IN THE SUPREME COURT OF FLORIDA

RONALD WOODS,

Appellant,

v.

CASE NO. 64,509

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR UNION COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

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INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Ronald Woods is the appellant in this capital appeal. The record on appeal consists of 15 volumes, and references to the record will be indicated by the letter "R" while references to the transcript itself will be indicated by the letter "T." References to the supplemental record on appeal will be indicated by the letters "SR."

II STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Union County on June 7, 1983, charged Leonard Bean and Ronald Woods with one count of first degree murder, three counts of attempted first degree murder and one count each of possession of contraband in a state correctional institution (R-1-6).

Both men pled not guilty to the charges (R-11-12) and filed several pretrial motions. Of particular significance to this appeal, they filed the following motions:

1. Motion for individual voir and sequestration of jurors during voir dire (R-64). Denied (R-784).

2. Motion to exclude certain prospective jurors (correctional officers, their spouses, and relatives) (R-70). Granted in part (R-435).

3. Motion for change of venue (R-425). Denied.

5. Motion to continue (R-47). Denied (R-814).

Bean and Woods proceeded to trial on September 26, 1983, before Judge R. A. Green. Woods was found guilty of the crimes charged, and Bean was found guilty of the murder and possession charges and one count of attempted murder (R-592-597).

Accordingly, Bean and Woods proceeded to the sentencing phase of the trial, and after hearing the evidence, argument, and instructions, the jury recommended by a vote of 9 to 3 for life for Bean, and 7 to 5 for death of Woods (R-600-601).

The court following these recommendations, sentenced Bean to life (R-681) for the murder followed by a consecutive sentence of 30 years for the attempted first degree murder (R-682) and 15 years for the possession of contraband conviction (R-683). The sentences are to be served consecutively (R-683).

The court sentenced Woods to death for the murder (R-653-657) and sentenced him to consecutive 30 year terms for the attempted first degree murder convictions (R-660-663) and 15 years for the possession of contraband conviction (R-663).

In sentencing Woods to death, the court found in aggravation that: (1) Woods was under sentence of imprisonment at the time of the murder; (2) the murder was committed to disrupt or hinder the lawful exercise of any government function or the enforcement of laws (R-654).

The court found in mitigation that Woods was 18 years old (R-655).

This appeal follows.

III STATEMENT OF THE FACTS

Sometime during the morning of May 5, 1983, Correctional Officers Dennard and Anderson counseled with Leonard Bean, an inmate at Union Correctional Institution about disobeying a verbal order that he had received earlier (T-1334). Bean accepted the reprimand without showing any signs of hostility (T-1347). Similarly, another officer had counseled with Woods that day about his refusal to work (T-1701-1703). Woods also did not seem very upset about this reprimand, and the officer did not think Woods was a serious problem when he released him (T-1716-1717).

Shortly before 2:00 p.m. that day inmate Taylor, a white man, overheard inmates Bean and Woods talking with other black inmates (R-1721). In particular, Bean and Woods said that they were tired of being pushed around and were going to "get some crackers back." (T-1722). "Crackers" meant a white person in general and a white correctional officer specifically (T-1737).

Several minutes later, Officers Dennard and Anderson were walking through the main housing unit at UCI (T-1335). They were about 15 feet from the office when Anderson felt something hit him in the back (T-1336). He turned and saw Woods with a knife in his hand preparing to stab him again (T-1336). Anderson paried the blow and moved to a nearby office (T-1336). He had to work his way through some inmates, but he finally was pulled inside

the office by Officers Rogers and Wilkerson (T-1336).

Meanwhile Bean was stabbing Dennard, and after Anderson was inside the office, Woods also stabbed Dennard (T-1337). Officer Harvey rushed towards Woods and pulled him off Dennard (T-1767). Woods stabbed Harvey (T-1765) and fled. Woods passed another officer, Barker and stabbed him (T-1766). Barker staggered a bit, and Woods took a couple of steps but acted as if he was going to return to Barber. Harvey, however, hollered at Barker and Woods fled (T-1786). Bean by this time had also disappeared.

Shortly thereafter, the prison superintendent and another guard went to cell G-9 (T-1803) where Bean and Woods were found with two other inmates (T-1805). The superintendent told them to come to the cell bars, but before Woods did so, a guard saw him give Bean a knife, and Bean hid it under a blanket (T-1805). Bean and Woods were then arrested, their cells searched, and additional weapons found (T-1809).

A subsequent search of the prison turned up some bloody clothing and an additional knife (T-1851). Because that clothing was not promptly sent away for examination, however, nothing more definite than the blood type of the stains found on the clothing was identified (T-1272-1273).

Dennard died on the operating table as a result of the stabwounds (T-1417).

IV SUMMARY OF ARGUMENT

Ronald Woods, a prison inmate at Union Correctional Institution stands convicted of first degree murder of a prison guard, the attempted first degree murder of three other guards, and possession of contraband inside a prison. Leonard Bean, his co-defendant, was also convicted of the murder and possession of contraband, but the jury convicted him of only one of the attempted first degree murder charges. The jury recommended death for Woods and life for Bean, and the court, following these recommendations, sentenced Bean to life and Woods to death.

Woods challenges this sentencing disparity as from the evidence of Woods' and Bean's character and the nature of the crime they committed, there is no sufficient distinction between the two men to justify such a gross sentencing disparity. Both men are mentally defective and had disastrous childhoods. They are easily led and cannot appreciate the consequences of their acts.

Similarly, both men were equally culpable of the murder, and the court, in sentencing Woods to death, found no aggravating factor that could not also apply to Bean. Even more significant, the court found in mitigation that Woods was 18. This fact could not have been applied to Bean who was 26.

That was the only mitigation found by the court. It rejected Woods' IQ of 69 as being sufficient to find that his ability to appreciate the criminality of his conduct

was substantially impaired. The court, however, ignored the other unrebutted evidence that would have supported a finding of this statutory mitigating factor or at least would have supported some other non-statutory mitigation.

Had counsel had adequate time to prepare his case, he may have been able to present stronger evidence in mitigation and a stronger defense during the guilt phase of the trial. Counsel did not have this time, and the court, without any explanation, forced counsel to go to trial two months after he was appointed to represent Woods.

Counsel, despite his diligence, simply did not have sufficient time to prepare for this trial. The state disclosed to him the names of well over 100 persons who could possibly have relevant information about this case. Most of these men were inmates and many of them had been scattered throughout the state. Even on the first day of trial, counsel said he was not prepared for trial, and Bean's counsel filed a notice that he was also unprepared for trial.

At trial, counsel objected to the state's peremptory excusal of 75 per cent of the black prospective jurors. Nothing in either the state's or defense's voir dire suggested any reason for the state to peremptorily excuse so many blacks. Moreover, the state could not explain why it peremptorily excused two of the black prospective jurors. Because Woods had shown a substantial likelihood that the

state had impermissibly excused the blacks solely on account of their race, and the state could not explain why it had done so, the presumption exists that they were excused solely on account of their race.

Finally, during closing argument half of the spectators in the audience were Department of Correction employees who were in uniform. The court refused to clear the courtroom of these employees. As a result, Woods did not receive a fair trial because of their obvious intention to influence the jury by making a statement about the community's feelings about this case.

V ARGUMENT

ISSUE I

THE COURT ERRED IN DENYING WOODS' MOTION FOR MISTRIAL BECAUSE THE PROSECUTOR PEREMPTORILY EXCUSED BLACK PROSPECTIVE JURORS SOLELY BASED UPON THEIR RACE IN VIOLATION OF ARTICLE I, SECTION 16 OF FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During jury selection, Woods objected to the state's peremptory excusal of blacks from sitting on the jury:

> (Thereupon, a discussion at the Bench was had as follows out of the hearing of the prospective jurors and the venire:)
>
> MR. BERNSTEIN: My observation has been that the State has used five challenges.
>
> MR. TOBIN: No, I believe it is ten.
>
> MR. BERNSTEIN: Well, anyway, ten challenges with six of those for blacks. The State has removed every black that was on this jury.
>
> MR. TOBIN: Nor, Your Honor, that is not true. The record will show that the defendants have removed blacks. I can get the names of those but six is simply not true. I forget the names of them, but I can.
>
> THE COURT: Not all people were excused.
>
> MR. BERNSTEIN: Well, Your Honor, I counted six of the ten were removed and those were blacks.
>
> MR. TOBIN: That simply is not true.
>
> MR. BERNSTEIN: I would have to object and move for a mistrial based upon the denial of a significant class of jurors of their peers.

THE COURT: Motion denied.

MR. BERNSTEIN: Yes, Your Honor.

(T-1232-1233).

Upon motion by appellate counsel, this Court relinquished its jurisdiction and ordered the trial court to reconstruct the record so that Woods could challenge the state's apparent racially motivated excusal of black prospective jurors.

Upon remand, the prosecutor and trial counsel agreed that nine blacks had been questioned, and the state had peremptorily excused six while Woods and Bean had each challenged one. One black venireman served as an alternate juror (SR-13). In Neal v. State, Case Nos. 63,899, 63,933, Florida opinion filed September 27, 1984, this Court rejected the test developed in Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965) to prove intentional and systematic exclusion of blacks from petit juries. In its place, this Court said the trial court should apply the following test:

> The initial presumption is that peremptories will be exercised in a non-discriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood,

> no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue. On the other hand, if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.

Applying the first step of this test to the facts in this case reveals that the defense counsel made a timely objection to the state's peremptory excusing of blacks (T-1232). The reconstructed record shows that the prosecutor exercised 13 peremptory challenges and of those 13 challenges, six were exercised against blacks (SR-13). Moreover, both Bean and Woods peremptorily excused a black venireman (SR-13). Thus, the state peremptorily excused 75 per cent of the blacks examined.

Of course that fact is important in determining whether there is a strong likelihood that blacks have been peremptorily challenged solely on account of their race. Also neither the state's examination or that of the defense revealed the reasons for the state's excusal of this very large percentage of blacks. The state, in this case, did

nothing to somehow distinguish the black veniremen from the white. Defense counsel noticed the state's behavior, and at the reconstruction hearing, he explained why he objected to the state's use of its peremptory challenges against blacks:

> Q During the jury selection process you objected. Can you give us some of the background as to why you objected?
>
> A Yes. At the time there was a challenge to Juror Thomas who was juror No. 308. I had made notations and there had been, I think, five jurors challenged who were black by the State.
>
> On later reflection I discovered there had been one challenged by Mr. Bean's attorney who was black. So at the time of the objection I had stated there were six blacks challenged. There were six, but one of them was challenged by Mr. Bean's attorney.
>
> The pattern seemed clear in that out of at least 50 percent of the State's challenges were removing all of the blacks who were seated.
>
> * * *
>
> At the time of the objection I had noticed this pattern of blacks being removed there had been no remarkable statements by the blacks who had been removed in the jury voir dire examination by either side. There were no real extremes.
>
> The one juror who had been removed by Mr. Bean's attorney had worked for the prison system some, I think four years before, so he was acquainted with working for the Department of Corrections and had actually served as a guard. And that wasn't that remarkable, but it was the most remarkable of the blacks who had been removed.
>
> And I felt it incumbent on me to bring that to the Court's attention through my

objection. And at that time it seemed that there was a pattern of removing blacks from the jury. In fact, all the blacks who were seated there were removed from the jury and we did not have a black citizen serving on that jury. We had one, Ella Jane Perry, who was a woman who was seated as the alternate.

Q Before I get to Ms. Perry, there wasn't as far as you --

A Excuse me. That was Maybelle Webb that sat as the alternate. Ms. Perry was later challenged by myself.

Q As counsel in this case you could not see any reason other than race for these blacks being excused, is that correct?

A No. There was nothing that I could tell from the questioning and the answers that had been given at the time of the voir dire examination. And it just appeared to be a pattern.

The purpose of the objection was to one, raise the point, preserve the point and the issue and to at that time request the Court to make some further inquiry as to why that pattern appeared to be going on.

(SR-50-52).

Indeed, the state's examination of the veniremen was bland. Typically, it asked individual prospective jurors, black or white, the following questions:

THE COURT: You may inquire for the State.

MR. TOBIN: May it please the Court.

THE COURT: Mr. Tobin.

MR. TOBIN: Ms. Stewart, do you work outside of the home, ma'am?

PROSPECTIVE JUROR STEWART: Yes.

MR. TOBIN: Where do you work at?

PROSPECTIVE JUROR STEWART: Southern States.

MR. TOBIN: I am sorry.

PROSPECTIVE JUROR STEWART: Southern States Sportswear.

MR. TOBIN: Where is that?

PROSPECTIVE JUROR STEWART: Lake City.

MR. TOBIN: Where?

PROSPECTIVE JUROR STEWART: Lake City.

MR. TOBIN: And are you married, ma'am?

PROSPECTIVE JUROR STEWART: Yes, sir.

MR. TOBIN: What does your husband do?

PROSPECTIVE JUROR STEWART: He is unemployed at the present time.

MR. TOBIN: And do you have any close friends or family with the Department of Corrections?

PROSPECTIVE JUROR STEWART: No, I don't.

MR. TOBIN: Our seating chart got messed up a while ago and, so, I have to look and shuffle around a little bit.

Mr. Fortner, what do you do for a living, sir?

(T-1089-1090).

Whatever other questions he asked of the prospective jurors, he addressed to the panel, and the responses were uniformly the same among the jurors.

In addition, nothing else distinguished these black prospective jurors from their white counterparts. There were black men (T-1226) and black women called, and the women either worked in the home or outside (T-880,989,1046).

The blacks worked at jobs similar to the whites (T-1090, 1226), and from the record nothing exists to explain why these people were excused other than their race. See People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). fn. 27.

Of course, the defense voir dire may have revealed reasons for the state peremptory challenge of a prospective juror.

In this case, however, the defense examination was almost as bland as the state's. See T-1052-1085.

Consequently when the state has excused 75 per cent of the blacks and has used half of its peremptory challenges to do so, there is a substantially likelihood that the blacks were excused solely on account of their race.

Of course, it would have been nice if the prosecutor had clearly announced his intention to strike all blacks from sitting, but as with most intent issues, we must use circumstantial evidence to determine the prosecutor's intent. In this case, that intent, while not absolutely clear, is sufficiently proven to require the state to explain its action.

That explanation largely revolved around a rating scheme the state had devised to evaluate prospective jurors. Before trial, the prosecutor and two unnamed "public officials" met and "went over each and every juror that was listed in the venire." (SR-25) Then, based upon

whether the person had a negative run-in with the law or whether he had strong death penalty convictions (SR-25), the prosecutor rated the person a one, two, or three. A "one" was pro-state, and a "three" was pro-defense (SR-26). A "two" was somewhere in the middle.

As should be expected, the prosecutor was unable to rate all of the people in the venire, and two of the blacks he excused, Bethea and Stewart, were unrated (SR-38). The remaining blacks were rated a three (SR-37-39) primarily because someone in their family had had a "negative" law enforcement experience.

Stewart and Bethea, however, posed a significant problem for the state on appeal:

> Q So the two unrateds then would have been Joyce Bethea and Glenda Fay Stewart?
>
> A Yes.
>
> Q Do you recall why you peremptorily excused them?
>
> A No.

(SR-40).

At this stage, Woods has carried his burden of showing that a substantial likelihood exists that the state has peremptorily excused black prospective jurors solely because of their race. The state must now carry its burden of explaining why it peremptorily challenged the blacks. If it cannot do so, this Court must assume that the state excused the blacks solely on account of their race.

Thus, because the state did not explain why it excused Bethea or Stewart, the presumption exists that it excused them solely because they were black.

The peremptory excusal of two or even one prospective juror solely on account of their race is, as a matter of law, reversible error. A harmless type of analysis is not applicable as judicially recognized racial discrimination cannot be, even a little bit, tolerated. Excusing blacks from serving on petit juries simply because they are black is never excusable.

In Rose v. Mitchell, 443 U.S. 545, 61 L.Ed. 739, 99 S.Ct. 2993 (1979) the U.S. Supreme Court said a criminal conviction could not stand which was based upon an indictment returned by a grand jury in which there had been a deliberate, systematic exclusion of blacks from being selected as grand jury foremen.

> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice.
>
> * * *
>
> We do not deny that there are costs associated with this approach. But the remedy here is in many ways less drastic than in situations where other constitutional rights have been violated.

* * *

> In any event, we believe such costs as do exist are outweighed by the strong policy the Court consistently has recognized of combating racial discrimination in the administration of justice.

Id. at 555-558.

In this case, exclusion of blacks solely on account of their race from serving on petit juries destroyed, with greater effectiveness than exclusion of blacks from being grand jury foremen, the appearance of justice and the integrity of the judicial process. The trial court, therefore, committed reversible error in not granting Woods' motion for mistrial.

ISSUE II

THE COURT ERRED IN DENYING SEVERAL OF WOODS' MOTIONS TO CONTINUE HIS CASE IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

Bean and Woods were arraigned on June 10, 1983, for the murder of Dennard and other attempted murders, and the Public Defender initially represented both men (R-20-21). A month later, that office withdrew from representing Woods, and Loyd Vipperman appeared on behalf of Woods on July 21, 1983 (R-58). Despite Vipperman's efforts to continue the trial (R-106,281-282,480-481), Woods went to trial two months later on September 26, 1983. Such unnecessary speed denied Woods his constitutional right to a fair trial and effective assistance of counsel.

Woods, of course, recognizes that the trial court has discretion in whether or not to grant or deny a motion for a continuance. Valle v. State, 394 So.2d 1004 (Fla. 1981), Williams v. State, 438 So.2d 781 (Fla. 1983). A court abuses that discretion, however, when a defendant's rights are violated by denying the requested continuance. Mills v. State, 280 So.2d 35 (Fla. 3d DCA 1973).

Valle and Williams, cited above, are directly relevant to resolving this issue in this case. In Valle, the trial court denied all defense requests to continue his case so he could adequately prepare his defense, and Valle went to trial twenty four days after arraignment. In reversing Valle's conviction for first degree murder,

this Court said that Rule 3.220(a)(1)(i), Florida Rules of Criminal Procedure necessarily implies that the trial court "must allow defense counsel time to interview [the persons disclosed by the state] to properly prepare for trial." Id. at 1008. This Court then said that regarding the trial phase, the trial court should have allowed defense counsel time to interview the additional witnesses and allow for a mental examination. In the sentencing phase, this Court said Valle had inadequate time to develop his case for mental mitigation. In short, trial counsel did not have a reasonable time to prepare for either the guilt/innocence or sentencing phases of the trial.

Similarly, trial counsel in this case did not have reasonable time to prepare for either phases of this trial. Here, the state initially disclosed to Woods a list of 100 persons who might have relevant information concerning the crimes charged (R-25-27). Later, the state disclosed at least 20 more people (R-40-41,145-146,169-170,253-254). Most of these were inmates and many of those inmates had been transferred from Union Correctional Institution (T-766-767).[1] Counsel specifically told the court that he needed more time to locate and depose these witnesses (T-766).

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[1] Woods filed a motion with the court to adopt Bean's motions (R-513-514), and the trial court said that only one objection was necessary by either party to preserve the issue for the non-objecting party (T-846).

The court "solved" this problem by authorizing an additional attorney and an investigator to assist Vipperman. This solution, however, is the classic case of "too little, too late" as the court did not grant the additional help until 10 days before trial (T-472). Counsel needed to depose witnesses and investigate his case at locations throughout the state (T-766-767).

Even with this belated help, counsel was unprepared for trial, and on the first day of the trial, he told the court:

> I want to put on the record some of the problems that we have dealt with before in this case. Though the State has complied with the order of the Court in my motion for sanctions and has given me copies and has allowed me to talk to the investigators involved in the cause of that investigation into alleged allegations of misconduct by members of the Division of Corrections.
>
> Now, Your Honor, I have reviewed that document and have found some 18 to 20 witnesses that the Division of Corrections did, in fact, interview, many of whom were polygraphed, and the polygraphs turned out to be unrevealing; they were talking truthfully, for whatever it is worth. We would want the opportunity to depose those people and, Your Honor, to date we have not had that time or that opportunity in light of the time it has taken to prepare for trial with a view on our part for that purpose rather than taking further discovery at depositions.
>
> Now, Your Honor, we still are faced with problems inherent with having to prepare the trial on such short basis in relation to the number of witnesses, which we have indicated or which we have brought to the Court's attention before.

* * *

> In light of the Court's previous rulings, in light of my objections to the Court's rulings, we are as prepared as we can to go to trial at this time.
>
> THE COURT: Again, gentlemen, I want to thank you for your courtesy.

(T-812).[2]

Part of the reason for counsel's need for more time was that the state, during the two month period, had not finished its investigation, and it periodically added more names to its discovery list thus necessitating further defense investigation. In addition, towards the latter part of this discovery, and immediately before trial, counsel became aware for the first time (SR-59-60) of an inmate group known as the "Dixie Playboys" who were threatening they were going to harm officers (SR-60). Counsel suspected that this group may have cajoled, threatened, or somehow coerced (SR-60) Woods so that he, instead of someone in the group, committed this particular murder. While evidence to support this theory may have had some impact upon the jury's finding of second degree murder rather

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[2] Even Bean's counsel, who had been assigned the case for at least five weeks longer than Woods' counsel, filed an unusual notice of his inability to prepare a defense because of the court's rush to bring this case to trial (T-461-462).

than first degree murder, its obvious relevance would have been to establish the mitigating factor that Woods "acted... under the substantial domination of another." Section 921.141(6)(f), Florida Statutes (1983) (SR-59-60). This theory has some support from the evidence the court had to consider in sentencing. This evidence included the fact that Woods had an IQ of 69 which meant he was mentally defective. As such, he lacked the ability to plan ahead, see the consequences of his actions, and anticipate long term results (T-2369). He was a follower type and was easily led (T-2354). The state's evidence also supports this theory as one witness said he saw Bean and Woods with a group of blacks immediately before the stabbing yelling and promising to get back at the "crackers."

While the evidence admitted at the trial may have been insufficient to support a finding that Woods was under the substantial domination of another, evidence to support counsel's "Dixie Playboy" theory would have justified finding this mitigating factor as it provided the necessary link between Woods' character and what occurred immediately before the murder.

Obviously, if counsel could have produced evidence that this group existed and they intended to harm officers, it would have shed greater light upon Woods' participation in this murder. Without such evidence, counsel could find no reason for Woods to kill the guard (SR-61). Woods had little contact with Dennard in general or on the day of the

killing. He also had little contact with any other guards that day. But, if the Dixie Playboys were able to pump up Woods and dupe him into committing this murder then a motive for the entire episode exists, and trial counsel would then have a strong argument that Woods should not die as he was dominated by other, more cunning individuals.

Consequently, the inability of trial counsel to investigate the "Dixie Playboys" and Woods' connection with them denied Woods a fair trial and may have resulted in an unwarranted death sentence.

Now, the state may have felt that the defense was ready for trial (T-808), and the limited record before this Court may suggest Woods' guilt of first degree murder. Nevertheless, upon full investigation and presentment of further evidence, what happens to be a first degree murder, may be, in reality, a lesser degree of homicide. Valle at 1008.

Also, as in Valle, Woods' mental status was an important issue in this case, and counsel in a timely manner asked the court to appoint experts to determine his competency to stand trial (R-154) and to appoint a psychiatrist to assist him at trial pursuant to Rule 3.216, Florida Rules of Criminal Procedure (R-156). The court granted both motions on August 30, but on September 8 counsel asked to continue his case because the psychiatrist originally appointed to assist Woods was unavailable, and Woods now had to find another expert (R-281). Moreover,

three days before trial, Woods, by way of a motion to continue, told the court that:

> Due to time constraints counsel has not been able to complete examinations of the Defendant's mental competency at the time of the offense or competency to stand trial. Nor has he been able to develop the psychiatric testimony regarding a potential mitigating circumstance.

(R-481). The court denied that motion (T-846).

Moreover, after the jury found Woods guilty, the court refused to grant a continuance and proceeded immediately to the sentencing phase of the trial (T-2309, 2313).

On the other hand, this case contrasts well with Williams v. State, 438 So.2d 781 (Fla. 1983) in which this Court said that the trial court did not abuse its discretion when it denied Williams' motion to continue filed after Williams was found guilty of murder but before the sentencing phase started. In that case, the court found several reasons to support the trial court's ruling:

1. The court recessed for two hours to consider the motion to continue and the facts supporting it.

2. Counsel offered no reason for his unpreparedness.

3. Counsel did not exercise due diligence in locating mitigating witnesses.

4. Counsel never alleged that his motion was made in good faith and not to delay.

5. Counsel was aware that this was a death case.

6. Counsel had had 11 weeks to prepare.

Applying these findings to this case reveals:

1. The trial court, at none of the hearings, took two hours to consider the motions to continue. To the contrary, he perfunctorily denied all motions to continue after hearing counsel's argument (T-2312,814).

2. In his motion for continuance filed on September 23 counsel for Woods offered several legitimate reasons for continuing his case (R-481). For example, counsel had not completed discovery despite his due diligence, he had not prepared any legal issues for the guilt or penalty phases of the trial, nor had he a chance to analyze the evidence gathered (R-481-482). Yet the record abundantly demonstrates Vipperman's diligence and extraordinary efforts to accommodate the trial court's unexplained rush to bring this case to trial.

3. Counsel had exercised due diligence in trying to locate mitigating witnesses. Until 10 days before trial counsel had no help. At that time, the court authorized counsel to employ an investigator to check witness backgrounds as well as the defendant's background (T-480). Counsel used law students and volunteers yet he still had inadequate time.

4. Counsel, in every motion for continuance, said that he asked for the continuances in good faith and he did not have the intention to delay or otherwise obstruct justice (R-106,282,482).

5. Counsel, of course, was aware that this was a death case (T-807).

6. Counsel had 69 days from the date he filed his notice of appeal until he went to trial. In Valle, this Court said that normally 60 days was sufficient time to move to trial after arraignment. Valle at 1008.

This case, however, provided the special circumstances recognized in Valle:

1. Counsel had to depose well over one hundred witnesses. As many of these witnesses were inmates, some of them had been transferred to other prisons (T-766).

2. The state repeatedly gave Woods' attorney new names, and during the week before trial, he gave him several more names (R-40-41,145-146,169-170,253-254).

3. Woods' counsel was a private attorney specially appointed to represent Woods (T-807, SR-68). By statute, all the state would pay him for his work was $3500, §925.06, Florida Statutes (1983). Consequently, his private practice occasionally interfered with this case in that, at least once, he was in trial on another case when depositions were scheduled (R-281). As important as this case was, counsel cannot be reasonably expected to make unnecessary sacrifices just to expedite a case.

This is true especially in light of the fact that the trial court never said why this case had to proceed to trial so quickly. The state attorney did not object to a continuance, and the trial calendar for the coming term was not crowded. Moreover, counsel asked only to continue the case for 20 days (T-806). Certainly trial counsel was

working as hard and diligently as could be expected under the circumstances. That he was not ready for trial was not his fault. The trial court, therefore, abused its discretion in denying Woods' motion to continue.

ISSUE III

THE COURT ERRED IN NOT EXCLUDING THE LARGE NUMBERS OF UNIFORMED DEPARTMENT OF CORRECTIONS' EMPLOYEES FROM THE SPECTATORS' PORTIONS OF THE COURTROOM IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL JURY AND RIGHT TO A FAIR TRIAL.

Immediately before closing argument, Woods' counsel asked the court to clear the courtroom of the uniformed employees of the Department of Corrections who were present as spectators at the trial:

> MR. BERNSTEIN: Your Honor, we would move to have a portion of the spectators cleared. The basis of the motion is that it is obvious that, en masse, the uniformed correctional officers have come to this trial. We would object to that, Your Honor, in that it impairs a fair and impartial trial of this cause.

(T-2136).

The court said that half of the estimated 90 people in the courtroom were in uniform (T-2138-2139).[3] Nevertheless, the court denied Woods' motion for mistrial (T-2139). By refusing to exclude these uniformed guards or in any way ameliorating their suggestive influence, however, the court denied Woods a fair trial.

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[3]The court ordered photographs and a videotape made of the courtroom spectators, and it entered them into evidence as court exhibits (T-2140). This evidence is at the Supreme Court, although, as a caution, none of the court cassette recorders are compatible with the videotape. The Florida State University Law School has a compatible machine.

Initially, Woods must clarify what this issue is not about. It is not about his right to a public trial. It is not about the right of prison employees to watch the trial. It is not about the right of prison employees to express an opinion about what they think the outcome of the trial should be. Moreover, Woods does not argue that they cannot send their message while in uniform.

What this issue involves is the very narrow question of whether Department of Corrections employees can attend, en masse, and in uniform, the trial of a prison inmate charged with committing the murder of a fellow Department of Corrections' employee. The presence of such uniformed guards denied Woods a fair and impartial trial by forcing the jury to consider public opinion in their deliberations and not only the evidence as developed in front of the Bar.

The conduct of a trial is part of the trial court's responsibilities, and normally what it does to maintain courtroom decorum is largely discretionary. This means that the court in this case could have imposed reasonable limits on the occupation of the courtroom by the public and the press. Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 65 L.Ed.973, 100 S.Ct. 2814 (1980) (Stewart, concurring). Cf. State ex rel. Gore Newspapers Co. v. Tyson, 313 So.2d 777 (Fla. 4th DCA 1975). Conceptually, the reason for such limits are easily found. Spectators can, by their very presence, increase the intimidation inherent in the atmosphere of a high visibility trial. Gore Newspapers

at 536. Proving such intimidation, however, is difficult yet anyone who has tried a case with high community interest knows of its presence. Without the court's protection through its power to control the courtroom, counsel and the jury are unduly intimidated, and throughout the proceedings the jury is constantly reminded of the spectators' opinion. C.f. Sheppard v. Maxwell, 384 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507 (1966).

As difficult as it may be to prove the intimidation of the guards' presence in this case, there are, nevertheless some indicators present that the trial court should have noticed and acted upon. This is, first of all, a prison murder case in which two black inmates allegedly killed a white prison guard in an unprovoked attack. Union County is a small county and the local prisons are a major employer. Virtually every prospective juror questioned in this case either had friends or relatives who had worked at the prison, or they had worked there themselves at one time. Moreover, community feelings about this particular murder were especially high as evidenced by the petitions which circulated in the community urging stronger protection for guards that worked at the prison (T-1056,1060). Of course, the hostility towards Woods was not overt, State v. Weldon, 74 S.E. 43 (SC 1912). On the other hand, it was not spontaneous, State v. Allen, 276 So.2d 868 (La. 1979) or fortuitous, State v. Hashimoto,389 P.2d 146 (Ha. 1963).

It was, instead, an obviously planned appearance with the equally obvious purpose of influencing the jury. State v. Gens, 93 S.E. 139 (S.Ct. 1917). This Court cannot believe that 40 to 45 guards coincidentally showed up in uniform to watch this trial without any intent to let the jury know of the community's opinion about this case. Yet, the trial court made no effort to minimize this extraneous influence by excluding the uniformed guards or instructing the jury to disregard Allen, supra, or by otherwise explaining the guards' presence. Hashimoto, supra.

In Gens v. State, supra, a jury convicted Gens of a prohibition era crime. During part of the trial, several ladies held large posters before the jury condemning liquor traffic. The court, in reversing Gens' conviction, said:

> The action of the women was highly improper, in that it was an attempt to impede justice, however innocent on their part, and deny to the defendant a fair and impartial trial, guaranteed to him by the law of the land, an attempt to influence a sworn jury to arrive at a verdict improperly, and to be influenced by outside influence, trying the case by manufactured outside public opinion, and not by the facts of the case as developed in evidence and the law of the trial judge. The parties should have been summarily dealt with. They were in gross contempt of court and such conduct should not for a moment be overlooked. At the hearing before this court it was stated that the presiding judge's attention was not called to this phase of the case until after conviction

> and motion for new trial was made. His honor inquired of the jury then if they were in any manner influenced by these posters. They answered in the negative. His honor should have set the verdict aside promptly when he found out how an attempt had been made to influence the jury.
>
> There is no doubt that the action on part of the audience and crowd in the courtroom during part of the trial was so irregular and improper and was allowed to go unchecked by the officials that the defendant did not get what he was entitled to, a fair, impartial, and legal, trial.

In United States v. Rios-Ruiz, 579 F.2d 670 (Ca 1 1978) the trial court did not err in excusing three policemen from watching the trial in uniform:

> THE COURT: Gentlemen, I am a little concerned that we have three police officers in uniform in the court. It smacks a little bit of pressurizing the jury and intimidating the jury. I am disturbed about the fact, if there is to be any intimidation of the jury. Whoever is guilty is going to spend some time in jail and I am going to be very certain that that occurs. Maybe these gentlemen here are for no illegitimate purposes, they are entitled to be here. But I am not very happy to find three officers with their badges and their uniforms sitting in court during these proceedings.

Id. at 674.

If three policemen were too many for the court in Rios-Ruiz to tolerate, certainly 40 to 45 guards or half of the trial spectators were too many for the trial court in this case to have permitted to be in the courtroom. That the trial court made no effort to reduce or eliminate

the intimidation present at this trial by the guards' presence was an abuse of its discretionary power to control the courtroom, and it is reversible error.

ISSUE IV

THE COURT ERRED IN SENTENCING WOODS TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This case presents a novel issue in the administration of Florida's death penalty law. Leonard Bean, Woods' co-defendant, received a life recommendation from the same jury that recommended death for Woods (R-600-601). The court, following these recommendations sentenced Bean to life and Woods to death (R-653-657,681). What makes this case unique is the lack of any significant difference between Bean and Woods either as individuals or in the extent of their participation in this murder. Simply put, two men, both mentally defective, participated equally in the killing of a prison guard. Under Tedder v. State, 322 So.2d 908 (Fla. 1975), the trial court could perhaps have justified overriding the jury's life recommendation for Woods and imposed death. See Barclay v. State, 343 So.2d 1266 (Fla. 1977). The court, however, did not do that. Instead, it followed the recommendations of the jury and imposed different sentences upon two defendants who have similar characteristics and who were equally culpable. In the process, the court rendered its sentence of Woods unconstitutional.

The dominant theme of the early cases discussing the constitutionality of the death penalty in general, and Florida's death penalty scheme specifically, focused upon

the need for consistency in applying that penalty. For example, in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) Justice Stewart in concurring with the court's ruling that Georgia's death penalty statute was unconstitutional said:

> These death sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

Id. at 309-310.

Four years later, in Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976) the court reemphasized the need for consistency:

> Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Mr. Justice White concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and. . . there is no meaningful basis for distinguishing the few cases in which it is not." 408 US, at 313, 33 L Ed 2d 346, 92 S Ct 2726 (concurring). . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." Id., at 309-310, 33 L Ed 2d 346, 92 S Ct 2726. (Stewart, J., concurring).
>
> Furman mandates that where discretion is afforded a sentencing body on

> a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Likewise, this Court early on recognized the constitutional requirement of consistency, and it found that Florida's death penalty statute provided this:

> Review by this Court guarantees that the reasons present in one case will reach similar result to that reached under similar circumstances in another case. State v. Dixon, 283 So.2d 1,10 (1973).

The consistency requirement has most often surfaced in murders involving at least two defendants. In such cases, this Court has imposed the required consistency or explained the inconsistency of treatment between two defendants.

In Slater v. State, 316 So.2d 539 (Fla. 1973), this Court said Slater did not deserve a death sentence where the triggerman got life:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law.

Id. at 542. Accord Malloy v. State, 382 So.2d 1190 (Fla. 1979).

Similarly, in McCaskill v. State, 344 So.2d 1276 (Fla. 1977), this Court reduced McCaskill's death sentence to life imprisonment, and in doing so it said:

> The imposition of life sentences in similar cases is not absolutely controlling. Where they to be ignored, however, our death penalty statute, Section 921.141, Florida Statutes, could not be upheld under the requirements of Proffitt v. Florida, supra, and Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Id. at 1280.

Finally in Barclay v. State, 343 So.2d 1266 (Fla. 1977), this Court upheld the trial court's override of the jury life recommendation because Barclay's co-defendant had received a death recommendation and had also been sentenced to death.

> Two co-perpetrators who participated equally in the crime would have disparate sentences were the jury's recommendations accepted. The variation between defendants being so nominal (a minor age difference but no suggestion of different maturities), the facts here do not warrant the dispensation of unequal justice. See Messer v. State, 330 So.2d 137 (Fla. 1976); Slater v. State, 316 So.2d 539 (Fla. 1975). "Equal Justice Under Law" is carved over the doorway to the United States Supreme Court building in Washington. It would have a hollow ring in the halls of that building if the sentences in these cases were not equalized. This is a case, then, where the jury did not act reasonably in the imposition of sentence, and the trial judge properly rejected one of their recommendations.

Id. at 1271. On the other hand, this Court has recognized that differences exist between defendants, and it has affirmed death sentences for one defendant even though a co-defendant may have received some non-death sentence. For example, in Downs v. State, 346 So.2d 788 (Fla. 1980),

the co-defendant minimally participated in the murder. See also Routly v. State, 440 So.2d 1257 (Fla. 1983); Salvatore v. State, 366 So.2d 745 (Fla. 1978).

Similarly, when the co-defendant has been a follower, Messer v. State, 330 So.2d 137 (Fla. 1976), or the defendant dominated the co-defendant, unequal treatment of the defendants was justified. Witt v. State, 342 So. 2d 497 (Fla. 1977). Also, one defendant may have a significantly worse criminal history which justifies unequal treatment. Demps v. State, 395 So.2d 501 (Fla. 1981). In this case, we have none of these variables. Bean and Woods are remarkably similar. Their intelligence is so low that they are either mentally defective (T-2351) (Woods) or borderline mentally defective (T-2396) (Bean). Both are follower types (T-2354,2399) although no evidence exists that either one followed the other. Both have records for committing violent crimes: Bean has an armed robbery conviction (T-2339), and Woods has an arson conviction (T-670).

Moreover, they share the same culpability for the murder of Dennard (R-594-597). Bean stabbed Dennard first (T-1337), and Woods struck him sometime later. Dennard died of multiple stab wounds (T-1417), and it cannot be said that Woods' blows were more significant than Bean's.

From the jury verdicts, the jury clearly saw Bean as culpable of the stabbing of Anderson as Woods (R-593),

and from the facts, Bean and Woods clearly wanted to stab as many "crackers" as they could find. Only by fortuity did Bean not stab Officers Harvey or Baker. That distinction, however, does not justify the different sentences especially when the trial court did not use the convictions for Woods' stabbing of Officers Harvey and Baker as aggravating circumstances. The two aggravating circumstances the court did find in sentencing Woods to death hardly justifies the court's unequal treatment of Woods and Bean as both factors apply with as much logic to Bean as they do to Woods. The court found that Woods was under sentence of imprisonment when he committed this murder (T-654). Section 921.141(a), Florida Statutes (1983). Bean, however, was also under a sentence of imprisonment for an armed robbery (T-2339). The court also found that Bean and Woods committed the murder to disrupt or hinder the lawful exercise of governmental functions or the enforcement of the law (T-654). Section 921.141(g), Florida Statutes (1983). As with the first factor, this finding applies with equal force to Bean as the court explicitly recognized (T-654).

The evidence in mitigation for Bean is also similar to that for Woods. Bean, like Woods, had childhood seizures (T-2378) and suffers from neurological brain damage (T-2396). Bean is also borderline retarded (T-2386), and of the two men, Bean is the more brilliant with an IQ of 73 (T-2394).[4]

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[4] The Department of Corrections apparently reported that Bean had an IQ of 60 (T-2396).

Consequently, he is unable to profit from his past mistakes (T-2395) and has little appreciation for the criminality of his conduct (T-2399).

The expert who testified about Bean said that Bean was under duress on the day of the murder because an inmate threatened to kill him (T-2418). There is, however, no evidence that Bean committed this murder because of that duress, and the trial court accordingly refused to instruct the jury on the statutory mitigating factor that Bean committed the murder "under extreme duress or under the substantial domination of another." (T-2432). Section 921.141(6)(e), Florida Statutes (1983).

The expert also said that Bean's capacity to appreciate the criminality of his conduct was substantially impaired (T-2420). The expert, however, was unsure of the definition of "substantial":

> I was hoping that maybe you could give me some definition of what substantial means so that I might be able to compare it.

(T-2420).

The state never provided the requested definition, and the expert's response remains ambiguous because of his uncertain understanding of the meaning of the word "substantial." In any event, the expert who examined Woods said that Woods had a hard time conforming his conduct to the requirements of the law (T-2371). That difference is the only distinction between Bean and Woods,

and it is so small that it hardly justifies a sentence disparity so enormous. This conclusion is even stronger in light of the fact that Bean is 26 (T-2394) as compared to Woods who is 18 (R-655).

This case thus presents the problem the trial court in Barclay v. State, supra, avoided: The trial court here accepted the jury's recommendations and imposed disparate sentences upon two co-perpetrators who participated equally in the crime. Yet, the variation between the defendants was so nominal that the facts here do not warrant the dispensation of unequal justice. Barclay at 1021.[5] In short, by sentencing Woods to death, the trial court unconstitutionally abdicated its sentencing function and gave the jury's recommendation of death undue weight. Ross v. State, 386 So.2d 1191 (Fla. 1980). Under Florida's sentencing scheme, while the jury recommendation is given great weight, Tedder v. State, 322 So.2d 908 (Fla. 1975), it is only a recommendation. Ultimately, the court must "still exercise its reasoned judgment in deciding whether the death penalty should be imposed." Id. at 1197. Section 921.141(3), Florida Statutes (1983). The court in this case failed to exercise its reasoned judgment and

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[5] The jury votes (9 to 3 life for Bean, 7 to 5 death for Woods) also indicate the jury's ambivalence in recommending death for Woods. That is, of the 12 votes, 3 voted for life for Bean and Woods, but only 5 would have imposed death for the two men. The remaining 4 jurors were split on their recommendation.

it gave undue weight to the jury's recommendation. Woods' death sentence is as arbitrary as being struck by lightening, and there is no distinction between Bean and Woods that justifies so disparate a sentence.

Woods, therefore, asks this Honorable Court to reverse the trial court's sentence of death and remand for imposition of a life sentence.

ISSUE V

THE COURT ERRED IN NOT FINDING ANY MITIGATING FACTOR THAT REFLECTED WOODS' CHARACTER.

The court, in sentencing Woods to death, rejected Woods' low intelligence as sufficient evidence to establish the statutory mitigating factor "that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." (R-655) Section 921.141(6)(f), Florida Statutes (1983). The court's analysis focused only upon one aspect of Woods' character, and it ignored the unrebutted testimony of his other, relevant character traits. Had the court made the required complete character analysis it may have found the statutory mitigating factor it rejected. If not, certainly that analysis would have supported a finding of some non-statutory mitigating factor. As the record now stands, the court did not consider any non-statutory mitigation, and from what the court said in its sentencing order, it weighed only the applicable statutory aggravating factors against the applicable statutory mitigating factors. Under Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978) this is error, as the sentencer in capital cases must consider the defendant's character as well as the circumstances of the crime he committed. Id. at 604. This requirement necessarily applies that the sentencing court must conduct a complete character analysis.

The court in this case did not make that complete character analysis. From the court's sentencing order, Woods was merely a young man, apparently like any other 18 year old, except that he had killed a prison guard.

This view of Woods not only is false, but the unrebutted evidence about his character paints a picture at odds with the courts incomplete analysis of Woods. Rather than focusing upon Woods' intelligence, the court should have used that fact to direct its inquiry.

For example, the unrebutted testimony of the court appointed psychiatrist was that Woods had an IQ of 69, and he is borderline retarded (T-2351).[6] In concrete terms he cannot add four apples plus five apples, he cannot define winter, he does not know how a banana and an apple are similar (T-2368). Beyond this inability to form abstractions, however, lies the more significant problem that he cannot plan ahead, see the consequences of his actions, or anticipate long term results (T-2369). Most significantly, Woods has a hard time conforming his conduct to the requirements of the law because of his low intelligence (T-2371).

Woods realizes that low intelligence by itself does not compel a finding of some non-statutory mitigating factor. Ruffin v. State, 397 So.2d 277 (Fla. 1981).

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[6] Only two per cent of the population have IQ's that low or lower (T-2351).

Moreover, when the evidence conflicts, the court can also reject the evidence supporting some mitigating factor. Lucas v. State, 376 So.2d 1149 (Fla. 1977). Nevertheless, neither situation exists here as the evidence is unrebutted and Woods' character is more complex than simply having a low IQ.

In particular, as a corollary to his low intelligence, Woods is easily led and is a follower (T-2353-2354).[7] As a child (and at 18, he is hardly more than that) he was hyperactive and suffered organic impairment and brain disfunctioning (T-2356). His father beat him, and he received no emotional support from his family (T-2356,2357). Although he may have outgrown his hyperactivity (T-2357) his perceptions of the world were influenced by his disastrous childhood (T-2357). At 18, Woods simply has had neither the time, the intelligence, or the maturity to sort out the good parts from the bad parts of his life and somehow define who he is. Instead, he looks to a group for attention (T-2356) and approval. When this craving is combined with his pliant nature and lack of judgment, a disaster is assured as this case demonstrates.

The trial court made no similar analysis of Woods' character and the crime as required by Lockett. Instead, it simply rejected Woods' low intelligence as being

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[7] That fact is especially significant for this case as there is some evidence suggesting that Woods may have committed the murder because he was told to do so or was conned into committing the crime. See Issue

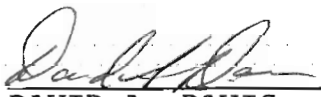
insufficient to sustain the statutory mitigating factor that his "capacity...to appreciate the criminality of his conduct...was substantially impaired." It ignored the other, unrebutted evidence which would have supported a finding of that factor or supported a finding of some non-statutory mitigating factor. That the court did not find any mitigation, statutory or otherwise, when plenty of unrebutted testimony existed to support such a finding, is reversible error.

VI CONCLUSION

Based upon the arguments presented above, Ronald Woods respectfully asks this Honorable Court to reverse the trial court's judgment and sentence and remand for a new trial. In the alternative, he asks that this Court reverse the trial court's sentence and either impose a life sentence or remand for a new sentencing hearing.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



DAVID A. DAVIS
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Mr. Larry Kaden, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee, and a copy has been mailed to appellant, Mr. Ronald Woods, #064857, Post Office Box 747, Starke, Florida, 32091, this 8th day of March, 1985.

DAVID A. DAVIS