IN THE SUPREME COURT OF FLORIDA

HOWARD S. AULT,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC00-863
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant was the defendant and appellee the prosecution in the Criminal Division of the Circuit Court of the Judicial Circuit, In and For County, Florida. The volume number will be referred to by Roman numeral and the page number by Arabic numeral.

The symbol "R" will denote the Record on Appeal.

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STATEMENT OF THE CASE

Mr. Ault was indicted for two counts of first degree murder, two counts of capital sexual battery, two counts of kidnapping, and two counts of aggravated child abuse. IR1-1b. This involved an incident on November 4, 1996. He was found guilty as charged on all counts, after a jury trial. XIT2025-30. The jury recommended death as to both murder counts by a vote of 9 to 3, after a penalty phase. XVIT2928-9. The trial judge imposed the death penalty on both murder counts, life sentences on the sexual battery counts, and sentences of a term of years on the other counts. VR901-954.

STATEMENT OF THE FACTS

This case involves the killing of two young girls. The defense in the case was that the homicide was second degree murder. The State's case consisted of lay testimony, law enforcement testimony, and the statement of Mr. Ault. Winifred Walters, a teacher at the school of the deceased; Deanne Mumin and Alicia Jones, testified that Deanne was a patrol officer. VIIIT1506. She saw both Deanne and Alicia after the Halloween party. VIIIT1510. Alicia was crying and said that someone stole her candy. VIIIT1510. Ms. Walters said that she would bring her some candy the following Monday. VIIIT1511. (This discussion was on a Friday). The girls leave school at 2:05 p.m. each day. VIIIT1511. She saw them on Monday, November 4, 1996 after school and gave them candy and they left. VIIIT1511-2.

Mildred Manning, general manager of Evening Delight Fireplaces, stated that on November 4, 1996 she worked from 8:30 a.m. to 6 p.m. VIIIT1514-5. He saw the deceased walk in front of her building as they usually did. VIIIT1516. She did not know the time, but guessed it was between 2 and 3 p.m. VIIIT1517.

James Marrazzo, stated that he frequented a convenience store on Powerline Road and 38th Street. VIIIT1519. He went there on November 4, 1996 with his wife. VIIIT1520. He stated that Mr. Ault was there about 1:45 p.m. VIIIT1521-1525. He did

not see the girls on the day in question, but had seen them on a previous day. VIIIT1524.

Larry Jackson, an employee of the Broward County Parks and Recreation Department, stated that on October 30, 1996, he was going to a meeting and saw two young Black girls talking to Mr. Ault. VIIIT1527-31. He then saw Mr. Ault buy the girls sodas and snacks at a convenience store. VIIIT1529. He later saw the girls at Easterlin Park. VIIIT1529.

Delois Skeete, stated that in October, 1996, she was working as a park aide at John Easterlin park. VIIIT1544-5. She worked from 7 a.m. to 3 p.m. VIIIT1546. She met Donna Jones in April, 1992, when she first went to work at Easterlin Park in April, 1992. VIIIT1547. She became friends with her and her three children. VIIIT1547. They camped at the park off and on. VIIIT1551. Mr. Ault would come to the park. VIII1552. She saw the girls riding with Mr. Ault on Friday, October 30,1996. VIIIT1554. Deann stated that Mr. Ault had bought the girls food and fixed their mother’s car. VIIIT1554. She did not work on November 5, 1996. VIIIT1558. Her daughter called her about 7:20 p.m. and told her that the girls were missing.

Sherry Karan testified that she camped at Easterlin Park from January, 1995 to January, 1996. VIIIT1560. She met Donna Jones at that time. VIIIT1560. Their kids were friends. VIIIT1561. Ms. Jones was in and out of the park. VIIIT1561.

Donna Mae Jones, mother of the deceased, testified that Deann was 11 and Alicia was 7. VIIIT1566. She stayed with her kids in her white station wagon with a pop-up trailer. VIIIT1567. Her children went to Lloyd Estates Elementary School. VIIIT1568. They usually walked home. VIIIT1569. She met Mr. Ault in Easterlin Park. VIIIT1569-70. He offered to let them shower at his house and told her his wife's name. VIIIT1570. The second time she saw him he was with his wife. VIIIT1571. He gave her a map to his house. VIIIT1571. Mr. Ault drove a small truck with tinted windows. VIIIT1572. She saw Alicia and Deann riding in that truck once. VIIIT1572-3. She scolded them for getting in the truck. VIIIT1573. She stayed in the park on Thursday, October 31, 1996. VIIIT1574. Mr. Ault had fixed her car that day. VIIIT1574. On Monday, November 4, 1996, she took the girls to school and they didn't come home on time. VIII1578. She went back to the school and called the police. VIIIT1578. Officers came to the school. VIIIT1579. She eventually went to Mr. Ault's house about 7 p.m. VIIIT1580. Mr. Ault said he hadn't seen the girls. VIIIT1580. He said not to call the police as he had some problems with them in the past. VIII1581. She went to her cousin's house and then to the police station. VIIIT1581-2. Joy Hall, testified that she first met Mr. Ault in September, 1996, when he rented an apartment from her. VIIIT1590. His wife moved in a few weeks later. VIIIT1592.

The first law enforcement witness was William Rhodes, a former officer of the Oakland Park Police Department. VIIIT1594. He was assigned as lead officer on November 5, 1996. VIIIIT1595. He interviewed Mr. Ault and his wife in the detective division of Oakland Park Police Department on November 5, 1996, at approximately noon. VIIIT1596-7. Mr. Ault stated that he had only met the girls once, a few days before, in Easterlin Park. IXT1604-5. He stated that the girls had never been in his car. IXT1610. He went to see Mr. Ault on November 6, 1996, at the Broward County Jail. IXT1610. He was brought down at 2:15 p.m. IXT1616. Mr. Ault stated that he would only talk to Mr. Rhodes, so the other officer left. IXT1617. He was given his Miranda rights and agreed to waive them. IXT1620-1. Mr. Ault told him that the girls were dead and offered to take them to the bodies. IXT1621. Mr. Rhodes then instructed the other officer to obtain a court order to transport Mr. Ault. IXT1622. He admitted that he had killed the girls and that he had planned on having sex with them from the start. IXT1623. Mr. Ault took them to his apartment and consented to a search of the apartment. IXT1624. The girls were dead in the attic. IXT1629. Mr. Ault made a videotaped statement. He met Donna Jones and her three kids on Monday, October 28, 1996 in Easterlin Park. IXT1683-4. He gave them his name and address and offered to let them come and cook. IXT1685. He introduced his wife to her. IXT1685. He saw the

girls 2-3 days later and gave them a ride in his truck. IXT1686. He also helped Ms. Jones work on her car one day. IXT1687. He first thought of having sex with the children when he gave them a ride in the car. IXT1688-9. On Monday, November 4, 1996 he left his apartment about 2:15 and picked the children up at about 2:30 p.m. IXT1690. He told them that he was going to give them Halloween candy at his apartment. IXT1691. The kids came in with him. IXT1692. He began to have sex with the oldest child on the floor and she started to scream and fight. IXT1692. He penetrated her with his finger and briefly with his penis. IXT1693. He began to choke her to stop the noise. IXT1694. He claimed that he continued to strangle her until she stopped breathing. IXT1695. He then went over and strangled the other one on the couch. IXT1695. He did not have an original intent to kill either girl. IXT1696. He never attempted to sexually assault the younger girl. IXT1696. He put the older girl's clothes back on and then put them both in the attic. IXT1698. He then left and picked his wife up from work. IXT1699. Donna Jones came to his house about 9 p.m. IXT1699. Some police officers spoke to him later that night. IXT1700.

Mr. Ault stated that after he was raped by his older brother, he began having sexually devious thoughts. IXT1704. His brother began abusing him when he was 5 and it went on for several years. IXT1704. He never thought about killing anyone

until the older girl was screaming in this incident. IXT1705. He was on community control. IXT1713. Mr. Ault said he had been seeing a psychologist and had been in group therapy for over a year for his sex problems. IXT1716. He still has visions of having sex with minors. IXT1717.

Officer Rhodes was told after the fact that Officer Deborah Cox, of the Broward County Sheriff's Office, arrested Mr. Ault for a different offense, which had occurred 11 months earlier, after his first interview. IXT1730. Officer Rhodes claims that he had no advance knowledge of the arrest. IXT1743. Deborah Cox is married to Bill Cox, an officer with the Oakland Park Police Department. IXT1730. Officer Bill Cox did the video setup for Officer Rhodes for his interview with Mr. Ault. IXT1731. He was placed in the Broward County Jail that afternoon. IXT1732. Mr. Ault had originally agreed to take a polygraph and changed his mind. IXT1733. He said he would run the questions by an attorney before he would take it. IXT1734. The following day he called down for Mr. Ault at 1:50 p.m. and the videotaped statement began at 5:37 p.m. IXT1735. Mr. Ault showed emotion and remorse at the end of the tape. IX1744. Mr. Ault had been in a sex offender treatment program for two years. IXT1745. He tried to get help for his problem without success. IXT1746. Mr. Ault first thought about killing anyone when the girl was screaming and yelling. IXT1748.

Dr. Lance Davis, the medical examiner, testified that he was called to the scene on November 7, 1996. IXT1752. He saw the bodies of two children in the attic. IXT1753-4. He determined that Deann Mumin died by manual strangulation. IXT1776. There was also some bruising of the vaginal area. IXT1755. The amount of decomposition was consistent with her having been dead for two days. IXT1780. He also believes that Alicia Jones died from manual strangulation. IXT1787. He believes that she died 12-18 hours later. IXT1787. However, she was probably comatose for a long period of time. IXT1788. She had no signs of trauma to her vaginal area. IXT1787. The prosecution then rested. IXT1789.

The defense asked the court to take judicial notice of the fact that Mr. Ault had invoked his right to remain silent and right to counsel and that the first appearance judge had issued an order that these rights be honored. XT1855-6. The defense then rested. IX1856. The jury found Mr. Ault guilty as charged on all counts. XIT2026-30.

The State's first penalty phase witness was Byron Mattai, a Fort Lauderdale police officer. XIIT2118. He stated that on September 30, 1986, he was off duty and went walking on Ft. Lauderdale beach at 1:30 a.m., with his date. IXT2118. Two male figures began walking toward him. IXT2119. One man, Mr. Ault, pulled out a knife and began to attack him. IXT2120. He

sustained minor cuts. IXT2123. Mr. Mattai pulled out his badge and said he had a gun and they left. XIIT2120.

Michelle LeMay testified concerning an incident on May 15, 1988. XIIT2125. She was 12 and living in an apartment complex. XIIT2126. Charlie Ault, Howard Ault's brother, was the boyfriend of their former housemate. XIIT2126-7. She had met Howard Ault. XIIT2127. On May 15, 1998, she went to bed about 10 or 11 p.m. XIIT2127. Charlie and Howard had come by earlier to get her mom's medication to take to her at work. XIIT2128. She woke up at 4-5 a.m. with Howard Ault on top of her. XIIT2128. He took off her panties. XIIT2129. She was screaming and he hit her. XIIT2129. He left when he heard a car door slam. XIIT2130.

Officer George Rylander, of the Sunrise Police Department, testified concerning an incident on March 14, 1994. XIIT2135-6. The victim was 6 years old and lived with her mother in Markham Park in Sunrise. XIIT2139-40. Mr. Ault was a neighbor. XIIT2139. He picked her up at the store one day and drove her to an isolated area of the park. XIIT2140. He removed her clothes and inserted his fingers in her. XIIT2140. She cried and he took her back home. XIIT2140.

Alvertis Johnson, Mr. Ault's community control officer, testified that he supervised Mr. Ault from April-May, 1996 until November, 1996. XIIT2146. Mr. Ault was always at home when he

checked on him. XIIT2150. He was very compliant with community control. XIIT2154. He got reports from Dr. Rambo, Mr. Ault's psychiatrist. XIIT2154. He went to Mr. Ault's house at 8:45 p.m. on November 4, 1996. XIIT2157.

Timothy Allen, an inmate at the Broward County Jail, testified that at one time he was housed near Mr. Ault. XIIT2169-71. Ault claimed he strangled one of the girls and released for the feeling of power. XIIT2172-3. Allen was in jail for a violation of community control for armed burglary, which is punishable by life. XIIT2175. He was once in a gang. XIIT2177. He said that Mr. Ault was prescribed antipsychotic medication in the jail. XIIT2178.

Winifred Walters testified that she was Deanne's teacher and that Deanne was compassionate and artistic. XIIT2184. Delois Skeete, a park aide, testified that the girls would help her with park chores. XIIT2231-34. Sherry Karan testified that the girls were good children. XIIT2235-6. The State rested. XIIT2239.

The first defense witness was Barbara Matson, Mr. Ault's mother. XIIT2240. She is a retired secretary. XIIT2241. She married Ron Ault, Howard's father, in 1958. XIIT2241. He worked construction and they moved all the time. XIIT2241-2. They had four kids. XIIT2242. Charles was born in 1960, Lisa in 1964, Sherry in 1965, and Steve in 1966. XIIT2242-3. They moved 20-25

times when the kids were young. XIIT2243. She and her husband had a very chaotic relationship. XIIT2243. He had a very short fuse and was violent at times. XIIT2243-4. They had a lack of communication and often argued. XIIT2244. She was an alcoholic and this exacerbated their problems. XIIT2244. She was drinking heavily and was in denial and the children suffered. XIIT2244. She was depressed and unhappy and drank to drown her sorrows and get away from things. XIIT2245. She was drinking heavily when she was pregnant with Steve, especially in the first trimester. XIIT2245. She drank bourbon and coke or rum and coke. XIIT2245. Her family did not get the nurturing that they needed. XIIT2246. She and her husband separated twice before they divorced. XIIT2246.

Her drinking increased during the separations and she became more depressed. XIIT2246. They often moved to try to start over, but it never helped. XIIT2246. Alcoholism affected her parenting skills. XIIT2247. She was not there for her children, did not take care of them, did not help them with their homework, and did not give them attention when they needed it. XIIT2247. Her husband's answer to everything was to grab a belt and whip the children, especially the boys. XIIT2247. She was often drinking during these whippings. XIIT2248. She left her husband in charge. XIIT2248. They had no support group, no friends, no family, no religious background, and often moved.

XIIT2248. She felt alone and lost and hid her problems. XIIT2248. She blocked out a lot and drank a lot as defense mechanisms. XIIT2249. She continued to drink after she knew she was pregnant with Steve. XIIT2249.

Steve was born in Fort Myers and moved to Texas soon thereafter. XIIT2251. He continued sucking his thumb until he was 10 and wetting the bed until he was 13. XIIT2252. Both were issues of contention in the family. XIIT2252. He also suffered several head injuries as a child. XIIT2252-4. He jumped from a roof when he was 7 and hit his head and was unconscious for several minutes. XIIT2252-3. He was not taken to the hospital as his family did not have health insurance. XIIT2252-3. He fell again on the ice and hit his head when he was 12. XIIT2253. He was nauseous, but received no medical attention. XIIT2253. He was also involved in two automobile accidents. XIIT2253.

Chuck was 6 years older than Steve. XIIT2255. Chuck was an only child for 4 years before the second child was born. XIIT2255. He was very jealous of the other children and was very aggressive with them. XIIT2255. Chuck was sent away to a boy’s ranch when he was 13, because there was a lot of chaos in the family and fighting and sibling rivalry. XIIT2257. There was also sexual abuse going on. XIIT2257. When Chuck came back the sexual abuse started again. XIIT2257. Chuck dropped out of high school and was dishonorably discharged from the military.

XIIT2258. Chuck later married and sexually abused his stepson. XIIT2258. Chuck sexually abused his two sisters. XIIIT2263-4. The two girls stuck together and eventually ended it. XIIIT2264.

Chuck was 11 when he began sexually abusing Steve, who was 5 at the time. XIIIT2266. She had the feeling that something was drastically wrong in the lives of the boys. XIIIT2266. She talked to her husband and asked him to talk to the boys. XIIIT2266. He talked to them and then told her that there was sexual activity between the two boys. XIIIT2266. He said he would "take care of it." XIIIT2266. She never felt like it was being properly addressed. XIIIT2266. Steve was almost shot by Chuck when he was 6. XIIIT2267. Chuck was disciplined by being whipped with a belt over the sexual abuse and the near shooting. XIIIT2267-8. He was never given counseling. XIIIT2268. Ms. Matson still feels ashamed about what went on in her house, especially the sexual abuse. XIIIT2270.

Ms. Matson was drinking heavily and she and her husband were separated when Steve was 10. XIIIT2270. Steve was the only child living with her. XIIIT2270. She came home one day and saw the sheets crumpled up and a jar of Vaseline on the table. XIIIT2270. She had a bad feeling about what was happening and called her husband. XIIIT2270. Chuck got a whipping over this. XIIIT2271. The next day he came over and tore up the storeroom because he was mad that she told on him. XIIIT2271. Steve was

sexually abused by Chuck from ages 5 to 12. XIIIT2271-2. She believes that it contributed to the bed wetting. XIIIT2272.

Steve got very limited counseling on a couple of occasions. XIIT2272. He attended a special school and was being socially promoted. XIIIT2273. He had no interest in learning, sports, or any outside interest. XIIIT2275. He was never tested for learning disorders or other neurological problems. XIIIT2276. He did not know how to interact with other children. XIIIT2276. He was often whipped with a belt. XIIIT2277. That was the primary form of discipline. XIIIT2277. They locked Steve in his room. XIIIT2278. She got divorced in 1983 and Steve went to live with his dad. XIIIT2278. She continued drinking heavily. XIIIT2278-9.

Steve began to run away when he was 13 and they tried counseling. XIIIT2285. She first became aware that Chuck was raping Steve when Steve was 8. XIIIT2286. Both Steve and Chuck attempted to fondle their sisters. XIIIT2287. Both her husband, Ron Ault, and Steve had told her that Chuck had sexually abused Steve. XIIIT2288. She was in denial and thought it “was all a bad dream”. XIIIT2290. She didn’t understand the impact of it all until years later. XIIIT2290. She left it to her husband to handle the sexual abuse and it went on. XIIIT2290. She stated that she failed her son. XIIIT2290. They never had the money to take Steve for appropriate counseling. XIIIT2292. They only

went to family counseling two or three times. XIIIT2296. Her heavy drinking contributed to her denial. XIIIT2295. She stated that Steve has expressed great remorse for this offense. XIIIT2297.

The defense then called Dr. Hyman Eisenstein, an expert in clinical neuropsychology. XIIIT2316-20. He has a Ph.D in clinical psychology and was a post-doctoral fellow in neuropsychology at Yale Medical School. XIIIT2316. He is board certified in neuropsychology. XIIIT2317. He had worked for 5 years with criminal forensic patients at the State Psychiatric Hospital in Connecticut. XIIIT2317. He also helped establish the head trauma program at the Sunrise Rehabilitation Hospital. XIIIT2318. Neuropsychology involves human behavior and the functioning of the human brain. XIIIT2318.

He interviewed Mr. Ault and reviewed records of other doctors, his statements, and police reports. XIIIT2322. Mr. Ault had severe learning disabilities and basically received failing grades XIIIT2322-3. He was socially promoted. XIIIT2323. His mother drank heavily during the first trimester. XIIIT2323. She tapered drinking somewhat in the second and third trimester. XIIIT2324. He suspects Fetal Alcohol Syndrome given the amount of alcohol consumption. XIIIT2324. Steve fell off a porch at age 5 and lost consciousness for 3-5 minutes. XIIIT2324. He continued thumb sucking until age 10 and bed

wetting until age 14, beyond the normal age. XIIIT2324. He slipped on ice and hit his head and suffered a concussion. XIIIT2325. He was in 3 auto accidents. XIIIT2325. He suffered several head injuries and these often have a synergistic effect with multiple head injuries having much more effect than a single head injury. XIIIT2325-6. Mr. Ault has suffered the cumulative effect of these injuries. XIIIT2326. He has a significant history of usage of "serious drugs" and alcohol. XIIIT2326.

Mr. Ault had a "classical dysfunctional family". XIIT2236. He was "sexually, physically, and emotionally abused by his older brother" from ages 5 to 12. XIIIT2326. The parents' marriage was very troubled. XIIIT2327. The father used physical punishment, beatings, and straps as his way of dealing with problems. XIIIT2327. Part of the mother's alcohol consumption "was to hide from the difficult and horrific conditions that existed in the family." XIIIT2327. The incident in which his brother shot at him was traumatic and he suffers from flashbacks and post-traumatic stress disorder from all the "cumulative sexual, physical, and emotional abuse". XIIIT2327. He was sexually abused and raped at gunpoint by his older brother. XIIIT2328. People who are abused tend to abuse others. XIIIT2328. The entire family has been scarred. XIIIT2328.

Dr. Eisenstein gave Mr. Ault a complete neuropsychological examination. XIIIT2329. This takes about 10 hours and assesses all areas of brain functioning. XIIIT2329. All of the skills that involve learning are in the borderline defective range. XIIIT2332. Mr. Ault demonstrates the greatest area of impairment in frontal lobe skills which affects the ability to make difficult or complex decisions. XIIIT2332. He lacks the ability to make complex decisions. XIIIT2333. He demonstrated "moderate to severe organic brain damage, primarily of the frontal lobe function." XIIIT2333. His learning and visual memory function at a borderline level. XIIIT2333. He ranks in the bottom 2% of the population on most learning and memory skills. XIIIT2334. This type of frontal lobe damage effects "critical thinking, judgment, and reasoning ability". XIIIT2334. He stated that Mr. Ault suffered from extreme mental and emotional disturbance. XIIIT2335. He also stated that his capacity to conform his conduct to the requirements of the law is substantially impaired. XIIIT2335. He bases this opinion on several factors.

> First and foremost his neuropsychological brain impairment, his brain damage, the organic brain defects he has that have been demonstrated, the alcoholism that he reported, his own alcohol usage and his own drug usage as well as the alcohol abuse that his mother reported during the first trimester, which indeed may be the source of a fetal syndrome or an early developmental problem of his learning difficulty in school records.

> The numerous head injuries that I talked about with the loss of consciousness as well as the synergistic effect of the multiplicity of head injuries, the sexual, physical, emotional abuse he suffered and sustained the post-traumatic stress disorders from that as well as from the incidents of being raped at gunpoint, being shot at.

XIIIT2335-2336.

Dr. Eisenstein testified that he did not believe that Mr. Ault was malingering. XIIIT2236. He explained his reasoning.

> Q. And one final question, doctor, you spent a lot of time with Steve Ault; is that correct?
>
> A. Correct.
>
> Q. In doing your evaluation you, – do you believe he has the capacity to make some of this stuff up to be able to alter your tests in such a way to somehow fool the words about who he is?
>
> A. No. The reason why I am of the opinion that Mr. Ault did not fake the results is there is several reasons.
>
> Q. Please tell the jury.
>
> A. The analysis of the results demonstrate strength and weaknesses so there are areas that he answered adequately, he is ok, he performed in the normal range.
>
> He did not know which examples to fake and which not to fake especially if the results indicated that there were areas that he did okay in. So the conclusion is that when you have results that are normal in some areas and are abnormal in other areas one then tends to believe that the results are accurate.
>
> They are truly indicative and valid of his functioning and strength and weaknesses are indeed are considered impairment.
>
> The second thing is from his own statement, his own statements that he gave is indicative –

Q. From statements to the police.

A. – from statements to the police are indicative that there was no preplanning, there is was no information though, he said it as it was.

He was faced with the situation, he made some bad decisions if you even want to call it decision making skill, but this was not planning. There was no planning in what happened.

It was a reaction to events which is very different than which means the lack of planning or the inability to plan which is exactly the type of frontal lobe injuries that I'm talking about, which are indeed indicative of brain impairment or organic brain damage in the lack of the ability to think through a situation.

The thing which I think is probably important to mention as well, and I have had adequate experience with working with individuals that are facing serious capital crimes and there is a certain profile of an individual that, one, begins to develop, often at times they are in denial as to what they did, or they do not feel a sense of shame or guilt as to the behavior, the consequence, they are in denial and it just goes on and on and so you get the wrong guy, the wrong person, the wrong events, but, okay, we'll go through this process anyway of this assessment.

It is not the case with Mr. Ault. Mr. Ault is genuine. He feels horrific about what happened and I think part of the reason why he needs psychiatric medication is to manage his feelings because the more intense that he feels, the more depressed he is about what happened and he himself feels that these consequences and behavior is quite horrific. He is no different than anyone of us to evaluate the severity of what has happened.

Such an individual in my practice is somebody that is certainly honest and is able to share and try to do the best they can.

They are not trying to escape, avoid what has happened. So I think for those reasons, the valid – the profile is valid and my results are indeed

> reflective of what, you know, Mr. Ault's psychological neurological function is all about.

XIIIT2336-2339.

Mr. Ault is taking 300 milligrams of Thorazine, an anti-psychotic, and 150 milligrams of Sinequan, an anti-depressant. XIIIT2340. He had attempted suicide in the jail and the jail file had "several requests for evaluations for depression and for suicidal ideation and behavior." XIIIT2340. Dr. Eisenstein reiterated that the purpose of his evaluation was as a neuropsychologist and that his diagnosis was that Mr. Ault had organic brain damage. XIIIT2360. He saw Mr. Ault on September 9, 1999 and did a mental status exam and conducted 10 neuropsychological tests. On September 16, 1999, he conducted another 15-20 tests. XIIIT2365-6. His diagnosis is based on the totality of the tests. XIIIT2369-70. He stated that if a person is malingering there is a quality to their tests that an experienced clinician can pick up. XIIIT2379. He also stated that Mr. Ault's tests show normalcy in some areas and serious impairment in others which tends to point against malingering. XIIIT2379. He stated that in some ways neuropsychological tests are more sophisticated than an MRI as a person can have a normal MRI and still have impaired functioning. XIIIT2386. Mr. Ault also stated that he had taken two hits of blotter acid and drank a quart of vodka on the date of the offense. XIIIT2399. He has

an impairment in his ability to plan due to his brain damage. XV2668. He described this impairment:

> The neuropsychological data, the history, are all consistent with frontal lobe impairment, the lack of ability in his planning skills, his ability to make appropriate judgements, to think things out and weigh options in their logical sequence, the history from the developmental through his adolescence through his early adulthood and the numerous contributing factors all indicated together, of course, with the objective neurological data.

XV2672-3.

Dr. Eisenstein further explained to the jury why he felt that Mr. Ault was not malingering on the neuropsychological tests:

> Neuropsychological test data are the only data that actually, because of the objective nature of the testing, can actually be tested with rigorous criteria of whether or not someone is faking. That is number one. The test data have to fit the individual.
>
> When one conducts a neuropsychological or psychological examination of an individual who has to have a good fit, that means that the backgrounds data, the medical data, the schooling records, the psychological records, the reports from individual corroborating data, they have to fit, they have to make sense.
>
> You don’t just pick out a test and say the test is whatever the result and then you make a conclusion. Hopefully you do not throw the arrow and then draw the bull’s-eye and say we got a score. Now, if one does that, that is obviously inappropriate and this is misuse of the clinical examination process.
>
> The data, and I can go through the entire data which to a great extent you have already heard. The fact that I did not rely on a single test, the scores showed high/normal functioning, superior functioning, average functioning, and mild to moderate, severe.

There was no one particular area that was distinguished as being compromised, as a matter of fact, some of the validity instruments that would be easiest to fake, for example, the motor measures, which is certainly an important measure here, one's grip strength with both right and left hands, specially the left hand grip strength as it relates specifically to the crime scene which I have to tell you I only read after I conducted the examination, certainly is if someone would want to fake, they would go straight to the first measure of their strength to hold a dynamometer was their strength and here the dynamometer in the left hand was in the high/normal range of the population, and the dynamometer in the right hand was in the normal range. There was no faking here.

Measures of attention and concentration, an easy measure to fake, were all normal. He attended, he did well. There were no indications from the neuropsychological data that the individual's performance was grossly abnormal across the board especially on the easier measures.

If one looks at a learning curve, if one can remember easier items and fake them which is generally the pattern that one would fake them on the easier items and then get some that are difficult items are gross exaggerations of faking, for example, you ask the person the date, they can't tell you, where they are, they can't tell you, simple questions which would be indicative of faking at a very simple level, and that wasn't the case.

There were some times then of course, he did not respond. Because of his cognitive impairment there was a breakdown, and that is where his brain does not function versus not being able to because on all the measures, simple faking, they were – the tests are robust, they are strong and indicative of an individual who really did try. I compared not only to the research and the data, but I will tell you to the – well, in my 20 years of experience of examining and administering, probably well over 2,000, neuropsychological test batteries myself.

XV2677-79.

Dr. Eisenstein also described the impact of pedophilia on his behavior.

> When an individual has a certain compulsion, the compulsion could overtake their thinking processes, and the compulsion to the behavior is part of the issue of his mental disorder.
>
> Now, whether or not an individual who suffers from a particular disorder has the ability to override the mental disorder, and the compulsion is a question that I believe is up for debate.
>
> Neuropsychological examinations deal with both the mental disability as well as the thinking processes.
>
> It is unclear as to whether or not there is really a planned decision. Clearly it is not one of weighing the options and the alternatives in understanding and appreciating the consequences of what he is supposed to do.

XIV2686-87.

Dr. Gilbert Raiford, a professor of social work at Barry University for 25 years testified concerning Mr. Ault's background, as an expert in social work. XIIIT2412-7. He met with Mr. Ault twice in order to do a psycho-social evaluation. XIIIT2419. He also reviewed school records, interviewed Mr. Ault's mother, police reports, and the reports of other doctors. XIIIT2420. A psycho-social evaluation concentrates on a client's formative years. XIIIT2421. He stated that Mr. Ault "never really had a chance to be a normal human being, that from the beginning he has had to be warped in the way he grew up to be an adult." XIIIT2424. He described Mr. Ault's family.

> There seems to have been a very chaotic dysfunction of the family. There was a lot of drinking taking place, a lot of pornography in the house, and from what I can gather a lot of abuse. A lot of that was indicated in school records where the first two years of the records I looked at first and the second and third year records, I saw where he was pretty much of a marginal child.

XIIIT2427.

His schoolwork was deficient and he was socially promoted. XIIIT2425. His parents were preoccupied with working and drinking. XIIIT2426. He was bed wetting and thumb sucking far beyond the normal time. XIIIT2426. His early life points to someone who will be dysfunctional all his life. XIIIT2428. He experienced little emotional growth beyond 6 or 7. XIIIT2428. He described Mr. Ault's early life.

> He seems to have grown up without parental supervision and guidance so that he would not have really had a chance to develop a good sense of morality; that he may not have the strength to have a very strong conscious development, I mean, there's a lot of things that would go into making an adult a functional person and those things seem not to have obtained to him.

XIII2428-29.

He was neglected. XIIIT2429. Both parents were preoccupied and his older brother Chuck was often placed in a parental role. XIIIT2429-30. His family was violent. There was a lot of screaming and yelling and beatings of the children. XIIIT2431. He is extremely emotionally disturbed. XIIIT2431. He doesn't believe that Mr. Ault is malingering. XIIIT2454. His emotional

disturbance is not inconsistent with an anti-social personality. XIIIT2458. His emotional compulsions make him incapable of refraining from criminal conduct. XIII-XIVT2459-64.

Dr. Ted Shaw, a psychologist who specializes in evaluating and treating sex offenders testified concerning Mr. Ault. XIVT2471. He evaluates sex offenders for the State of Florida for the Jimmy Ryce program. XIVT2471. He also consults with 2 different schools who treat juvenile sex offenders. XIVT2472. He was a therapist in the Mentally Disordered Sex Offender (MDSO) program for a number of years. XIVT2473. He does considerable work with pedophiles. XIVT2490. Pedophilia is a recognized mental disorder in the DSMIV. He described the development of pedophilia in a person.

> Q, Please help the jury to understand now how one becomes a pedophile, and be as clear as you can.
>
> A. There is a lot of literature looking at how people become pedophiles, how they learn to be sexually attracted to children, and there are a variety of ways that people get there.
>
> A number of them explained to me between 35 and 50 percent of the pedophiles start out by being molested themselves or raped or sexually abused in some way and then those folks later act out what was done to them, either acted out thinking it is okay because they enjoyed it or acted it out because they were traumatized by what was done to them, and they are trying to gain mastery over the memory of what was done to them.
>
> However, many people suffering from pedophilia get a disorder where you make it say accidentally, they might have been socially backward and accidentally discovered that it felt good to be sexual about a

> young child and then because of other things in their life continued on doing that and so gradually developed the actual attraction to children that became so powerful for them.
>
> Still others may have first started in the course of other criminal behavior, again, common to be exciting. Still others have a young sexualized child that approaches them and then they first discover that way and go on, but that is how it first starts then if they engage in the behavior over a period of time without usually being caught initially, and then they develop these deviant fantasies, sexual fantasies that maintain the disorder.

XIV2491-92.

After reviewing many of Mr. Ault's records he stated that Mr. Ault is a pedophile. XIVT2493. He had reviewed DOC reports as well as the reports of other doctors. He stated that when Mr. Ault was screened in his admission to the Department of Corrections in 1988 he asked to be admitted to the MDSO program and was determined to be a good candidate for the program. XIVT2496. The funding was terminated in 1989 when Mr. Ault was on the waiting list. XIVT2497-8. He stated that Mr. Ault is severely emotionally disturbed. XIVT2501. Pedophilia is a compulsive disorder. XIVT2506. He stated that he suffers from extreme emotional disturbance and that his capacity to conform his conduct to the requirements of law is substantially impaired. XIVT2508,2527. This is from the compulsive nature of pedophilia and anti-social personality disorder. XIVT2528. He says Mr. Ault suffers from pedophilia and anti-social personality disorder. XIVT2511-2. He stated that Mr. Ault has

“a long standing severe disorder”. XIVT2524. He has a serious cognitive distortion. XIVT2525. His conduct in the incident was “purposeful, but not rational”. XIVT2526.

The State called Dr. Sherrie Carter, a clinical psychologist. XIVT2553. She interviewed Mr. Ault and reviewed records. XIVT2560-4. He was on Thorazine, an anti-psychotic, and Sinequan, an anti-depressant. XIVT2566. Thorazine is normally prescribed for people who are delusional and not in touch with reality. XIVT2566. Mr. Ault reported auditory hallucinations in the past. XIVT2568-9. Dr. Carter stated that she was suspicious of this report. XIVT2568-70. She gave Mr. Ault an IQ test and he scored in the low average to borderline range. XIVT2576. She also felt that Mr. Ault was malingering due to the results of certain psychological tests. XIVT2580-90. She stated that her tests show:

> His ability to control his behavior, his ability to act in an appropriate socially acceptable way is extremely impaired, in fact, it is severely impaired.

XIV2592.

She stated that he had a severe personality disorder, but did not have a major mental illness. XIVT2593. She felt that he suffered from pedophilia, anti-social personality disorder, and malingering. XIVT2594-5. She claimed that he was falsely reporting hallucinations and multiple personalities. XIVT2612-3. She did not know whether the allegations that Mr. Ault was

sexually abused by his brother are true or not. XIVT2618. She did not feel that he met the criteria for the two statutory mental mitigators. XIVT2631-5.

The State called Lisa Allmand, Mr. Ault's sister. XVT2708. She is 2 years older than Mr. Ault. XVT2709. The family moved constantly for their father to find work. XVT2710. She felt that her father loved her, but that her mother was sporadically involved. XVT2710-1. The parents were often separated with the mother living with her boyfriend. XVT2710-11. The parents argued in front of the kids, but he never saw the father hit the mother. XVT2712. The father spanked the children with a belt for discipline. XVT2712. A gun went off when Steve and Chuck were in the room, when she was 12. XVT2714-5. Chuck said the gun went off accidently. XVT2715. She first heard about Chuck raping Steve after this murder. XVT2716. Chuck fondled her 3-4 times a month for a year when she was 10 or 11. XVT2717. The parents were separated 3 or 4 times, usually for a year or so. XVT2723. She hasn't spoken to the mother in almost 2 years. XVT2723. She stated that she has feelings of "total disappointment" towards her mother. XVT2723.

The State called Sherrie Munoz, another sister of Mr. Ault, who is one year younger. XVT2725. She stated that they moved a lot. XVT2725. She claimed that her mom drank occasionally, but not excessively. XVT2728. She claimed that the gunshot incident

was an accident, but that the shot went fairly close to Steve. XVT2728. She first heard of Chuck abusing Steve after the murder. XVT2728-9. She stated that Steve seemed "slow, but not excessively slow." XVT2731. Steve roomed with Chuck and she roomed with her sister. XVT2732. Both sides rested.

The jury recommended death by a vote of 9 to 3 on both murder counts. XVIT2927-2932. The defense recalled Mr. Ault's mother, Barbara Mattson, to testify at the Spencer hearing. XVIT2954. She stated that when Steve was growing up there was pornography in their home, alcohol abuse, and no religious guidance. XVIT2956. She stated that Steve is seriously ill. XVIT2956. She stated that Chuck abused Steve and she was guilty of "the sin of silence." XVIT2957. She stated that it has been very difficult to talk about what went on in her family. XIVT2959. Steve was exposed to hard core pornography, such as Hustler, at a young age. XIVT2963. There was no religious foundation in the home. XIVT2964. She stated that Steve is emotionally and mentally ill. XIVT2965.

The trial judge imposed the death penalty on Counts I and II, life without parole on counts III and IV, 511.211 months on counts V and VI, and 360 months on counts VII and VIII. VIR1057-9.

SUMMARY OF THE ARGUMENT

I.

The trial court erred in denying Mr. Ault's Motion to Suppress his Statements when he was interrogated after invoking his rights to counsel and to remain silent.

II.

The trial court erroneously granted a State cause challenge based on a juror's views on the death penalty. The juror's views did not give a basis for a cause challenge. Reversal for a new penalty phase is required. Farina v. State, 680 So. 2d 392, 392-99 (Fla. 1996).

III.

The trial court erred in denying Mr. Ault's motion for mistrial when the State brought out an alleged collateral crime of which Mr. Ault had never been charged or convicted.

IV.

The trial court erred in refusing to allow a defense mental health expert to express his opinion on a statutory mitigator.

V.

The trial court erred in allowing the State to introduce hearsay evidence in the penalty phase.

VI.

The trial court erred in failing to conduct an adequate hearing on Mr. Ault's request to discharge penalty counsel. It

also failed to inform him of his right to proceed pro se when it denied the motion.

VII.

The felony murder aggravating circumstance is unconstitutional.

VIII.

The death sentence in this case violates Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000).

IX.

Several of the sentences on the non-capital counts were rendered in violation of Heggs v. State, 759 So. 2d 620 (Fla. 2000).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING MR. AULT'S MOTION TO SUPPRESS.

This issue involves the denial of Mr. Ault's motion to suppress his statements and any fruits thereof. The trial court's factual findings are clothed with a presumption of correctness. However, issues of law are reviewed de novo. State v. Glatzmayer, 789 So. 2d 297 (Fla. 2001). However, the trial judge's discretion is limited by the Florida and United States Constitutions. The denial of this motion denied Mr. Ault his rights to remain silent and to counsel pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution. Reversal for a new trial is required.

Facts Surrounding the Motion to Suppress

Mr. Ault filed a written motion to suppress and memorandum of law in support thereof IIR390-4,IVR404-409. The State filed a memorandum of law in opposition. IIR395-400. The trial court held an evidentiary hearing and heard oral argument. IT1-125. The State called William Rhodes, formerly of the Oakland Park Police Department. IT5. He became involved in this case on Tuesday, November 5, 1996. IT7. Mr. Ault and his wife came to the Oakland Park Police station at noon on that day. IT9. Two

officers had spoken to Mr. Ault the night before; Tuesday, November 4, 2001. IT39. Mr. Ault had allowed the police to search his house that night. IT40. He interviewed Mr. Ault and his wife in each other's presence. IT11-2. He was told approximately one hour after the interview that the Broward County Sheriff's Office (BSO) had arrested Mr. Ault on another charge, while he was still in the Oakland Park Police Department. IT18. He was arrested by Officer Deborah Cox, of BSO, who is married to Officer William Cox of the Oakland Park Police Department. IT43. He had completed his interview with Mr. and Mrs. Ault and had taken him back to his sergeant for a polygraph. IT18. Mr. Ault ultimately refused to take the polygraph. IT41. He was told the BSO case involved "some type of assault or attempted assault on a young girl." IT19. Mr. Rhodes was not present when Mr. Ault was arrested. IT45. After a meeting at approximately 5-6 p.m., he became the lead detective.

Mr. Rhodes stated that he went to the Broward County Jail at approximately 1:50 p.m. on Wednesday, November 6, 1996. IT20. He stated that Mr. Ault agreed to an interview as long as Mr. Rhodes was the only law enforcement officer present. IT21. He stated that he read Mr. Ault his Miranda rights and that Mr. Ault agreed to talk to him. IT22. Mr. Ault initialed and signed a rights card. IT25. He then began to interrogate Mr. Ault and

he claimed that he admitted involvement and agreed to take the police to the bodies. IT26. Mr. Rhodes claimed that he then had asked an FDLE agent to get a court order allowing him to take Mr. Ault out of the jail. IT28. He got the order and then took Mr. Ault out of the jail and Mr. Ault told them to go to his house. IT30. Mr. Ault then signed a consent to search form. IT30. Two detectives from the City of Ft. Lauderdale met them at the house as it was in the City of Ft. Lauderdale. IT32. They broke in the home and found two bodies in the attic. IT33. They then closed the house up and got a search warrant. IT33. Mr. Ault was taken back to the Oakland Park Police Department and agreed to give a taped statement, but continued to insist that he would only talk to Officer Rhodes. IT35. He arrested Mr. Ault for murder after the taped statement. IT50.

Patricia Geyer, of the FDLE, stated that she assisted the Oakland Park Police Department in this investigation. IT52-3. On November 6, 1996, she went with Officer Rhodes to the Broward county jail to talk to Mr. Ault. IT54. Mr. Ault only wanted to talk to Officer Rhodes. IT54. Mr. Ault took them to his house and signed a consent to search form. IT57. They went in the house. IT58. They returned to the Oakland Park Police Department and Officer Rhodes spoke to Mr. Ault alone. IT59.

Deborah Cox, of BSO, stated that she became involved in the investigation of an attempted sexual battery of Tabitha Wasson,

on January 4, 1996. IT66. On February 6, 1996 she took a statement from Ms. Wasson. IT66. Ms. Wasson claimed that Mr. Ault had attempted to sexually assault her on December 31, 1995. IT66-7. Officer Cox had an address for Mr. Ault and she intended to contact him, but did not because of "caseload" IT69. She claimed that nothing happened on the case from February 6, 1996 to November 5, 1996. IT75. Ms. Cox stated that her husband is an Oakland Park Police officer. IT66. She said that he called her and told her that they had Steven Ault and that he was being questioned concerning the disappearance of two girls. IT70. She went to the Oakland Park Police Department to question Mr. Ault. IT70. She saw Mr. Ault at about 1 p.m. and told him about the incident and he said, "I don't remember anything like that ever happening," and then said, "I don't have anything else to say." IT71. She then placed him under arrest. IT71. She had not read him his Miranda rights. IT72. She claimed that she arrested him because she had probable cause on her case and that she acted without consulting Oakland Park officers. IT72. She claimed that she was aware that Oakland Park was working on a case involving missing children, but that she acted on her own in arresting Mr. Ault. IT81. Mr. Ault was taken to a magistrate hearing on the attempted sexual battery charge on November 6, 1996. XT1855-56. At this hearing, he invoked his right to counsel and to remain silent and the judge

issued an order to this effect. XT1855-56. This was prior to the police interrogation which led to Mr. Ault's statement.

The trial court denied the motion. IIIR403. Defense counsel renewed his motion at the time the statement was introduced. IXT1615.

ARGUMENT

It is undisputed in this case that Mr. Ault had been to a magistrate hearing, had counsel appointed, invoked his rights to counsel and to remain silent and counsel pursuant to the United States and Florida Constitutions, and that the trial court had entered an order that no law enforcement personnel speak to Mr. Ault without his counsel, after his arrest on the attempted sexual battery case. XT1855-56. The issue in this case is whether this mandates the suppression of his statement (and fruits thereof) in the homicide case. The trial court relied on this Court's opinion in Sapp v. State, 690 So. 2d 581 (Fla. 1997) in denying the motion to suppress. However, the present case is significantly different from Sapp. In Sapp, the defendant was arrested for a robbery unrelated to the charges at issue. The next day he signed a form invoking his Fifth and Sixth Amendment rights at first appearances. One week later the police came to speak to him about an unrelated homicide. He made an inculpatory statement. This Court held that the Sixth

Amendment right to counsel is “offense specific” and thus did not prohibit interrogation.

This Court also rejected a Fifth Amendment claim, holding that the Fifth Amendment right to counsel can only be invoked either during custodial interrogation or when it is “imminent”. 690 So. 2d at 586.

This case is significantly different from Sapp. In this case, Mr. Ault was interrogated on this homicide. While he was being interrogated on this homicide, one of the law enforcement officers called his wife, who was an officer with another department. She came and began to question Mr. Ault about another offense and he invoked his right to remain silent. She then arrested Mr. Ault on the other offense. Mr. Ault had never left the police station from the interrogation on the possible homicides. The next day, he was taken to first appearances on this charge, counsel was appointed, he invoked his rights to counsel and to remain silent pursuant to the Florida and Federal Constitutions. The trial court actually entered an order prohibiting law enforcement from speaking to him without his counsel being present. Later the same day the police interrogated Mr. Ault concerning the homicide.

This case is significantly different from Sapp. Mr. Ault first invoked his right to remain silent, during custodial interrogation, on the attempted sexual battery case. This was

immediately after his interrogation on the homicide case. The next day he invoked both his rights to counsel and to remain silent at first appearances. In this case, interrogation on the homicide case was clearly "imminent". Indeed, it had already occurred. This is far different from Sapp, where there was no questioning on the homicide until one week after the invocation of rights at first appearances. This case involves another significant distinction from Sapp. In this case, the defendant had invoked his right to remain silent when questioned on the attempted sexual battery case, which the officer recognized by terminating the interrogation. The defendant in Sapp had never invoked his right to remain silent or right to counsel during any interrogation. The trial court erred in denying Mr. Ault's statements and the fruits thereof as they were taken in violation of his right to remain silent and right to counsel pursuant to the Florida and United States Constitutions. Miranda v. Arizona, 384 U.S. 436 (1966); Edwards v. Arizona, 451 U.S. 477 (1981).

The denial of the motion at issue was clearly harmful. Mr. Ault's statement and the resulting search was the only direct evidence of his guilt in this case. Indeed, the other evidence was scant indeed. Reversal for a new trial is required.

POINT II

THE TRIAL COURT ERRED IN GRANTING THE STATE'S UNFOUNDED CAUSE CHALLENGE.

This issue involves the erroneous grant of the State's cause challenge, over objection, to a juror whose views gave no basis for a cause challenge. This denied Mr. Ault due process of law, right to trial by jury, and subjected him to cruel and/or unusual punishment pursuant the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17, and 22 of the Florida Constitution. Witherspoon v. Illinois, 391 U.S. 510 (1968); Davis v. Georgia, 429 U.S. 122 (1976); Gray v. Mississippi, 481 U.S. 648 (1987); Chandler v. State, 442 So. 2d 171 (1983); Farina v. State, 680 So. 2d 392 (Fla. 1996); Farina v. State, 679 So. 2d 1151 (Fla. 1996).

The State's cause challenge to potential juror, Joyce Reynolds, was granted over defense objection. This was reversible error, requiring a new penalty phase, as the juror's views on the death penalty gave no basis to believe that she would not be fair and impartial on the question of penalty. The standard of review on this issue is abuse of discretion. However, the trial court's discretion is restricted by the requirements of the Florida and United States Constitutions. Farina v. State, 680 So. 2d 392, 396-9 (Fla. 1996).

The following is the entire colloquy with potential juror, Joyce Reynolds.

> MS. REYNOLDS: My name is Joyce Reynolds. R-E-Y-N-O-L-D-S. I've lived in Fort Lauderdale for about

twenty-one years, Broward County for twenty-one years. Previous to that I lived in Connecticut for twenty-one years.

I am a manager of a subway shop out in Sunrise. I have been working there about seven years. I have one daughter, age fifteen. She is still in high school.

My hobbies are swimming, reading, bicycling, and gardening.

Thirteen I've never been a juror.

Fourteen, I don't have any family member in a lawsuit.

Fifteen, no friend, acquaintance or relative in any law enforcement.

Sixteen, nobody in my family has been arrested and number seventeen, no to that, nobody has been the victim of a crime.

IIT375.

PROSECUTOR: Okay. Now, how many people are opposed to the death penalty?

Let's start here. Mr. Simpson, I think you told us that a couple of days ago?

MR. SIMPSON: Yes, sir.

PROSECUTOR: Mrs. Bersch, you also told us that a couple of days ago.

Mrs. Aaron, you had your hand raised, and you hadn't mentioned that a couple of days ago, but we'll talk about it in a little detail. So today is kind of the first time you are telling us that?

MRS. AARON: Yes.

PROSECUTOR: And Mrs. Mendez I saw your hand go up again. Okay. Ms. Mendez, your hands went up a second time.

MRS. MENDEZ: (Nodding in the affirmative.)

PROSECUTOR: I'm sorry. You have to say yes or no because he can't take down your nodding of the head.

MRS. MENDEZ: Yes.

PROSECUTOR: All right. Over on this side, Mr. Simmons and the first row Ms. Reynolds.

IIT573-74.

DEFENSE COUNSEL: Ms. Reynolds, do you think that a person's decision, any person, do you think their decision is better when they are angry or upset or when they are calm and deliberate?

MS. REYNOLDS: I think their decision is better when they are calmer.

MR. KULIK: If you were a juror on a case, and there is something about the case that was upsetting to you, made you angry early do you think that you would be able to make a better decision if, after getting angry and upset you could become calmer and more deliberate about it?

MS. REYNOLDS: Yes, I could.

IVT776-777.

DEFENSE COUNSEL: Ok. You will hear the testimony of a witness which you believe the witness, is it the same as proof beyond a reasonable doubt?

MR. DINOWITZ: That I believe a witness?

DEFENSE COUNSEL: Mr. Reynolds is shaking her head no. Why would you say no?

MS. REYNOLDS: Can you repeat the question?

DEFENSE COUNSEL: Have you had a situation in which you believe people –

MS. REYNOLDS: Yes.

DEFENSE COUNSEL: – but what they told you later turned out not to be accurate, they could be wrong, they could be lying to you?

MS. REYNOLDS: Yes.

DEFENSE COUNSEL: Maybe you didn't understand what they said. It was misleading somewhat so I will ask you again.

Do you think that believing a witness is the same thing as proof beyond a reasonable doubt?

MS. REYNOLDS: What they were saying, no that is the same guy that was pointed out when, in fact, it was incorrect.

DEFENSE COUNSEL: So let me ask you this then let me go to the next person and make it easy on you.

MS. REYNOLDS: Thank you. Right.

IVT785-786.

DEFENSE COUNSEL: Mr. Donnelly has already asked you if you knew anybody, friends, relatives who have died because of an accident, who were killed. I need to know how many people actually ever suffered any experience of someone, a loved one dying.

MR. PATON: Natural causes?

MS. SMITH: Any cause. Is there anyone in this room who has never had a loved one or someone close to them die?

Mr. Weiss, Mrs. Aaron, and also Mr. Dirmann.

Because death is such a part of our lives, it is about tragedy where we know from the Indictment that Deanne and Alicia died, and we know that Steve Ault is facing death. In our own lives because death it has touched almost all of us, we are going to bring, a guarantee of some of those experiences of death from our background to this process, and I'm not telling you that that is wrong, or inappropriate. It is, in fact, very normal. It is to be expected. That is why we need to talk about it.

If we don't talk about it, it is as if it doesn't exist, and that would not be fair to Steve Ault.

So at this time I want you – if you can't do it in public I want you to raise your hand and tell the Judge that you need to talk to us in private. I want you to tell us how any experience in death in your life might effect you with finding either guilty or innocence or a proper penalty while being fair and impartial to Mr. Ault, how nay death might effect your life.

The first row? Let me this: how many aren't sure how it will effect you?

Ms. Reynolds. The rest of you are sure that it won't effect you whatsoever. It is a very difficult topic for us to you talk about.

VT849-850.

DEFENSE COUNSEL: Now, we haven't even shared this idea yet, but I think you got the point of what has been happening.

Now, instead of just explaining whatever you need to say to determine whether or not you – if you find Steve guilty of these crimes, all of these crimes, if you can put aside feelings that you have, legitimate feelings and be fair and impartial now is the time to come clean.

Mr. Simmons?

MR. SIMMONS: Yes.

DEFENSE COUNSEL: You can put all of your feelings aside?

MR. SIMMONS: Yes.

DEFENSE COUNSEL: Mrs. Baker?

MRS. BAKER: No.

DEFENSE COUNSEL: Mr. Paton?

Mr. PATON: No.

DEFENSE COUNSEL: Mr. Frye?

MR. FRYE: Yes.

DEFENSE COUNSEL: Ms. Reynolds?

MS. REYNOLDS: Yes, I would put the my feelings aside.

VT866.

DEFENSE COUNSEL: After all of the questions have been asked and you know it isn't your position to favor the death penalty, what matters in this courtroom today is whether or not you can be fair and impartial in the guilt phase and penalty phase. I am asking, could you do that?

MRS. AARON: Yes, I think I could.

DEFENSE COUNSEL: Thank you.

Mr. Simmons, I believe you already made it clear, but let me just put in on the record. You will not follow the law?

MR. SIMMONS: Not at all.

DEFENSE COUNSEL: Thank you sir.

Ms. Reynolds, I believe you said that you oppose the death penalty?

MS. REYNOLDS: Yes, I do.

DEFENSE COUNSEL: After everything has been discussed in this room, in this courtroom, and you understand that you are in opposition and your feelings about the death penalty are important to you, but not in this process, are you a juror who can be fair and impartial in the guilt phase and the penalty phase of this trial?

MS. REYNOLDS: Yes, I can.

VT895.

The following took place when the prosecution struck Ms. Reynolds for cause.

> PROSECUTOR: The State would move to strike juror number twenty-seven, Joyce Reynolds for cause. Ms. Reynolds indicated that she is opposed to the death penalty and that she could not consider both sentences and cannot make a recommendation of death even if the aggravating circumstances outweigh the mitigating circumstances.
>
> THE COURT: Defense.
>
> DEFENSE COUNSEL: I would submit that Ms. Reynolds is in the same category as Mrs. Aaron. At the end she did state she would follow the court's instructions on the law in both the penalty phase and guilt phase of the trial. She was therefore rehabilitated.
>
> THE COURT: Without any reference to Mrs. Aaron, I agree with the State, I will grant that one.
>
> DEFENSE COUNSEL: We object.
>
> THE COURT: So noted.
>
> DEFENSE COUNSEL: Your Honor, I would again ask that we be able to bring her back in if the State is going to strike her for cause so that we could attempt to rehabilitate her.
>
> THE COURT: I am not going to allow that. I believe there was adequate inquiry extensively on both sides.

IVT792. Defense counsel renewed this objection prior to the jury being sworn VIIIT1408.

Defense counsel's objection was clearly well taken. Although Ms. Reynolds indicated that she was personally opposed to the death penalty, she <u>never</u> indicated that this would prevent her from being fair and impartial in either the guilt or penalty phase. Indeed, she specifically stated on two occasions

that she could be fair and impartial and follow the judge's instructions on the law. The exclusion of this sort of juror is precisely the error condemned by the United States Supreme Court in Witherspoon, Davis, and Gray and by this Honorable Court in Chandler and the two Farina cases.

The United States Supreme Court in its seminal Witherspoon case stated:

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it....
>
> Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

391 U.S. at 519-523 (footnotes omitted).

In Davis, the Court went on to hold that the erroneous exclusion of even one juror under this standard is reversible error, requiring a new penalty phase. In Gray, the Court was asked to overrule Davis and allow a harmless error test. The Court reaffirmed that Davis had created a per se rule of reversal.

> This Court in Davis surely established a per se rule requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but

> who nevertheless under Witherspoon is eligible to serve, has been erroneously excluded for cause. See Davis, 429 U.S. at 123-124, 97 S.Ct. at 399-400 (dissenting opinion).

481 U.S. at 659.

The Court went on to reaffirm the per se reversal rule.

> Because the Witherspoon-Witt standard is rooted in the constitutional right to an impartial jury, Wainwright v. Witt, 469 U.S., at 416, 105 S.Ct., at 848, and because the impartiality of the adjudicator goes to the very integrity of the legal system, the Chapman harmless-error analysis cannot apply. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S., at 23, 87 S.Ct., at 837. The right to an impartial adjudicator, be it judge or jury, in such a right. Id., at 23, n. 8, 87 S.Ct., at 828, n. 8, citing, among other cases, Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (impartial judge). As we stated in Witherspoon, a capital defendant's constitutional right not to be sentenced by a "tribunal organized to return a verdict of death" surely equates with a criminal defendant's right not to have his culpability determined by a "tribunal 'organized to convict.'" 391 U.S., at 521, 88 S.Ct., at 1776, quoting Fay v. New York, 332 U.S. 261, 294, 67 S.Ct. 1613, 1630, 91 L.Ed.2d 2043 (1947).

481 U.S. at 668.

This Honorable Court first had a chance to apply this rule in Chandler.

> Examination of the voir dire record before us indicates that at least two of the venire members for whom the state was granted cause challenges never came close to expressing the unyielding conviction and rigidity of opinion regarding the death penalty which would allow their excusal for cause under the Witherspoon standard set out above. Both these venirewomen stated unequivocally that their feelings toward capital punishment would not affect their ability to return a verdict of guilty, if such a

> verdict were warranted by the evidence. As for the penalty phase, it is not enough that a prospective juror "might go towards" life imprisonment rather than death. It is not enough that he or she "probably would lean towards life rather than death, if [the aggravating and mitigating circumstances] were equal." The excusal for cause of these two individuals clearly violates the guidelines of Witherspoon....
>
> The state urges, however, that any error in the granting of cause challenges was purely harmless. The argument is made that, since the state used a total of only eight of the eighteen peremptory challenges available to it, the challenged members of the venire would have been excused peremptorily had the trial court refused to grant cause challenges. We do not deny that this harmless error theory has a certain logical appeal. Nevertheless, our analysis of the case law, especially the decision in Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976), compels us to conclude that the dismissals for cause complained of by Chandler cannot be sanctioned as "harmless error," regardless of whether the state, at trial, could have peremptorily challenged the same jurors.

442 So. 2d at 173-174 (footnote omitted).

In Farina, this Court faced this issue again. This Court stated:

> In a capital case, it is reversible error to exclude for cause a juror who can follow his or her instructions and oath in regard to the death penalty. See Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 1045, 95 L.Ed.2d 622 (1987); Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976). The relevant inquiry is whether a juror can perform his or her duties in accordance with the court's instructions and the juror's oath. Gray, 481 U.S. at 658, 107 S.Ct. at 2051. The record shows that Hudson was qualified to serve:
>
> > Q [by the trial court]: Miss Hudson – Mrs. Hudson and Mr. Nichols, in this particular case the defendants are charged with murder in the

first degree. Are either of you opposed to the death penalty in an appropriate case?

A [by Hudson]: I have mixed feelings.

Q [by prosecutor]: All right. Miss Hudson, are your feelings such that you would never recommend the death penalty in, let's say, a murder case?

A: It would depend on the circumstances.

Q: Okay. Are you telling me that you would fairly consider the imposition of the death penalty, depending on the evidence you heard in the courtroom?

A: Yes.

Q: Would you be able to do that?

A: Yes.

Q: In this particular case, as well as in every criminal case, the defendants are presumed innocent. Do each of you presume them innocent? And they don't have to prove anything to you? Okay.

I would like to ask you this, Miss Hudson: Is your feelings against the death penalty or your – I think you said you had concerns. Are they such that, are you telling us you would be very reluctant to vote for a death penalty in any case regardless of fact?

A [by defense lawyer]: Objection to the form of the question

THE COURT: Sustained.

Q [by prosecutor]: Can you tell me you could be fair to the state of Florida in this case, and we're going to seek the death penalty. Can you give us a fair shake on that?

A [by Hudson]: I can try.

Q Will you try?

A I will try.

Q In the trial of this case, the judge decides what evidence comes into the courtroom. He doesn't weigh the evidence, it's the jury's responsibility to decide what is credible and how much weight to give it.

Do each of you understand that and will you assume that responsibility if you sit as jurors?

A Yes....

Q I'm asking you this: Because you're concerned about the death penalty, and feel you might have difficulty dealing with that, would that prevent you from finding the defendants guilty of murder in the first degree if you were convinced they were guilty based on the evidence?

A [by Hudson]: If I'm totally, whole heartedly convinced, then I would do what I thought was right.

Q Okay. And that might even include voting guilty of murder in the first degree?

A If they are guilty, yes, or if the person is guilty.

Q Okay. Notwithstanding that might mean you have to sit and listen to whether or not to recommend death, you would still give that part of the case unbiased consideration?

A I would try to do what's right.

After Hudson's examination, State Attorney John Tanner indicated that he wanted to question Hudson further during individual voir dire. The prosecutor changed his mind, however, after the trial judge granted a defense challenge for cause:

PROSECUTOR: While we're at it then, Judge, could we go ahead and challenge Mrs. Hudson for cause?

THE COURT: Let [the defense] object to it will be on the record and it will be granted. Put

> your objections on the record. Tell me why you object.
>
> JEFFREY FARINA'S LAWYER: For the reasons previously stated that the defendant is entitled to a jury of his peers, and that includes people who are not only in favor of the death penalty, but opposed to the death penalty.
>
> THE COURT: I thought it would be interesting to see how it works both ways. So if I grant you [a challenge for cause for another juror], I'm going to grant [the State's challenge].
>
> Mr. Mott [Anthony Farina's lawyer], you join in and the ruling will be the same. If I grant yours, I'll grant [the State's].
>
> ANTHONY FARINA'S LAWYER: I join in, and on the specific grounds that pursuant to the 6th, 8th, 14th amendments to the United States Constitution, article one, section two, nine, 16, 17, and 22.

The Davis Court established a per se rule that requires the vacation of a death sentence when a juror who is qualified to serve is nonetheless excused for cause. See generally Davis,; see also Gray, 481 U.S. at 659, 107 S.Ct. at 2052; Davis, 429 U.S. at 123, 97.S.Ct. at 400 (Rehnquist, J., dissenting). The Davis Court relied on an earlier case in which the Court held that "'a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.'" Id., at 122, 97 S.Ct at 399 (quoting Witherspoon v. Illinois, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1968)).

In this instance, we are bound by the decisions of the United States Supreme Court. In Chandler v. State, 442 So. 2d 171, 173-75 (Fla. 1983), this Court ruled on Davis to vacate death sentences when two jurors were dismissed for cause over the defendant's objection. We found that "at least two of the venire members for whom the State was granted cause challenges never came close to expressing the unyielding conviction and rigidity regarding the death

> penalty which would allow their excusal for cause under the Witherspoon standard." Id. at 173-74.
>
> A review of Hudson's voir dire questioning reveals that while Hudson may have equivocated about her support for the death penalty, her views on the death penalty did not prevent or substantially impair her from performing her duties as a juror in accordance with her instructions and oath. She was qualified to serve under the Witherspoon-Witt standard. Thus, we find that the trial court erred in granting the State's challenge for cause, and Farina's death sentence cannot stand....
>
> The erroneous exclusion of Hudson is not subject to harmless error analysis. The United States Supreme Court determined in Gray that harmless error does not apply because the Witherspoon-Witt standard is rooted in the constitutional right to an impartial jury, which goes to the integrity of the legal system. Gray, 481 U.S. at 688, 107 S.Ct. at 2056. The right to an impartial jury is so basic to a fair trial that its infraction cannot be considered harmless. Id. We emphasize that Gray is controlling. See Chandler, 422 So. 2d at 174 (dismissal of jurors such as Hudson is not subject to harmless error analysis – even if the State could have peremptorily challenged the same juror).

680 So. 2d at 396-98.

The juror's responses in this case are even less equivocal than those in Chandler and Farina. She consistently said that although she opposed the death penalty she would follow the law at both guilt and penalty phases. She is exactly the sort of juror envisioned by Witherspoon and its progeny. Reversal for a new penalty phase is required.

POINT III

THE TRIAL COURT ERRED IN DENYING MR. AULT'S MOTION FOR PENALTY PHASE MISTRIAL.

This issue involves the trial court's denial of a motion for mistrial, and giving an inadequate curative instruction, during the penalty phase, when the prosecutor brought out alleged collateral crimes of which Mr. Ault had never been charged or convicted. The review of the denial of a motion for mistrial is generally subject to an abuse of discretion standard. However, the trial judge's discretion is restricted by the United States and Florida Constitutions as well as caselaw. The denial of this motion denied Mr. Ault a fair penalty phase pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, and Eighth Amendments to the United States Constitution. Reversal for a new penalty phase is required.

The prosecutor brought out an alleged plot by Mr. Ault to kill a deputy and escape, allegedly in response to testimony by Mr. Ault's mother that he was remorseful. Defense counsel brought out the following testimony, on redirect, from Mr. Ault's mother, Barbara Matson.

> Q Why don't we take this opportunity then to tell the jury how you feel about what happened to the victims in this case.
>
> A It's very tough.
>
> Q Try to tell them.
>
> A I am very remorseful. I can't imagine being in his mother's position having two daughters at this age taken away from her, that is pretty horrible and I pray for her. I'm sorry it happened.
>
> Q And has Steve discussed his remorse with you?

A Yes, he has. He has sent me letters and we have talked about it over the phone because as a mother I need to know that he is remorseful. That is just natural to want to know that he is remorseful and feels guilt and shame for what he has done.

Q Are you a hundred percent sure that he is remorseful?

A Yes.

XIIIT2297.

On recross examination, the State brought out the following:

Q Do you think he is remorseful for killing these two girls? You are his mother, right?

A He is remorseful.

Q You wouldn't expect him to tell you that he is (not) remorseful?

A He has shown me other ways through my husband and others.

Q Did he tell you about other incidents after he murdered these two girls when he has been in jail as an example of his remorsefulness?

A We have not talked about it. I have not asked him questions. It has come to light, yes, other things that have happened I am aware of then through other ways.

Q So you are aware then that while he is in jail and expressing this remorse to you by killing these two girls that he was making plans to kill a deputy with a razor blade and escape?

XIIIT2299-2300.

The trial court sustained the defendant's objection to this testimony, but denied his motion for mistrial XIIIT2300-12. The trial court gave the following curative instruction to the jury.

> Ladies and gentlemen, the jury is instructed to disregard the last question by the Assistant State Attorney.

The trial judge refused defense counsel's request to tell the jury that the question is prosecutorial misconduct XIIIT2301-12. Counsel also specifically renewed her motion for mistrial, which the trial court denied XIIIT2301-12.

The trial court erred in this issue in two respects. It erred in failing to rebuke the prosecutor in front of the jury and it erred in denying the motion for mistrial. Of course the judge correctly determined that the admission of testimony concerning remorse did not open the door to such inflammatory evidence. Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Garron v. State, 528 So. 2d 353 (Fla. 1988). However, the trial court erred in failing to tell the jury that the question constituted prosecutorial misconduct. Deas v. State, 119 Fla. 839, 161 So. 729, 731; Barnes v. State, 743 So. 2d 1105, 1107 (Fla. 4th DCA 1999). The trial court also erred in denying the motion for mistrial. The inadequacy of a curative instruction in a situation like this is laid out in this Court's opinion in Geralds. In Geralds, the trial court improperly admitted evidence of the defendant's prior non-violent felony convictions, based on a door opening theory. This Court stated:

> Although the judge gave a so-called "curative" instruction for the jury to disregard the question, such instructions are of dubious value. Once the prosecutor rings that bell and informs the jury that

> the defendant is a career felon, the bell cannot, for all practical purposes, be "unrung" by instruction from the court. See Malcolm v. State, 415 So. 2d 891, 892 n.1 (Fla. 3d DCA 1982) (labeling such an instruction as being "of legendary ineffectiveness").

The error in this case was harmful. The improper question goes directly to the ultimate question in this case; whether the defendant can live in prison or whether the death penalty is the only appropriate sentence. Skipper v. South Carolina, 476 U.S. 1 (1986). There was extensive mental mitigation introduced. Reversal for a new penalty phase is required.

POINT IV

THE TRIAL COURT ERRED IN REFUSING TO ALLOW A DEFENSE EXPERT TO EXPRESS HIS OPINION AS TO THE APPLICABILITY OF A STATUTORY MENTAL MITIGATING FACTOR.

This issue involves the trial court's refusal to allow Dr. Gilbert Raiford, a Professor of Social Work at Barry University to testify as to the applicability of a statutory mental mitigating circumstance, pursuant to Fla. Stat. 921.141(7)(B) (whether the defendant was "under the influence of extreme mental or emotional disturbance") at the time of the offense. This error denied Mr. Ault his rights to due process of law and the effective assistance of counsel pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, and 16 of the Florida Constitution. It also denied him the right to present mitigating evidence and subjected him to cruel and/or unusual punishment pursuant to the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution. Lockett v. Ohio, 438 U.S. 586 (1978). This issue involves the admission of evidence. The standard of review is abuse of discretion. However, the trial court's discretion is limited by the Florida and Federal Constitutions and by the Evidence Code.

Dr. Raiford had a bachelor's and master's degree in Social Work, a master's degree in sociology and a Ph.D. in mental

health XIIIT2412. He had taught Social Work for 30 years and has been a social work practitioner XIIIT2413. He has worked as a mental health consultant, worked with delinquent youth and gangs, and worked with the homeless XIIIT2414. He has taught at Florida International University, Pepperdine University, New York University, University of Kansas, University of Chicago, and Barry University as well in Nigeria, Spain, and Japan XIIIT2414. He teaches courses in human growth and development, case work, social welfare policy, forensic social work and other courses XIIIT 2414,45-6. He had a private practice in which he did psycho-social histories and mental health consultations XIIIT2415. In his practice he has worked with mentally ill and emotionally disturbed people XIIIIT2447. He has previously testified as an expert in social work in a criminal case XIIIT2415-6. He was declared an expert in social work without objection XIIIT2417. He testified concerning the elements of normal human growth and development XIIIT2418.

He interviewed Mr. Ault in order to provide a psycho-social history XIIIT2419. He also reviewed records and interviewed Mr. Ault's mother XIIIT2420. He also reviewed police reports in the case and the reports of psychologists. He stated that social workers look at the causes of human behavior and treating dysfunctional behavior XIIIT2422-3. He stated that social workers utilize the Diagnostic and Statistical Manual of Mental

Disorders, Fourth Edition, just as psychiatrists and psychologists do XIIIT2423.

Dr. Raiford testified as to much of the supporting data concerning his evaluation of Mr. Ault XIIIT2414-31. However, he was prevented from giving his opinion as to the "extreme disturbance" statutory mental mitigator XIIIT2431-45. The following took place during the direct examination of Dr. Raiford:

> Q And in diagnosis, even though you didn't really label it the same way that psychologists do, you don't do the testing, have you found Steve to be emotionally disturbed?
>
> A I would think he is emotionally disturbed, yes.
>
> Q Would you characterize this as extremely emotionally disturbed?
>
> A I would say extremely.
>
> Q You can stop there.
>
> MR. DONNELLY: Objection. He is not qualified to answer that question.
>
> THE COURT: Sustained.

XIIIT2431.

Although there was a lengthy argument over this objection, the trial court ultimately sustained the State's objection XIIIT2431-2445. Although the basis for the trial court's ruling is not entirely clear, it seems to be based on a belief that a social worker is not qualified to render an opinion on this issue, only a psychologist or psychiatrist XIIT2444.

The trial court's ruling was harmful error. Fla. Stat. 90.702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Fla. Stat. 90.702.

As Professor Ehrhardt has noted in his treatise, the methods of gaining the required knowledge are stated in the disjunctive. Ehrhardt, Florida Evidence, Section 702.1, p. 574 (2001 Edition); Lake Hospital and Clinic, Inc. v. Silversmith, 551 So. 2d 538, 545 (Fla. 4th DCA 1989). In the present case, Dr. Raiford was qualified in several respects to speak to the issue of whether Mr. Ault was suffering from an extreme mental or emotional disturbance. He was certainly qualified by academic training. He possessed bachelors and masters degrees in social work, as well as a Ph.D in mental health and had taught social work for 25 years, including human growth and development, a subject directly relevant to the issues at hand. He additionally possessed considerable practical exper-ience in the area. He had done several psycho-social histories in capital cases, had a private practice in social work in which he had done mental health consultations, had previously testified as an

expert in a criminal case, and had been declared an expert in social work in this case, without objection.

The trend in Florida is toward broad admissibility of expert testimony, especially in the mental health field. This is perhaps best exemplified by an analogous case. Rose v. State, 506 So. 2d 467 (Fla. 1st DCA 1987). In Rose, the Court reversed a first degree murder conviction for a new trial due to the trial court's refusal to allow a witness named James Beller testify as a defense mental health expert when the defendant was pursuing an insanity defense. His insanity defense was premised, in part, on a diagnosis of episodic dyscontrol syndrome. Mr. Beller had a Master's degree in psychology. However, he did not have his PhD and was not licensed as a psychologist or as a mental health counselor. He worked under the direction of Dr. Warriner, a clinical psychologist. Mr. Beller administered a battery of tests to the defendant under Dr. Warriner's supervision.

The trial court allowed the following testimony:

> During trial, Dr. Warriner testified as an expert that he utilized Beller's findings to form his conclusion that appellant had suffered from organic brain injury that might lead to impulsiveness. In his opinion, appellant's capacity to form the specific intent to kill was diminished or subsequently impaired. Upon further redirect examination, Dr. Warriner testified that there was a possibility that appellant suffered from episodic dyscontrol syndrome, which syndrome would be consistent with a head injury appellant had suffered in 1965.

> Beller testified only as to the specifics of the test he had administered to appellant and the scores appellant had received. He was not allowed to give any opinions or conclusions relating to the meaning of those scores.

Id. at 469.

The First District held that the refusal to allow Beller to testify as an expert was reversible error. The Court stated:

> Although whether a witness is qualified as an expert is a preliminary question of fact which must be determined by the trial court in the court's discretion: Ehrhardt, Florida Evidence, supra, at 396. In the instant case, because the trial court premised its denial to qualify Beller as an expert on the fact that Beller was not a licensed psychologist, we find the trial court abused its discretion. By that abuse, appellant was effectively deprived of his right to a fair trial and to present witnesses on his behalf.

Id. at 470-471.

The trend to liberal introduction of expert testimony in the mental health field in Florida is exemplified in Provenzano v. State, 750 So. 2d 597 (Fla. 1999). In Provenzano, the trial court had refused to allow a psychologist to testify as an expert in psychology, because her degree was an Ed.D. and not a Ph.D. This Court held this to be error. A recent en banc opinion of the Fourth District Court of Appeal also exemplifies this trend. Broward County School Board v. Cruz, 761 So. 2d 388 (Fla. 4th DCA 2000), affirmed on other grounds in Cruz v. Broward County School Board,___ So.2d ___, 26 Fla. L. Weekly S721 (Fla. Nov. 1, 2001). In Broward County, the unanimous en banc held that a neuropsychologist could testify to the physical causes of

brain damage, despite not being a medical doctor. The court overruled its prior opinion in Executive Car and Truck Leasing, Inc v. DeSerio, 468 So. 2d 1027 (Fla. 4th DCA 1985).

The Florida licensing statutes also support the admissibility of the testimony of a social worker in this issue. The scope of duties of a social worker, outlined in the statute are very broad.

> The "practice of clinical social work" is defined as the use of scientific and applied knowledge, theories, and methods for the purpose of describing, preventing, evaluating, and treating individual, couple, marital, family, or group behavior, based on the person-in-situation perspective of psychosocial development, normal and abnormal behavior, psychopathology, unconscious motivation, interpersonal relationships, environmental stress, differential assessment, differential planning, and data gathering. The purpose of such services is the prevention and treatment of undesired behavior and enhancement of mental health. The practice of clinical social work includes methods of a psychological nature used to evaluate, assess, diagnose, treat, and prevent emotional and mental disorders and dysfunctions (whether cognitive, affective, or behavioral), sexual dysfunction, behavior disorders, alcoholism, and substance abuse. The practice of clinical social work includes, but is not limited to, psychotherapy, hypnotherapy, and sex therapy. The practice of clinical social work also includes counseling, behavior modification, consultation, client-centered advocacy, crisis intervention, and the provision of needed information and education to clients, when using methods of a psychological nature to evaluate, assess, diagnose, treat, and prevent emotional and mental disorders and dysfunctions (whether cognitive, affective, or behavioral), sexual dysfunction, behavioral disorders, alcoholism, or substance abuse. The practice of clinical social work may also include clinical research into more effective psychotherapeutic modalities for the treatment and prevention of such conditions.

Fla. Stat. 491.003(7).

Social workers are given broad powers to "evaluate, assess, diagnose, treat, and prevent mental and emotional disorders". The ability to determine whether a person is "under the influence of an extreme mental or emotional disturbance" pursuant to Fla. Stat. 921.141 is clearly within the ambit of a social worker's statutory authority.

Decisions from other jurisdictions support the ability of a social worker to testify to the issues at hand. Numerous out of state decisions have allowed social workers to testify as experts on mental health issues. In People v. Giles, 192 Colo. 240, 557 P.2d 408 (1976), the Colorado Supreme Court unanimously held that a social worker could testify to a defendant's mental condition in a hearing to determine whether a person found not guilty by reason of insanity is a danger to himself or others. In In Re Detention of A.S., 138 Wash.2d 898, 982 P.2D 1156 (1999), the Washington Supreme Court held that a social worker is qualified to render an expert opinion as to the presence of a mental disorder in an involuntary commitment proceeding. (The Court was interpreting an Evidentiary Rule, ER 702, which was identically worded to Fla. Stat. 90.702. Id. at 917). In In Re Adoption/Guardianship No. CCJ14746, 360 Md. 634, 759 A.2d 755 (1999), the Court held that a social worker could diagnose and give expert opinions concerning mental and emotional disorders

in a termination of parental rights case. The Court in State v. Bordelon, 597 So. 2d 147 (La. App.3 Cir. 1992) reversed for a new trial when the trial court excluded the testimony of a social worker on the issue of the defendant's mental state at the time he waived his rights to remain silent and to counsel. The Court in People v. Scala, 128 Misc.2d 831, 491 N.Y.S.2d 555 (1985) held it proper to appoint a social worker to examine a defendant on the issue of lack of criminal responsibility due to mental disease or defect. The Court stated:

> Clinical social workers, who provide the majority of psychotherapeutic services rendered in the United States (see "Social Workers Vault into a Leading Role in Psychotherapy," N.Y. Times, Section C, Page 1, April 30, 1985) are particularly suited to be of assistance to the courts in resolving clinical-legal issues and in facilitating the effective administration of individualized justice in cases where issues relating to psychosocial dysfunctions and mental disorders are involved.

491 N.Y.S.2d at 564-565.

The Court in People v. Gans, 119 Misc. 843, 465 N.Y.S.2D 147 (1983) held that a social worker could testify to a defendant's mental competency and likelihood of regaining fitness in the future. The Court stated:

> With regard to the question of whether or not a non-medical mental health professional may diagnose mental disorders and provide an expert opinion as to that diagnosis, I note that clinical social work, as a profession, is one of the core mental disciplines. As are psychiatrists and clinical psychologists, clinical social workers are skilled in the diagnosis and treatment of mental disorders. Psychiatrists, who are physicians, bring their expertise in understanding of

> organic pathology, psychopharmacology and other somatic treatments to the mental health field. Clinical psychologists, being scientists who study human behavior as well as being non-medical mental health professionals, bring their particular skills in research and in the study of behavior to the mental health field. It can be noted that clinical social workers, also non-medical mental health professionals, bring their expertise in dealing with the relationship between social and emotional functioning as well as their expertise in social policy and in environmental intervention to the mental health field.
>
> The Diagnostic and Statistical Manual of Mental Disorders – Third Edition (DSM III) represents the current guide for the diagnosis of mental disorders in the United States. The diagnostic criteria set forth in the DSM III were validated during field trials. These field trials were carried out by professionals from the disciplines of Psychiatry, Clinical Social Work and Psychiatric Nursing. Besides psychiatrists, psychologists and clinical social workers served on several of the advisory committees which developed this diagnostic guide and served as consultants to the task force which compiled it. This court is informed that a social worker, Janet Williams, M.S.W., served as Co-principal Investigator and Project Coordinator for the reliability study and field trials of the DSM III. Further, throughout the DSM III references are made to its utilization by "clinicians", not exclusively by psychiatrists. It is clear, that if one is to accept the DSM III as a valid and reliable guide, then one must accept that properly trained psychiatrists, psychologists, clinical social workers and psychiatric nurses are qualified to apply its diagnostic criteria in their diagnostic assessment of patients. I find no merit in any arguments that the application and use of the DSM III diagnoses should be limited to physicians and psychiatrists.

465 N.Y.S.2d at 844-5.

Numerous decisions have held that it is appropriate for social workers to testify to the characteristics of child sexual abuse victims. Rodriguez v. State, 741 P.2d 1200 (Alaska App.

1987); State v. Spigarolo, 210 Conn. 359, 556 A.2d 112 (1989); People v. Beckley, 434 Mich. 691, 456 N.W.2d 391 (1990); State v. Remme, 173 Or. App. 546, 23 P.3d 374 (2001); Duckett v. State, 797 S.W.2d 906 (Tex. Cr. App. 1990), overruled on other grounds in Cohn v. State, 849 S.W.2d 817 (Tex. Cr. App. 1993). In State v. Freeney, 228 Conn. 582, 637 A.2d 1088 (1994), the Court held that a social worker could testify to patterns of conduct of sexual assault victims. In State v. Borrelli, 227 Conn. 153, 629 A.2d 1105 (1993), the Court held that a sociologist could testify to the characteristics of battered woman syndrome. (Dr. Raiford had a Master's degree in sociology as well as his other qualifications.)

The trial court clearly erred in refusing to allow Dr. Raiford to testify as to his expert opinion on this statutory mitigator. This error was harmful in the present case. There was extensive evidence of mental mitigation. The presence of the statutory mental mitigators was a highly contested issue. The failure to allow Dr. Raiford to testify on this issue can not be considered harmless beyond a reasonable doubt.

POINT V

THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION OF HEARSAY EVIDENCE AT THE PENALTY PHASE.

The trial court allowed the State to rely on hearsay evidence at the penalty phase, over objection. This evidence is

subject to an abuse of discretion test. However, this discretion in limited by the State and Federal Constitutions. This denied Mr. Ault his rights to confront witnesses and to due process of law and subjected him to cruel and/or unusual punishment pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Mr. Ault filed pre-trial motions to preclude the use of hearsay in the penalty phase IR187,IIIR583. These motions were denied XIIT2079-81. The State then introduced hearsay testimony on two occasions over contemporaneous objections XIIT2135-2141; XVT2716. The first incident in which the State relied on hearsay involved the testimony of a police officer, George Rylander, concerning a prior violent felony XIIT2135-41. The following took place in the direct examination of Mr. Rylander by the prosecution.

Q Good afternoon, sir.

A Good afternoon.

Q Who are you employed by?

A The City of Sunrise Police Department.

Q In what capacity?

A Currently as a police officer.

Q How long have you been employed with the Sunrise Police Department?

A Approximately twelve and a half years.

Q I would like to direct your attention to March 14th, 1994. Did you become involved in an investigation into the sexual battery of a person by the name of Nicole Gainey?

A Yes, sir, I did.

Q How did you become involved in that investigation and what role did you have in the investigation?

A At the time, I was assigned the case to conduct an investigation. I went to Hollywood to meet with the victim and the parents.

Q Who did you meet with there?

A I met with the mother and the victim Nicole Gainey.

Q How old was she at the time?

A At the time, six and a half.

Q Did you meet with the hospital personnel who had treated Miss Gainey?

A Subsequently, yes.

Q What information were you provided with respect to any injuries that Miss Gainey had?

DEFENSE COUNSEL: Objection. Hearsay, Your Honor.

THE COURT: Objection what?

DEFENSE COUNSEL: Hearsay.

THE COURT: Overruled.

A The nurse practitioner at the sexual abuse treatment division after the examination of the victim told me what she had observed which was tears to her hymen.

Q Can you describe to the members of the jury what your investigation revealed as to what occurred to Miss Gainey?

A Upon talking to the child victim, after building a rapport with her, she told me and that she went to a store to pick up the food.

DEFENSE COUNSEL: Your Honor, I need to object at this point. Can we sidebar?

THE COURT: Yes.

(Thereupon, a sidebar conference was had outside the hearing of the jurors.)

DEFENSE COUNSEL: The objection, Judge, would be this is hearsay.

THE COURT: This is going to be examined even more closely, then it would at th trial court level. The officer has already testified that the victim had tears in the hymen on a pure hearsay basis.

DEFENSE COUNSEL: That is the opinion of the expert, obviously, at some point that he talked to, it is not something that we can present based purely on this officer's testimony. We can't.

THE COURT: You can recross-examine him on it.

DEFENSE COUNSEL: And now, I guess the prosecutor is going to take him through everything that he says with regard to every witness. We would like a continuing hearsay objection to individual statements. I think the law requires the Court scrutinize each individual statement with regard to these witnesses, whether it very strictly fits one of hearsay or whether there is some special or prejudicial reliability for each element.

As to hearsay, it has to have difference and it clearly fits an exception and it has to be found to be reliable for some reason and that is actually the motion that Ms. Smith filed, the case cites in it.

THE COURT: State.

PROSECUTOR: That is exactly what the Supreme Court wants me to do is on a case where you have a six and a half year old victim of a rape to put on lead detectives so that I don't have to put on the child

and bring up the emotional aspects of the child, on one so young, whose prior violent felony convictions for Supreme Court has said it is fine to put the lead detectives to give a synopsis of the case so that the jury can understand what the defendant, the circumstances of the crime that he has been convicted of, that is what the detective is doing.

THE COURT: Overruled.

(Thereupon, the sidebar conference was concluded and the following proceedings were had in open court.)

PROSECUTOR:

Q Can you tell us what occurred then?

A I interviewed her as to what had occurred and she told me that she was staying at a trailer with her mother at a park in Sunrise called Markham Park and they had a neighbor who she called Steve who they were friends were her family, they were friends.

On the date of the incident she said they had gone to the store, Steve had gone to Winn-Dixie to pick up items for Biscayne which is the district right outside the park.

Upon getting those things she said he bough her some pads to color and then returned back to the park. She stated that she was driven to a isolated area within the park. She said, you know, it began raining and they had driven down a dirt path.

Once down at the dirt path, she said that the defendant had told her to take her pants off and she refused, at which time he yelled at her, firmly slapped her on the buttocks and removed her pants and panties.

She said he then put his fingers inside of her. She said she cried because it hurt.

Subsequently they began driving back toward the main road within the same park and at one point she tried to get out and he pulled her back in.

> Once he drove her back to her trailer she immediately went into the trailer and told her mom what happened.

XIIT2135-40.

The prosecution again presented hearsay evidence in the penalty phase over objection in its rebuttal portion of the penalty phase. The State called one of Mr. Ault's sisters, Lisa Allmand, as a rebuttal witness. The following took place during her direct examination by the prosecution.

> Q Did there come a time when – when was the first time that you had heard anything that Steven was sexually abused as a child?
>
> A Not until around November, December, three years ago.
>
> Q After this murder occurred?
>
> A Yes.
>
> Q Who did you hear that information from?
>
> A My mother.
>
> Q What did your mother tell you?
>
> A She would just say –
>
> DEFENSE COUNSEL: Objection, Your Honor. This is not the kind of hearsay that is admissible.
>
> THE COURT: I believe it is. Overruled.
>
> A She said that Steve had told her that my brother had been raping him, abusing him since he was little.
>
> Q And when did she tell you that Steven had told her that?
>
> A After all this had happened.
>
> Q After the murder had happened?

A Yes, in November.

Q That is when your mother informed you that she first found out that Steven told her that?

A Yes, sir.

XVT2715-16.

Both of these statements were inadmissible hearsay and denied Mr. Ault his rights of due process of law and to confront and cross examine witnesses pursuant to the Florida and United States Constitutions. Appellant concedes that the analysis of Fla. Stat. 921.141(1) which this Court has historically employed would allow the type of testimony given by Officer Rylander. Rhodes v. State, 547 So. 2d 1201,1204 (Fla. 1989). However, Mr. Ault would urge this Honorable Court to revisit its analysis of this issue and hold this type of evidence to be inadmissible as violative of the Confrontation Clauses of the United States and Florida Constitutions.

Fla. Stat. 921.141(1) states in part:

> Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

Fla. Stat. 921.141(1).

The primary case of this Court interpreting this section is Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). In Rhodes, this Court stated:

> In his first point concerning the penalty phase of his trial, Rhodes claims the trial court improperly admitted the testimony of Captain Jerry Rolette of the Mineral County, Nevada sheriff's office regarding his investigation of the battery with a deadly weapon and attempted robbery offenses for which Rhodes was convicted in Nevada. Captain Rolette's testimony followed the introduction into evidence of a certified copy of Rhodes' Nevada judgement and sentence showing his conviction for these offenses. As part of his testimony Captain Rolette identified a tape recording of an interview he conducted with the sixty-year-old victim. The tape recording was subsequently admitted into evidence and played for the jury. Rhodes argues that Captain Rolette's testimony and the tape recording were highly prejudicial to his defense. Moreover, Rhodes contends that by allowing the jury to listen to the tape recording of Rolette's interview with the Nevada victim, the trial court denied Rhodes' his sixth amendment right to confront and cross-examine witnesses.
>
> This Court has held that it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction. See Thompkins v. State, 502 So. 2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987); Stano v. State, 473 So. 2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986). Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence. It was not error for the trial court to admit Captain Rolette's testimony.
>
> However, we do find error in the introduction of the tape recorded statement of the Nevada victim. While hearsay evidence may be admissible in penalty phase

> proceedings, such evidence is admissible only if the defendant is accorded a fair opportunity to rebut any hearsay statements. § 921.141(1), Fla. Stat. (1985). The statements made by the Nevada victim came from a tape recording, not from a witness present in the courtroom. In Engle v. State, 438 So. 2d 803, 814 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984), we stated:
>
> > The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the fourteenth amendment to the United States Constitution. Pointer v. Texas, 480 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). This right of confrontation, protected by cross-examination, is a right that has been applied to the sentencing process. Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).
>
> Obviously, Rhodes did not have the opportunity to confront and cross-examine this witness. By allowing the jury to hear the taped statement of the Nevada victim describing how the defendant tried to cut her throat with a knife and the emotional trauma suffered because of it, the trial court effectively denied Rhodes this fundamental right of confronting and cross-examining a witness against him. Under these circumstances if Rhodes wished to deny or explain this testimony, he was left with no choice but to take the witness stand himself.

547 So. 2d at 1204.

This analysis misses the point of the Confrontation Clause and is internally contradictory. This Court correctly points out that a defendant is denied his Confrontation Clause rights by the playing of the tape as there is no ability to cross-

examine the witness. However, this Court's statement that the admission of testimony of the investigating officer is admissible as the officer is available for cross-examination misses the mark. A police officer's testimony as to his/her investigation virtually always relies on information relayed to him/her by other persons, unless the officer is an eyewitness. Having the officer available for cross-examination does not satisfy the requirements of the Confrontation Clause when the officer is relaying statements of other persons. This Court has recognized this in very similar situations in the guilt phase context. Wilding v. State, 674 So. 2d 114 (Fla. 1996).

> Even if reversal were not required because of jury misconduct, reversal would be necessary because of two other errors that occurred in this trial. First, we agree that it was error to admit testimony that the lead detective in the murder investigation received an anonymous tip that named Neil Wilding in connection with the murder.
>
> During direct examination of the detective, the prosecutor asked whether the anonymous tip received by the detective gave the name Neil Wilding. The detective was allowed, over objection, to answer that it did. The detective further testified that the department began its investigation of Wilding from the tip and "verified a lot of information that we received in the tip and developed additional information." The detective went on to explain that the police interviewed Wilding's family and friends.
>
> The State maintains that this testimony was properly admitted because, given the fact that it took four years to arrest Wilding for the murder, the testimony was relevant "to show the logical sequence of events regarding the murder investigation." We cannot agree.

While it might have been permissible to allow the detective to testify that police began the investigation because of a "tip" or "information received," this testimony clearly went beyond that authorized in State v. Baird, 572 So. 2d 904 (Fla. 1990). In Baird, we held that it was error for an investigator to testify that he received information that the defendant, who was on trial for racketeering and bookmaking, was a major gambler and operating a major gambling operation in the area. We explained:

> [W]hen the only purpose for admitting testimony relating accusatory information received from an informant is to show, a logical sequence of events leading up to an arrest, the need for the evidence is slight and the likelihood of misuse is great. In light of the inherently prejudicial effect of an out-of-court statement that the defendant engaged in the criminal activity for which he is being tried, we agree that when the only relevance of such a statement is to show a logical sequence of events leading up to an arrest, the better practice is to allow the officer to state that he acted upon a "tip" or "information received," without going into the details of the accusatory information.

572 So. 2d at 908.

We recognize that the information received in the tip in this case was not detailed to the jury to the same extent as was the information received in Baird. However, similar evils are involved in both cases. As noted by the Third District Court of Appeal in Postell v. State, 398 So. 2d 851, 854 (Fla. 3d DCA), review denied, 411 So. 2d 384 (Fla. 1981) (footnote omitted), where "the inescapable inference from testimony [concerning a tip received by police] is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated."

In this case, even though the detective never specifically repeated what the informant told him, the

> clear inference to be drawn from the testimony was that the informant had implicated Wilding in the murder and the information received was reliable because it had been verified by police who talked to Wilding's family and friends. Thus, the jury was led to believe that an unidentified persons, who did not testify and was not subject to cross-examination, had given the police evidence of Wilding's guilt, evidence that upon investigation proved to be reliable.

674 So. 2d at 118-119.

Applying the analysis in Wilding to the situation at hand clearly shows that the testimony at issue was violative of the Confrontation Clause. Officer Rylander and Ms. Allmand did not merely provide "a clear inference" that another witness had provided adverse information they virtually quoted these witnesses. This is in clear violation of the Confrontation Clause.

The testimony at issue here is prejudicial. Officer Rylander was the only witness to relate the highly inflammatory details of an attempted sexual battery on a six year old. Ms. Allmand's testimony was used to question the veracity of Mr. Ault being the victim of sexual abuse by his brother. These pieces of evidence can not be seen to be harmless beyond a reasonable doubt in a case in which substantial mitigation was introduced and three jurors voted for life. Reversal for a new penalty phase is required.

POINT VI

THE TRIAL COURT ERRED IN DENYING MR. AULT'S REQUEST TO DISCHARGE PENALTY PHASE COUNSEL.

The trial court erred in handling Mr. Ault's request to discharge penalty counsel in two respects. (1) It conducted an inadequate hearing on his motion. (2) It failed to inform him of his right to proceed pro se when it denied the motion. Review of this issue is based on an abuse of discretion standard. However, the trial judge's discretion is constrained by the United States and Florida Constitutions and by case law. These errors individually and cumulatively denied Mr. Ault due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, and 16 of the Florida Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. It also would subject him to Cruel and/or Unusual Punishment pursuant to Article I, Section 17 of the Florida Constitution and the Eighth Amendment to the United States Constitution.

Approximately one month before trial, Mr. Ault filed a motion to dismiss his penalty phase counsel SRIII413-5. In the motion he specifically alleged that his counsel had failed to make adequate investigation and preparation for the penalty phase and that she had failed to retain mental health professionals in order to prepare for the penalty phase SRIII413-5. The trial court's hearing on this motion was inadequate. In the hearing, the trial judge only questioned Mr. Ault and never questioned his penalty phase counsel concerning

the issues raised in Mr. Ault's motion. The hearing is as follows:

> HOWARD STEVEN AULT was called as a witness on his own behalf and after having been first duly sworn, was examined and testified as follows:
>
> THE COURT: Mr. Ault, in your motion you have indicated, among other things, that your court appointed counsel for the death penalty phase knowingly and wilfully failed to make adequate investigations and to prepare you for the penalty phase. Is that correct?
>
> MR. AULT: Yes.
>
> THE COURT: All right. Now, you want to fire your attorney; is that correct?
>
> MR. AULT: Yes.
>
> THE COURT: All right. Do you have any specific complaints besides what you just quoted?
>
> MR. AULT: She's not going to be ready on the 26th. Kevin is going to be read to go on the 26th. Kevin is prepared to try the case.
>
> THE COURT: I didn't ask you that. What are your specific complaints with reference to Ms. Smith?
>
> MR. AULT: She isn't going to be ready on the 26th.
>
> THE COURT: Has she done anything wrong?
>
> MR. AULT: Not really, no.
>
> THE COURT: Is she incompetent in your opinion?
>
> MR. AULT: No.
>
> THE COURT: Is there anything she has done that you don't thing she should have done? Answer me.
>
> MR. AULT: She hasn't appointed a psychologist yet.
>
> THE COURT: Is there anything else?

MR. AULT: No.

THE COURT: Do you have any evidence that she has knowingly and wilfully failed to make adequate investigations in this matter?

MR. AULT: No.

THE COURT: None?

MR. AULT: No.

THE COURT: Outside of the psychologist matter, is there any specific complaint about your representation by Ms. Smith?

MR. AULT: No.

THE COURT: Is there anything else?

MR. SMITH: No.

THE COURT: I will deny your motion. Is there anything else we need to address?

MS. SMITH: No.

THE COURT: Based on your representation, I want it perfectly clear that there is nothing indicating that she has been ineffective and incompetent in her representation of you.

MR. AULT: No.

VSR457-459.

It is clear that the trial judge never resolved the complaints raised in Mr. Ault's written motion. In addition, Mr. Ault orally reaffirmed that his counsel had failed to make adequate investigation and preparation and had not retained a mental health professional. The trial judge failed to ask defense counsel to clarify these issues. Indeed, he did not ask

defense counsel any questions at all. Additionally, the judge did not explain to Mr. Ault his right to go pro se when he denied the motion.

In the seminal case of Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973) the Court outlined the procedure to be followed when a defendant complains about the effectiveness of counsel.

> It follows from the foregoing that where a defendant, before the commencement of trial, makes it appear to the trial judge that he desires to discharge his court appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reason for the request to discharge. If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

274 So. 2d 255-256 (emphasis supplied). This Court has expressly adopted this formulation from Nelson. Hardwick v. State, 521 So. 2d 1071, 74-5 (Fla. 1998).

It is well settled that it is reversible error to fail to question both the defendant and counsel concerning the allegations of ineffectiveness. Perkins v. State, 585 So. 2d 390 (Fla. 1st DCA 1991), disapproved of on other grounds in Heuss

v. State, 687 So. 2d 823 (Fla. 1996); Davenport v. State, 596 So. 2d 92 (Fla. 1st DCA 1992); Kearse v. State, 605 So. 2d 534 (Fla. 1st DCA 1992); Jones v. State, 658 So. 2d 122 (Fla. 2d DCA 1995); Burgos v. State, 667 So. 2d 1030 (Fla. 2d DCA 1996). The trial court completely failed to question counsel in this case. Reversal for a new penalty phase is required.

It is also clear that if the trial court denies a defendant's motion to dismiss court appointed counsel, based on allegations of ineffective assistance of counsel, it must inform the defendant of his/her right to proceed pro se. Taylor v. State, 557 So. 2d 138 (Fla. 1st DCA 1990), disapproved of on other grounds in Heuss v. State, 687 So. 2d 823 (Fla. 1991); Jackson v. State, 572 So. 2d 1000 (Fla. 1st DCA 1990); Matthews v. State, 584 So. 2d 1105 (Fla. 2nd DCA 1991), receded from on other grounds in Bowen v. State, 677 So. 2d 863 (Fla. 2d DCA 1996); Reddick v. State, 636 So. 2d 176 (Fla. 2d DCA 1994); Lewis v. State, 623 So. 2d 1205 (Fla. 4th DCA 1993); Chiles v. State, 454 So. 2d 726 (Fla. 5th DCA 1984). It is clear that the judge also failed in this respect. Reversal for a new penalty phase is required.

POINT VII

THE FELONY MURDER AGGRAVATING CIRCUMSTANCE (FLORIDA STATUTES 921.141(5)(d)) IS UNCONSTITUTIONAL.

The felony-murder aggravating circumstance (Florida Statute 921.141(5)(d)) violates both the Florida and United States Constitutions. The use of this aggravator renders Mr. Ault's death sentence unconstitutional pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This is a pure issue of law which this Court reviews de novo. Appellant acknowledges that this Court has previously rejected this issue.

Mr. Ault filed a motion to declare this aggravator unconstitutional IIIR443;IV679-684. The jury was instructed on this aggravating circumstance and the trial court found it VIR901-954;ISR2912-2928.

Aggravating circumstance (5)(d) states:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Fla. Stat. 921.141.

All of the felonies listed as aggravators are also felonies which constitute felony murder in the first degree murder statute. Fla. Stat. 784.04(1)(2)2.

This aggravating circumstance violates both the United States and Florida Constitutions. Under the Eighth and

Fourteenth Amend-ments an aggravating circumstance must comply with two requirements before it is constitutional. (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 456 U.S. 410 (1982). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Zant, supra.

The felony murder aggravator fulfills neither of these functions. It performs no narrowing function whatsoever. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill. However, persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with "heightened premeditation." See Fla. Stat. 921.141 (5)(i). Rogers v. State, 511 So. 2d 526 (Fla. 1987). It is irrational to make a person who does not kill and/or intend to kill automatically eligible for the death penalty while a person who kills with a premeditated design is not automatically eligible for the death penalty. This aggravating circumstance violates the Eighth and Fourteenth Amendments pursuant to Zant, supra. It also violates Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

Three different state supreme courts have held this aggravator to be improper under state law, their state constitution, and/or the federal constitution. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979); Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317, 341-347 (Tenn. 1992). This Court should declare this aggravator unconstitutional pursuant to the Eighth Amendment and Article I, Section 17 of the Florida Constitution.

The error in this case is harmful. The erroneous consideration of this aggravator could well have tipped the balance towards death.

POINT VIII

THE DEATH SENTENCE VIOLATES APPRENDI V. NEW JERSEY, 530 U.S. 466, 120 S.Ct. 2348 (2000).

This issue involves several related errors which combine to render the death sentence unconstitutional under the Florida and United States Constitutions. Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984). This is a pure issue of law, which this Court must review de novo. These errors include: (1) The jury made no finding of aggravating circumstances. (2) The jury made no finding that the aggravating circumstances are of sufficient weight to call for the death penalty. (3) The failure to instruct the jury that this finding must be beyond a reasonable doubt. (4) The jury's recommendation of death was only by a

vote of 9 to 3. (5) The indictment contains no notice of aggravating circumstances. Mr. Ault acknowledges that this Honorable Court has rejected similar arguments in Mills v. Moore, 786 So. 2d 532 (Fla. 2001). However, the United States Supreme Court has granted certiorari on a similar issue. Ring v. Arizona, ___ S.Ct. ___, 2002 WL 27836, 70 USLW 3246 (U.S.Ariz. Jan. 11, 2002). Appellant would urge this Honorable Court to reconsider its position in light of Ring.

Mr. Ault filed a Motion for Statement of Aggravating Circumstances IR147. He filed a Motion to declare Fla. Stat. 921.141 unconstitutional due to the fact that the jury's penalty recommendation is only by a bare majority IIR231;IVR698-700. He filed a Motion For Jury Fact Finding as to aggravating circumstances IIR241;IVR636-637. Mr. Ault filed a Motion requesting special verdicts as to aggravating circumstances IIR254-256. Thus, all of the issues were raised in the lower court.

Apprendi requires a rethinking of the role of the jury in Florida. The Court in Apprendi described its prior holding in Jones v. United States, 526 U.S. 227 (1999).

> The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.
>
> Our answer to that question was foreshadowed by our opinion in Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), construing a federal statute. We there noted that "under the Due

> Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id., at 243, n.6, 119 S.Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

This case shows several violations of Apprendi. Under Apprendi the jury must find the aggravating circumstances. The aggravating circumstances actually define which crimes are potential death penalty cases.

> With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them – facts in addition to those necessary to prove the commission of the crime – whether the crime was accompanied by aggravating circumstances sufficient to require death or whether there were mitigating circumstances which require a lesser penalty.

State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

It is clear that under Florida law the conviction of first degree murder alone does not make a person eligible for the death penalty. The jury must also find aggravating circumstances. This fact is also recognized by Fla. Stat. 921.141(7).

> (7) Victim impact evidence. – Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence.

It is only upon proving aggravating circumstances that the defendant becomes eligible for the death penalty.

The idea that the jury must find aggravating circumstances is further supported by the analysis in Apprendi. First, the proof of the aggravating circumstances is often "hotly disputed" as was the bias issue in Apprendi. 120 S.Ct. at 2354-5. Secondly, at least two of the aggravators at issue here; (6)(e) "The crime was committed to avoid arrest". (6)(f); "The crime was committed in a cold, calculated, and premeditated manner" directly relate to Mr. Ault's intent during the offense. The Court in Apprendi heavily relied on this aspect.

> The text of the statue requires the factfinder to determine whether the defendant possessed, at the time he committed the act, a "purpose to intimidate" on account of, inter alia, race. By its very terms, this statue mandates an examination of the defendant's state of mind – a concept known well to the criminal law as the defendant's mens rea.... It is precisely a particular mens rea that the hate crime enhancement statue seeks to target. The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense "element."

120 S.Ct. at 2364 (footnote omitted).

Third, it must be noted that four out of five aggravators at issue here directly relate to the offense itself. (6)(e) Avoid arrest. (6)(f) CCP. (6)(h) Especially heinous, atrocious, or cruel. (6) (d) During an enumerated felony (kidnapping). The Court relied on this factor in Apprendi in explaining why the exception it had previously approved in

Almendarez-Torres v. United States, 523 U.S. 224 (1998) should not be extended.

> New Jersey's reliance on Almendarez-Torres is also unavailing. The reasons supporting an exception from the general rule for the statute construed in that case do not apply to the New Jersey statute. Whereas recidivism "does not relate to the commission of the offense" itself, 523 U.S. at 230, 244, 118 S.Ct. 1219, New Jersey's biased purpose inquire goes precisely to what happened in the "commission of the offense." Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

120 S.Ct. 2366. Here, only the prior violent felony aggravator (6)(b) could conceivably fit in this exception. It should be noted that Apprendi specifically notes that Almendarez-Torres may have been incorrectly decided. Id. at 2362. In the concurring opinion of Justice Thomas, he specifically states that Almendarez-Torres was incorrectly decided. Id. at 2378-80.

The difference between the two potential penalties, death and life imprisonment, is of the greatest magnitude.

> The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The Court in Apprendi relied on the potential difference in finding constitutional significance to the increase.

> The constitutional question, ... is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count. The finding is legally significant because it increased – indeed, it doubled – the maximum range within which the judge could exercise his discretion, converting what otherwise was a maximum 10-year sentence on that count into a minimum sentence.

120 S.Ct. At 2354.

An additional constitutional error is that the jury made no finding that the aggravators were sufficiently weighty to call for the death penalty. Florida law requires not only the presence of aggravators, but that they are sufficiently weighty to warrant the death penalty. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). There was no jury finding that the aggravating circumstances are sufficiently weighty to call for the death penalty.

Apprendi was also violated in that the jury was not instructed that it had to find, beyond a reasonable doubt, that the aggravating circumstances must be sufficiently weighty to call for the death penalty or that it must find, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating circumstances. As to the first aspect the jury was told:

> It is your duty to follow the law that will now be given to you by the Court and render to the Court an

> advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

XVIT2911. The jury was given no guidance as to by what standard it would have to find the aggravators sufficiently weighty to call for the death penalty.

The jury was also given no guidance as to by what standard it would determine whether aggravating circumstances outweigh mitigating circumstances.

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole.
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

XVIT2918. Not only does this instruction fail to tell the jury that it must find <u>beyond a reasonable doubt</u> that aggravating circumstances must outweigh mitigating circumstances in order to impose a death sentence, it affirmatively tells them that mitigating circumstances must outweigh aggravating circumstances in order to impose a life sentence. This violates <u>Apprendi</u>'s requirement that any fact which increases the punishment, with the possible exception of recidivism, must be proven beyond a reasonable doubt.

An additional violation of Apprendi is the fact that the jury's verdict in support of death was only by a vote of nine to three. In Johnson v. Louisiana, 406 U.S. 356 (1972), the Court upheld a system whereby verdicts in serious felonies must be by at least nine votes out of twelve and verdicts in capital cases must be unanimous. In Apodaca v. Oregon, 406 U.S. 404 (1972), the Court upheld verdicts of 10-2 and 11-1 in non-capital felonies. In Burch v. Louisiana, 441 U.S. 130 (1979), the Court held that a six person jury must be unanimous. The Court took pains to note that Apodaca was a non-capital case. 441 U.S. at 136. The U.S. Supreme Court has not specifically reached the issue of whether a unanimous verdict is required in a capital case.

The Florida courts have held that unanimity is required in a capital case. Williams v. State, 438 So. 2d 781, 784 (Fla. 1983); Jones v. State, 92 So. 2d 261 (Fla. 1956); Brown v. State, 661 So. 2d 309 (Fla. 1st DCA 1995); Flanning v. State, 597 So. 2d 864 (Fla. 3rd DCA 1992). The nine to three verdict is in violation of this rule.

The indictment in this case is also defective pursuant to Apprendi. The indictment contains no mention of any aggravating factors or of any allegation that the aggravating factors are sufficiently weighty to call for the death penalty IR1-3.

The reasoning of Apprendi is consistent with decisions of the Florida courts. In State v. Overfelt, 457 So. 2d 1385 (Fla. 1984), this Court stated:

> The district court held, and we agree, "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." 434 So. 2d at 948. See also Hough v. State, 448 So. 2d 628 (Fla. 5th DCA 1984); Smith v. State, 445 So. 2d 1050 (Fla. 1st DCA 1984); Streeter v. State, 416 So. 2d 1203 (Fla. 3d DCA 1982); Bell v. State, 394 So. 2d 570 (Fla. 5th DCA 1981).

457 So. 2d at 1387. The District Courts of Appeal have consistently held that a three year mandatory minimum can not be imposed unless the use of a firearm is alleged in the indictment. Peck v. State, 425 So. 2d 664 (Fla. 2nd DCA 1983); Gibbs v. State, 623 So. 2d 551 (Fla. 4th DCA 1993); Bryant v. State, 744 So. 2d 1225 (Fla. 4th DCA 1999). The requirements of Apprendi must apply to the penalty phase of a capital case under the Florida and Federal Constitutions. Mr. Ault's sentence must be reduced to life imprisonment or the case must be remanded in light of Apprendi.

POINT IX

THE TRIAL COURT ERRED IN SENTENCING APPELLANT ON COUNTS V-VIII.

Mr. Ault was sentenced pursuant to the 1995 Sentencing Guidelines which this Court found to violate the Florida

Constitution. Heggs v. State, 759 So. 2d 620 (Fla. 2000). The offense in this case occurred on November 20, 1996 IR1-3. Thus, this case falls within the window period for Heggs relief. Trapp v. State, 760 So. 2d 924. Under the 1995 Guidelines, Mr. Ault scored 437 points, which yielded a range of 306.75 months to 511.25 months VR958-962. The trial court imposed sentences of sentences of 511 months on Counts V and VI and to 360 months on Counts VII and VIII VR941-952. The trial court gave no reasons for a guidelines departure and specifically denied the State's motion to depart VR897-900. The trial court made all these sentences consecutive to each other and consecutive to Mr. Ault's sentences of death and life imprisonment and Counts I-IV. VR927-8.

The sentences in this case were illegal in two respects. First, the sentences were all consecutive. The total sentence was well beyond the top of the guidelines range without a written reason for departure. Thus, the consecutive sentences were an illegal departure sentence under any version of the Sentencing Guidelines. Rease v. State, 493 So. 2d 454 (Fla. 1986). Additionally, the sentences were imposed under the unconstitutional 1995 Guidelines. Under the 1994 Guidelines, Mr. Ault scored 205.6 points, with a range of 133.2 months to

222 months. Appendix. Mr. Ault must be resentenced to a total sentence within this range on Counts V-VIII.[1]

[1] There was no objection to these errors below. (However, the Heggs objection could not be filed as the case had not been decided yet.) Normally, this would require appellate counsel to file a Motion to Correct Sentencing Error pursuant to Florida Rule of Criminal Procedure 3.800(b). However, this rule specifically exempts cases in which a death sentence is imposed and direct appeal jurisdiction is in this Court. Thus, this is appellate counsel's first opportunity to bring these issues before a court.

CONCLUSION

WHEREFORE Mr. Ault's conviction and/or death sentence must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Leslie Campbell, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this _____ day of January, 2002.

_____
Attorney for Howard S. Ault

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately this _____ day of January, 2002.

_____
Attorney for Howard S. Ault