In light of the invalidity of some of the aggravating circumstances and the compelling mitigating evidence Appellant presented below, especially that concerning his extremely deprived and abusive upbringing, the Court should reduce his death sentence to one of life imprisonment. In the alternative, the Court should remand for a new penalty proceeding before a new jury.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 10th day of July, 1996.

Respectfully submitted,

Robert F. Moeller

ROBERT F. MOELLER
Assistant Public Defender
Florida Bar Number 234176
P. 0. Box 9000 - Drawer PD
Bartow, FL 33831

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

/rfm

INDEX TO APPENDIX

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs. Case No. CF94-1248A1-XX

EDDIE WAYNE DAVIS,
Defendant.

ORDER ON MOTION TO SUPPRESS TESTIMONY

This matter came before the Court on Motion to Suppress Testimony. The Hearing was held on January 6, 1995. All citations refer to the hearing transcript on the Motion to Suppress. The Motion is Denied.

Detectives McWaters and Smith went to Mr. Davis' house on March 18, 1994, and requested that he come down to the police station to talk about the murder investigation. He agreed to go. The police had a warrant for his arrest, but chose not to tell him about it. (p. 7 Line 23). Defendant was not given his Miranda warnings when he was first brought into the station., because he went voluntarily. (p.15 Line 3) McWaters and Smith conducted defendant's initial interview, where he stated that he was elsewhere at the time of the murder. Defendant was not handcuffed or shackled or told he was under arrest. (p.8 Line 18) The detectives then told him they had DNA evidence. (p.9 Line 14) They allowed defendant to read the FDLE report and then told him he was being arrested. (p.10Line 5) Defendant asked the detectives, "Can I call my mom to get me a lawyer, and can I smoke a cigarette, they won't let me smoke in jail."(p.10 Line 13) The officers honored the request and stopped questioning defendant. (p.10 Line 18) There were still no Miranda warnings given at this point.

Defendant had been a suspect in the murder of Kimberly Waters from the beginning. Maj. Judd had spoken to him on previous occasions regarding the investigation.(p.64 Line 16) After defendant was put in the holding cell Major Judd entered the area. Defendant made eye contact with Judd through the glass plate in the door. (p.67 Line 17) Maj. Judd made the statement, " I'm disappointed in you," and started walking away. (p.99 Line 13) The defendant started talking but Judd couldn't hear him so he opened the door and asked, "What did you say?" The defendant responded, "I told you, you. need to look at Beverly." (p.68 Line 10) [Beverly is the victim's mother.] Maj. Judd told defendant that he couldn't discuss this with him, because he (defendant) had requested an attorney. Maj. Judd

went on to say that if defendant wanted to talk he had to initiate the conversation. (p.68 Line 22) Defendant then said he would like to talk to Maj. Judd and Det. Schreiber. (p.69 Line 2) Defendant went on to say he couldn't afford an attorney and Maj. Judd told him that the State would provide one. (p.69 Line 10) It is at this point that defendant started sobbing and voluntarily confessed to the crimes. (p.92 Lines 5 & 10) There were still no Miranda warnings at this point. Defendant agreed to tell detectives McWaters and Smith what he told Judd and Schreiber. He was then taken out of the holding cell and brought to the interview room where he spoke to McWaters and Smith (p. 104 Line 8) He was given his Miranda warnings, signed a waiver and confessed again, but on tape this time.

Invocation of the Right to Counsel

There is no issue at bar concerning the initial interview. Defendant made no incriminating statements, therefore the fact that he wasn't given his Miranda warnings is moot. It should also be noted that defendant went voluntarily with police to the station, unaware that they had a warrant for his arrest. The police did not have to disclose the existence of the warrant. State v. Rrown 558 So.2d 1054 (2nd DCA 1990) (Court held fact that officer didn't inform defendant that he was without authority to execute warrant did not affect voluntariness of suspect's decision to accompany officer to police station.)

The first issue is whether or not the defendant clearly requested the assistance of counsel. He did. After defendant was detained at the police station for questioning, he was told he was under arrest and then asked the Detective, "Can I call my mother to get me a lawyer ?"(p.10 Line 13) The detective stopped the interview at this point. (p.10 Line 18) The Court finds that defendant's statement "Can I call my mother to get me a lawyer?", was an unequivocal statement and as such defendant clearly requested an attorney and the police had to stop their questioning. They did. The Court understands the States' argument that the defendant's request for an attorney could be interpreted as equivocal. Davis v TI S., 114 S.Ct. 2350 (1994) However, the record shows that every detective who heard it understood it to be a request for counsel and acted accordingly. Maj. Judd was told about the request by the other detectives who were present when it was made. "Eddie, it's my understanding that...you've requested an attorney or you've requested your mother to get you an attorney, and I can't discuss this with you because you want an attorney." (p. 68 Line 21).

The inquiry as to whether the defendant actually invoked his right to counsel is an objective one. Davis, citing Connecticut v. Barrett, 479 U.S. 523,107 S. Ct. 828, 93 L.Ed2d 920 (1987). "Invocation of the Miranda right to counsel 'requires at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. Davis at 2355, quoting McNeil v. Wisconsin, 501 U.S. 171, at 178,111 S.Ct. 2204, at 2209. "..he must articulate his desire to have counsel present

sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Davis at 2355. The record shows that every officer who heard the statement understood it to be a request for counsel. They then stopped all questioning as is required. When the request for an attorney is clear interrogation must. cease. (Arizonas rule) Edwards v. ' ,451 U.S. 477, 485, 101 S.Ct. 1880, 1884-1885, 68 LEd.2d 378. citing Michigan v. Mosley, 423 U.S. 96, 46 L.Ed.2d 313, 96 S.Ct. 321 (1975).

The First Confession

The Florida Supreme Court in Lowe v. Florida, 19 Fla. L. Weekly S621 (1994) applies the U.S. Supreme Court's analysis in Arizona v. Mauro, 481 U.S. 520,107 S.Ct. 193, 95 L.Ed.2d 458 (1987) , on the issue of what constitutes interrogation. The U.S. Supreme Court opined, "[i]nterrogation may be express or its functional equivalent, and in de&mining whether police are engaging in conduct that they "'should know [is] reasonably likely to elicit an incriminating response,"' the focus is "'primarily upon the perceptions of the suspect, rather than the intent of the police."' Mauro at 526-27 (quoting Rhode Island v. Innis, 446 U.S. 291, 308, 64 LEd.2d 297, 100 S.Ct. 1682 (1980). This court, is bound by precedent to apply the analysis of Innis as set out in Lowe. Innis sets out a two pronged test defining interrogation within the meaning of Miranda . For words or actions on the part of police to be interrogation under the first prong, they must constitute express questioning. Major Judd's statement, as he was walking off, "I am disappointed in you." (p.99 Line 18) was in form, an aside. Detective Judd made this statement as he walked away. The statement was in no way a question, and did not invite a response. Therefore, it does not satisfy the first prong.

The second prong, "functional equivalent" covers words or actions reasonably likely to elicit an incriminating response from defendant. It is this prong that views the situation from the defendant's perspective. There is nothing in the record to suggest that defendant was subjected to the "functional equivalent" of questioning. The record states defendant cried and was upset, but he would regain his composure and talk. (p.92 Line 11) There is no allegation or showing in the record, that Maj. Judd knew defendant was "extremely upset" or "peculiarly susceptible" to an appeal to his conscience." The court in Innis, at 309, held that this showing would have to be made in order to find that it was reasonably likely under the circumstances that defendant would incriminate himself. It cannot be said that Maj. Judd should have known his off-hand remark was reasonably likely to elicit an incriminating response from defendant. Therefore, viewing the situation from defendant's perspective, this court finds that defendant was not subjected by the police to the "functional equivalent" of questioning. Maj. Judd's statement does not satisfy the second prong under Innis . Since neither prong has been satisfied, the court holds there was no interrogation.

The Florida Supreme Court interprets Miranda and its related cases to require warnings whenever there is custodial interrogation [emphasis ours]. Traylor v. State, 596 So.2d 957, (Fla. 1992) citing, Green v. State, 40 Fla. 474,476, 24 So. 537,538 (1898). "Confessions obtained in violation of these rules were inadmissible at trial." Traylor at 964 , citing Daniels v. State, 57 Fla. 1,2, 48 So.747, 748 (1909). The courts recognize an exception to this rule. There is no violation of defendant's rights where he initiates the conversation and voluntarily confesses. As stated by the U.S. Supreme Court in Edwards," . ..[a]n accused, such as [the defendant], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused [illegible]iated further communication, exchanges. or conversations with the police "[emphasis ours] 451 U.S. at 484-485, 101 S.Ct., at 18841885 (1981). See Davis v. U.S., 114 S.Ct. 2350 (1994). The Florida Supreme Court made a similar holding under the Florida State Constitution , in Traylor v. State, 596 So.2d 957,966 (Fla. 1992). "Once a suspect has requested the help of a lawyer, no state agent can reinitiate interrogation on any offense throughout the period of custody unless the lawyer is present. Although the suspect is free to volunteer a statement to police on his or her own initiative at any time on any subject in the absence of counsel." The court in Traylor, goes on to say that statements obtained in contravention of the guidelines [guidelines under the State Constitution analogous to Miranda] violate the Florida Constitution and are inadmissible as evidence. The same exception to the rule is recognized under the Florida Constitution, "These guidelines apply only to statements obtained while in custody and through interrogation; they do not apply to volunteered statements initiated by the suspect or statements that are obtained in non-custodial settings or through means other than interrogation." Traylor at 966. Defendant's confession was made after invocation of counsel, but prior to his being "subject[ed] to further interrogation by the authorities..," Edwards at 484, 101 S.Ct. at 1885. The U.S. Supreme Court held in, Oregon v. Bradshaw, 462 U.S. 1038, 103 S.Ct. 2830 at 2835 (1983), where a statement made by defendant to a law enforcement agent, ". ..evinced a willingness and desire for discussion about the investigation and was not merely a necessary inquiry arising out of incidence of custodial relationship," defendant has initiated the conversation and there is no Edwards violation. Defendant's statement "You should be talking to..."clearly referred to the investigation. Major Judd understood it as such and told defendant, that he couldn't talk to him unless defendant initiated. (p.68 Line 22) Maj. Judd spoke about the State providing defendant an attorney free of charge.(p.69 Line 9) Defendant requested specific police officers to talk to and then confessed.(p.69 Line 1) This court holds, on these facts, defendant initiated the conversation. Therefore there was no violation of the Edwards rule.

Defendant's confession was voluntary. The issue of voluntariness is determined by state law. It is subject to the minimum requirements of the Fourteenth Amendent's due process clause. Thompson v. State, 545 So.2d

198 (Fla. 1989) citing Jackson v. Denno, 378 U.S. 368, 393, 84 S.Ct. 1774, 1789, 12 L.Ed.2d 908 (1964). The State must prove voluntariness by a preponderance of the evidence. Towne v. State 495 So.2d 895, (1st DCA 1986). The standard for determining voluntariness was set out in Bram v. U.S., 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed.568 (1897) and adopted by the Florida courts. "A confession, in order to be admissible must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promise however slight, nor by the exertion of any improper influence... A confession can never be received by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." Towne at 898. See also Brewer v. State, 386 So.2d at 235; Hawthorne v. State, 377 So.2d 780, 784, (Fla. 1st DCA 1979); State v. Kettering, 483 So.2d 97, 98 (Fla. DCA 1986). The record is devoid of threats, violence, promises and improper influence.(p.72 Lines 21, 25) The court finds defendant's confession to have been voluntary.

The court-in Edwards at 387, interprets the holding in Rhode Island v. Innis, 446 U.S. at 298, n.2, 64 L.Ed.2d 297, 100 S.Ct. 1682. and applies it to a situation where there was no interrogation and defendant made a voluntary statement. "Had [defendant] initiated the meeting on Jan. 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered-statements and using them against him at the trial. The Fifth Amendment right identified in Miranda is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver. " The Court in Edwards went on to explain that even when the meeting was "initiated by the accused" as in the case at bar, the police may say or do something that "clearly would be interrogation." Edwards at 387 n. 9. In the case at bar, defendant's statement was described as a narrative.(p.92 Line 17) The officers did ask Davis questions such as, "What happened next?" But, no specific questions were asked. (p.92 Line 24) In Christmas v. State, 632 So.2d 1368 (Fla. 1994) The court held there was no Fifth Amendment violation where defendant did not receive his Miranda rights because defendant was not interrogated. "When, however, a defendant voluntarily initiates a conversation with law enforcement officers in which a defendant provides information about the defendant's case, Miranda warnings are not required." Christmas at 1370. The court in Towne, at 898, stated that part of the voluntariness inquiry (where defendant requested counsel) is whether defendant has waived that right knowingly and intelligently.

When determining if a waiver of the right to counsel was knowing and intelligent, the court looks at the totality of the circumstances. Davis, at 2354, citing Edwards, at 451 U.S. at 483, 101 S.Ct., at 1884. t t o counsel) 'requir[es] the special protection of the knowing and intelligent waiver standard." The totality of the circumstances includes the

A 5

"necessary fact that the accused, not the police reopened the dialogue with the authorities." Edwards at 387 n.9. This court has taken into consideration that the accused initiated the conversation. This court has found the testimony of the police at the hearing was credible. The police made no threats, promises or inducements for defendant to talk. A short time after requesting an attorney the defendant changed his mind without any influence of the police. The totality of the circumstances dictates that defendant's waiver of his right to an attorney was knowing and intelligent. This court holds that the defendant made a voluntary, knowing and intelligent waiver of his right to counsel. Therefore, the first confession is admissible.

III - The Second Confession

There is no issue in the case at bar, that after defendant confessed in his cell to detective Schreiber and Maj. Judd, he agreed to put it on tape. Defendant was moved to the interview room and given his Miranda warnings. He signed a waiver and then confessed on tape. (p.13 Line 17) The issue before the court is, is the second confession admissible? Yes. This court has already determined that defendant's first confession was made voluntarily and without coercion. It is admissible under both Florida and Federal law. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. Oregon v. Elstad 470 U.S. 298, 84 L.Ed.2d 222, 105 S.Ct. 1285 (1985). The Elstad court stated that it is the duty of the finder of fact to examine "...the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements" Id. at 238. Tbis court finds there was no improper police conduct or allegations of coercion and the record doesn't support any. Defendant's second confession was voluntary.

The Elstad Court held that a suspect who "...responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." Id. In making this finding, the court refused to impute a "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver." Id. Thereby allowing into evidence the second statement obtained after defendant 's waiver. The Florida Supreme Court adopted the holding in Elstad in Perry v. State, 522 So.2d. 817 (Fla. 1988). In Perry the defendant confessed while under questioning but before being given Miranda warnings. Shortly after, defendant was Mirandized and he repeated bis confession. The court found that any defect from the unwarned confession, relating to a waiver of the right against self-incrimination, was cured by subsequent warnings. The court went on to say ". ..when neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probable evidence of a voluntary confession to be irretrievably lost to the fact finder." Perry at 819 citing Elstad at 1294. Defendant's first confession was admissible, as it was uncoerced, voluntary, and initiated by the defendant . There is no

possible "taint" to impute to the second confession. Even if there were, the second confession would be admissible under Perry , because defendant was given his Miranda rights and validly waived them before making it. The second confession is admissible. See also, Kight v. State, 512 So.2d 922 (Fla. 1987) (Issuance of Miranda warnings by police cured any technical procedural violation of Miranda rights. Defendant's statements made after warnings were admissible.)

There is no Sixth Amendment violation regarding the second confession Defendant waived his request for counsel when he made the first confession, (see above). In addition, after receiving his Miranda rights he executed a written waiver, reaffirming the fact that he didn't want counsel. The court in Cannady v. State, 427 So.2d 723 (Fla. 1983) addressed this issue and found that there was sufficient evidence that defendant knowingly and intelligently waived the right to counsel before further interrogation, where he executed a written waiver. See also, Witt v. State, 342 So.2d 497 (Fla. 1977) cert. denied, 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 294 (1977). Aycock v. State, 528 So.2d 1223 (2nd DCA 1988) The second confession is admissible.

ORDERED AND ADJUDGED that the Motion is Denied

DONE AND ORDERED this 6th day of February, 1994 at Bartow, Polk County, Florida.

Daniel T. Andrews
Circuit Judge

Copies furnished to:

Austin Maslanik, Esq.
Attorney for the Defendant

ASA John Aguero

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR Polk COUNTY, FLOR

STATE OF FLORIDA,)

Plaintiff,)

vs.) CASE NO.

Eddie Davis)

Defendant,)

NOTIFICATION OF EXERCISE OF RIGHTS

I, E. Davis, do hereby exercise all rights guaranteed to me under the United States and Florida Constitution and in particular, those rights against self-incrimination and the right to counsel. Further,

1. I do not consent to be interviewed by any agent of the State of Florida concerning the charge(s) against me in this case, any matter related thereto, or any other criminal investigation.

2. I do not consent to be interviewed by any law enforcement officer, State Attorney, or State Attorney Investigator concerning any matter, without the presence of my attorney.

3. I do not consent to appear in any line-up, show-up, or any other identification procedure, without the opportunity to confer with my attorney.

4. I do not consent to any taking of any finger or palmprints, blood sample, hair sample, or other bodily sample, fingernail scrapings, or photograph of my person.

5. I do not consent to the search of my residence, automobile, person or any other of my property.'

6. I further exercise any and all rights against self-incrimination not specifically enumerated above which are guaranteed to me under the United States and Florida Constitutions.

3/19/94
DATE

DEFENDANT

WITNESS

xc:
State Attorney
County Sheriff's Dept. (Jail)
Investigating Agency

PUBLIC DEFENDER

A 8