IN THE SUPREME COURT
OF THE STATE OF FLORIDA

PAUL EDWARD MAGILL,

Appellant,

vs.

Case No. 64997

STATE OF FLORIDA,

Appellee.

_____/

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

The transcript of the proceedings held on the Motion to Vacate will be cited by the abbreviation "TrMV", and the separately bound volume containing the other portions of the record in the lower tribunal will be cited as "RMV". Citations to the original record and trial transcript will be made by the abbreviations "R" and "Tr" respectively.

To facilitate review in this case the Appellant has prepared an Appendix which includes the prior opinions of this Court and all pertinent orders of the Circuit Court. Parallel citations to the Appendix will be made througout this Brief.

The Apellant, Paul Edward Magill, will be referred to by name or as the "Defendant" and the Appellee will be referred to as the "State".

STATEMENT OF THE CASE

A.

Original Proceedings in the Trial Court

The Defendant was charged by Indictment with the crimes of first degree murder, sexual battery, and armed robbery. (R-1-2) Although he was seventeen years old and therefore a juvenile under Florida law, he was tried as an adult. A plea of Not Guilty was entered and the case was tried before a jury on March 21, 1977.

At the close of the guilt phase of the trial the jury returned a verdict finding the Defendant guilty as charged of each of the offenses. (R-66,66a,66b) The State produced no evidence of aggravating circumstances in the penalty phase proceedings which began shortly after the verdicts were announced, but at the conclusion of that portion of the trial the jury returned an advisory verdict recommending the imposition of the death penalty. (Tr-612)

Consecutive life sentences were imposed on the charges of robbery and involuntary sexual battery, and the trial judge imposed a sentence of death on the charge of murder, in accordance with the recommendation of the jury. (R-74-76) In the written findings submitted in support of the sentence of death, (R-78, Appendix A), the trial judge found the following four aggravating circumstances:

> (1) that three felonies, namely, Murder in the First Degree, Involuntary Sexual battery and used or threatened to use in the process thereof a deadly weapon, and Robbery and in the course thereof carried a firearm, were committed by the Defendant PAUL EDWARD MAGILL.
>
> (2) The capital felony of Murder was committed while the Defendant was engaged in the commission of, or flight after committing, the crime of Robbery and Rape.
>
> (3) The said capital felony was especially heinous, atrocious and cruel, as there existed no logical or compelling reason for the Defendant to kill said robbery and rape victim and same was the heinous act of a person evincing a depraved criminal mind.

(4) The said capital felony was committed in connection with the crime of robbery which was perpetrated for pecuniary gain.

The Trial Judge further stated in the written findings that there were "no mitigating circumstances which outweigh the ... aggravating circumstances." (R-78-79, Appendix A)

A timely direct appeal was filed in this Court to challenge both the conviction and sentence.

B.

The Direct Appeal

The Defendant's direct appeal to this Court resulted in an affirmance of the conviction, but the Court remanded the case for a new sentencing hearing on the ground that the Trial Judge erred generally in his failure to "list the mitigating circumstances" which may or may not have been considered. Magill v. State, 386 So.2d 1188 (Fla. 1980) cert. den. 450 U.S. 927, 67 L.Ed.2d 359, 101 S.Ct. 1384 (1981) (Appendix B).

C.

The Sentencing After Remand

On January 26, 1981, following the new sentencing hearing, the Trial Judge entered a new Judgment supported by written Findings of Fact. (Appendix C) He concluded that the same four

aggravating circumstances were applicable, and found the existence of the following three mitigating circumstances:

(1) that the Defendant Magill was seventeen years of age at the time of the offense,
(2) that the Defendant had no significant prior criminal record and,
(3) that the Defendant's father had passed away on December 28, 1975.

The ultimate conclusion of the Court was that there were "insufficient mitigating circumstances to outweigh the aggravating circumstances." Accordingly, the Trial Judge resentenced the Defendant to death. (Appendix C).

D.

The Appeal After Remand

The second appeal to the this Court involved only the validity of the Defendant's sentence. On March 10, 1983, the Court entered its four-to-one opinion affirming the imposition of the sentence of death. Magill v. State, 428 So.2d 649, (Fla. 1983) cert. den., ____ U.S. ____ (U.S. No. 82-6733, October 3, 1983). (Appendix D).

E.

The Post Conviction Proceedings

Governor Graham denied the Defendant's Petition for Executive Clemency and signed a death warrant on February 21, 1984, directing the execution of the sentence at some time

between March 16, 1984 and March 23, 1984. (Appendix E). Subsequently, the Superintendent of the Florida State Prison scheduled the execution for Tuesday, March 20, 1984, at 7:00 a.m.

Shortly after the Warrant was signed the Defendant filed a Motion to Vacate the Judgment and Sentence of Death and a Motion for Stay of Execution. (RMV) The Motions were scheduled to be heard in the Circuit Court for Marion County Florida on March 8, 1984 upon ten days written notice to the State. As the hearing commenced, the State filed a written Response to the Motion to Vacate and a Motion to Strike some of the grounds set forth in support of the Motion. (RMV).

The Defendant asserted a number of fundamental errors in his collateral challenge to the conviction and sentence including a claim that he was denied the effective assitance of counsel at trial and sentencing. The specific acts or omissions upon which the ineffectiveness claim was based were detailed in the factual allegations of the Motion to Vacate. (RMV).

The Trial Judge considered the evidence presented on the Defendant's behalf and entered an Order denying the Motion to Vacate (Appendix F) as well as the Motion for Stay of Execution. (Appendix G).

This Appeal was timely filed on March 8, 1984.

STATEMENT OF THE FACTS

A number of collateral legal challenges were raised in the Motion to Vacate, but the evidence presented to the Court in support of the Motion related primarily to the Defendant's claim of ineffective assistance of counsel at trial and at sentencing.

The Defendant was represented at trial by Mr. Robert Pierce who was then the Public Defender for the Fifth Judicial Circuit. Attorney Pierce showed up on the morning of trial and announced to Mr. Hale Stancil, the assistant public defender assigned to the case, that he was going to take over the presentation of the case. (TrMV-121).

Hale Stancil, now a county judge in Marion County, candidly stated that in his opinion Mr. Pierce was unprepared to try the case. (TrMV-177). Pierce had not handled any of the pretrial proceedings nor had he ever met the Defendant Magill. Although he swore that his primary objective was to save the Defendant's life, (TrMV-128), he walked out after the verdict of guilt and left Stancil to try the penalty phase. (TrMV-129).

During the hearing on the Motion to Vacate, Attorney Pierce testified that he did not recall trying the case. (TrMV-65). When his memory was refreshed by the trial transcript he admitted he had taken part in the case, but he did not recall the Defendant and could not identify him in court or by looking at a photgraph taken at the time of the offense. (TrMV-66,67).

The Defendant's present counsel asked Mr. Pierce to read his opening statement from the trial transcript and to state what defense he had raised on the Defendant's behalf. He read that portion of the transcript and said that the defense was either insanity or a plea for second degree murder. (TrMV-69,70). He could not reach a more specific conclusion on the basis of the one-page opening statement because no defense was mentioned in it and because it was clear that he told the jury that guilt was not an issue in the case. (TrMV-71).

Mr. Pierce could not recall filing or arguing any motions on Paul Magill's behalf. (TrMV-84). He could not recall taking any depositions or reading any police reports. (TrMV-72). When asked to affirm or deny the fact that he had spoken to Paul Magill he could do neither. (TrMV-72). He could not explain why he called Paul to the stand on the motion to suppress his confession or why he elicited testimnoy that he had confessed freely and voluntarily. (TrMV-107). Finally, he could not give any strategic or tactical reason why he called Paul to the stand in the guilt phase of the trial to confess that he was guilty of first degree murder (TrMV-75-81), or why he argued in summation, in the face of his own client's testimony, that the evidence only supported second degree murder.

Mr. Stancil was likewise unable to advance any strategic or tactical reasons for any of the acts and ommissions of Mr. Pierce during the guilt phase of the trial. He could offer no reason why Mr. Pierce took over the case on the day of trial, nor was he

aware of any pretrial preparation on Mr. Pierce's part other than the fact that they had had conversations about the case from time to time. (TrMV-121-124).

The only reason given for placing Paul Magill on the stand during the Motin to Supress was that the attorneys thought they needed to "protect the record." (TrMV-137,141,142). Mr. Stancil conceded that Paul Magill was the only witness called by the defense on the Motion and that his testimony that the confession was freely and voluntarily given was directly contrary to the essential allegations of the motion. (TrMV-136-145).

Mr. Stancil categorically stated that he did not think that Mr. Pierce was prepared to try the case. (TrMV-177). He stated that Pierce did not allow him to make any objections and that he was not consulted on any of the technical decisions made by Mr. Pierce. (TrMV-133). He did not know why Mr. Pierce stipulated to the introduction of all of all of the items of tangible evidence. (TrMV-151). Mr. Stancil further stated that Mr. Pierce left the courtroom after the guilt phase of the trial saying only that he was going. (TrMV-129).

Paul Magill testified that he met Mr. Pierce on the day of the trial and that Pierce did not discuss his testimony or prepare him for the prosecutor's cross examination. (TrMV-222). Magill stated, without contradiction, that he was not consulted by anyone about any of the tactical decisions made during the trial. (TrMV-223).

Dr. George Barnard, a psychiatrist appointed to determine sanity and competency, testified that he was not questioned by either defense lawyer as to the existence of any mitigating circumstances relating to Paul Magill's emotional health. (TrMV-16). He was given a package of information outlining Paul's life from the age of sixteen but he was not provided with any other history. (TrMV-19). Nor was he told whether Paul was on any psychotropic medication at the time of the examination. (TrMV-22).

Dr. Barnard did not recall any pretrial contact with Paul Magill's attorneys (TrMV-24), and did not recall whether he spoke with either of them prior to his testimony at the penalty phase. (TrMV-27). He was not prepared to give any opinion at the penalty phase other than his opinion that the Defendant was sane at the time of the offense and that he was competent to stand trial. (TrMV-16,27). In response to questioning at the hearing on the Motion to Vacate, Dr. Barnard said that the Defendant had exhibited "impulsive" behavior in the past. (TrMV-40-42).

Dr. Frank Carrera gave testimony similar to that of Dr. Barnard. He stated that he could not testify as to whether there were any psychologically-based mitigating circumstances in this case because no one ever asked him to look for any. (TrMV-15). He confined his examination to the two issues of sanity at the time of the offense and the competence to stand trial. (TrMV-10,11). He could recall no contact with either Mr. Stancil or Mr. Pierce. (TrMV-8).

The final medical witness called at the hearing was Dr. Martinez-Montford, a psychologist who had also evaluated Paul Magill. He testified that he had seen Paul Magill at age thirteen when he was referred by his parents after having exposed himself in public. (TrMV-46). Dr. Montford's opinion was that at that time Paul had very little control over his aggressive impulses. (TrMV-48), and that his only control mechanism was that of isolating himself in a schizoid pattern from other persons and living a solitary life. (TrMV-48).

Dr. Montford further testified that he was certain that Paul would become worse with age since the aggressive and sexual impulses would become stronger as adolescence progressed. (TrMV-50). It was his judgment that at age thirteen two mitigating factors were emerging: one, that Paul Magill then had an inability to conform his conduct to the requirements of law and two, that Paul Magill was suffering from an emotional illness. (TrMV-51).

The Defense also presented the testimony of Attorney Margaret Good, the assistant public defender who handled the direct appeal to this Court. She recited a conversation with Mr. Stancil in which he admitted that he was counting on the insanity defense and when he learned it could not be supported he just did not know what he was going to do. (TrMV-210). He told Ms. Good that he filed the Motion for Continuance in good faith (the denial of the motion was asserted as error by Ms. Good) because he was unprepared for trial. (TrMV-210).

Ms. Good further testified that she had had a conversation with Dr. Barnard in which the opinions of Dr. Martinez were discussed and that two mitigating factors seemed to be available. (TrMV-198). Neither one of these mitigating factors was offered by the defense to the members of the jury for their consideration.

Paul's mother, Mary Lou Magill, testified that she spoke with Mr. Stancil only twice during his entire preparation of the case and that both times she initiated the contact. (TrMV-227). She volunteered to Mr. Stancil the name of Dr. Martinez-Montfort, and gave him a written summary of Paul's life. (TrMV-227).

She was not consulted on any strategic decisions, including the decision to place her son on the witness stand and to subject him to cross examination. (TrMV-229,230). She had never heard of Mr. Pierce and had never seen him until the day of trial when he began picking the jury in Paul's case. In fact, she believed he worked for the prosecution. (TrMV-228).

The materials prepared by Dr. Martinez-Montford were never utilized by Mr. Stancil in the mitigation phase of the case, despite the fact that Mrs. Magill was present and witnessed a tape recording of the conversation between Stancil and Montfort, which took place over the phone. (TrMV-226). She verified the number of times that Paul Magill had seen Mr. Stancil and that he

had never seen Mr. Pierce. To her knowledge the attorneys did not discuss any tactical or strategic decisions with her son. (TrMV-225,226).

Finally, the Defense called Robert Link, a Jacksonville attorney who was qualified as an expert and accepted by the Court as an expert in the field of criminal law in the defense of capital cases. He testified that in his opinion the representation of the Defendant at trial fell measurably below that of competent counsel, (TrMV-244), and that the errors and ommissions were substantial enough that they affected the outcome of the case. (TrMV-281).

Mr. Link said that voir dire was ineffective to the extent that counsel allowed the prosecutor to create the impression that it would be wrong to consider the Defendant's youthfulness in mitigation. (TrMV-246). The opening statement failed to contest guilt, and failed to map out any defense for the jury. (TrMV-254). Mr. Pierce failed to cross examine both the chief investigating officer, (TrMV-255), and the medical examiner, (TrMV-256-260), and apparently failed to read the autopsy report.

Attorney Link stated that the mishandling of the guilt phase by Mr. Robert Pierce was so damaging to the penalty phase that Mr. Stancil could not prevent a recommendation of death in the penalty phase. (TrMV-245). Mr. Link testified that in addition to Mr. Pierce's failure to cross-examine crucial witnesses, his decision to put his client on the witness stand was in itself ineffectiveness of counsel (TrMV-261-265) because the record

shows (1), that he knew his client would confess to First Degree Murder and destroy the Second Degree Murder plea or (2), that Mr. Pierce did not know what his client would testify to. In either event he was ineffective in his assitance as counsel. (TrMV-267). Mr. Link considered it obvious that a lawyer in a First Degree Murder case should be conversant with his client's trial testimony prior to putting him on the stand. He also thought it was obvious that there was no preparation whatsoever for the trial testimony of Paul Magill. (TrMV-266).

Mr. Link pointed out that there was virtually no closing argument by Mr. Pierce addressing any of the factual matters in the trial, especially the factual matters brought out through the testimony of his own client.(TrMV-270-273). Paul Magill was allowed to state on cross examination that the offense was premediated but Mr. Pierce argued to the jury that it was not premediated, apparently asking the jury to disbelieve his own client. (TrMV-272).

Mr. Link also found it remarkable that Pierce could not identify Mr. Magill or recall any of the facts of the case. (TrMV-274). The conclusion he reached after reviewing the transcript and listening to all of the testimony presented during the Motion to Vacate was that Mr. Pierce mishandled the case to such a degree that he destroyed any chance Paul Magill had of obtaining a life sentence. (TrMV-244,245) He was of the opinion that Pierce substantially altered the course of the case by virtue of his ineffective representation. (TrMV-281).

The State did not present any testimony or other evidence during the hearing on the motion.

ARGUMENT

POINT ONE

THE DEFENDANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND SENTENCING IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

It is well established that the Sixth Amendment guarantees not only the right to an attorney but the right to "reasonably effective assistance" of counsel. Powell v. Alabama, 287 U.S 45, 77 L Ed 158, 53 S.Ct. 55 (1932) Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 70 L.Ed.2d 650 (1980). The federal and state courts are in disagreement, however, as to an appropriate test for the determination of the effectiveness of counsel.

The Supreme Court has granted certiorari to review the decision of the Fifth Circuit in Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc) cert. granted, 51 U.S.L.W. 3685 (U.S. June 7, 1983), which provides a more flexible standard for determining ineffective assistance of counsel claims in death penalty cases than that which was established by this Court in Knight v. State, 394 So.2d 997 (Fla. 1981).

In determining whether a defendant has been provided with reasonably effective assistance of counsel under Knight, the courts must adhere to the following four-step approach: (1) the act or omission upon which the claim is based must be detailed in

the appropriate pleading, (2) the defendant has the burden to show that the specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel, (3) the defendant has the burden to show that the act or omission when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceeding, and (4) in the event that the defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. The Washington standard merely requires a defendant to show that the ineffectiveness "resulted in actual and substantial disadvantage to the course of his defense" but not necessarily that the "disadvantage determined the outcome of the entire case.". Washington v. Strickland, supra, King v. Strickland, ___ F. 2d ___ (11th Cir. Case No. 82-5306 September 2, 1983).

The State argued that the Trial Judge was not bound by Washington because the precedents of intermediate federal appellate courts are not binding on the states court. While that much is obviously true, the argument is one which is ill advised. It is not just a question of precedent for if this claim is denied the case will ultimately be presented to the Eleventh Circuit which is bound by decisions of Unit B of the

former Fifth Circuit. Additionally it should be clear that the State's Petition for Writ of Certiorari in Washington may have the effect of creating a United States Supreme Court precedent to the same effect.

In any event the performance of counsel in this case fell far below that of competent counsel even when measured by the test in Knight. The Defendant clearly established each element of that test in the lower court.

A.

The Specific Acts or Omissions Were Detailed in the Appropriate Pleading

The sworn Motion to Vacate contained thirteen specific deficiencies in the representation of the Defendant during the guilt phase (Motion p. 10) and five other specific deficiencies in the representation of the Defendant during the penalty phase. (Motion 23,24). The Motion was served on the State ten days before the hearing and the State did not make any challenge to the sufficiency of the Defendant's factual allegations. Thus, the first element of the Knight test has been established and the State can not argue to the contrary in view of its failure to make any contemporaneous objection.

B.

The Acts and Omissions Were Proven to be Substantial Deficiency Measurably Below That of Competent Counsel

It hardly seems necessary to explain why the representation provided by Mr.Pierce was below that of competent counsel. No reasonably effective lawyer would show up on the morning of a capital trial totally unprepared and without having ever discussed the case with the Defendant. Nor would a reasonably effective lawyer open his case by telling the jury that "the burden of proof [is] not important" because he is not arguing the proof and because he is "not even arguing the guilt." Tr.226

Unfortunately for the Defendant and for the criminal justice system in general, the performance of attorney Pierce was a catalog of serious errors and omissions. Most lawyers would at least read the autopsy report in a homicide case and nearly all of them would take the depositions of the essential witnesses, file pretrial motions, and attempt some meaningful form of cross-examination of the key witnesses. Mr. Pierce admitted that he did not do any of these things.

The argument that Mr. Pierce was unprepared to try the case is not just the opinion of Mr. Magill's present advocates, it is also the opinion of Judge Hale Stancil who was then Mr. Pierce's assistant counsel at trial. It would be hard to present better evidence ineffectiveness than the opinion of a judge who was in the courtroom observing the performance of counsel from the vantage point of an assistant. It is obvious from the testimony

that Judge Stancil was not a friendly witness and that his candid admission about the quality of the Defendant's representation was in the nature of an admission against interest. If this does not constitute "proof" of the deficiency then it would be hard to imagine what would.

Judge Stancil's opinion about the representation of the Defendant during the guilt phase is consistent with the expert testimony of Attorney Robert Link who swore under oath that Mr. Pierce's performance was measurably below that of competent counsel. (TrMV-244,281). Mr. Link was of the opinion that the failure to cross-examine the medical examiner and the chief investigating officer were substantial omissions. He also believed that the decision to put the Defendant on the stand was in itself proof of ineffective assistance. Mr. Pierce either knew that the Defendant would confess to premeditated murder or he did not talk to the Defendant prior to putting him on the stand.

One of the most disturbing aspects of this issue is that Mr. Pierce left the courtroom without explanation as soon as the Defendant was found guilty and left Mr. Stancil to try the penalty phase in his absence. No lawyer worthy of the right to practice law should ever abandon a client in the middle of a trial. One can only imagine the effect this must have had on the jury.

It is also most disturbing that Mr. Pierce has no recollection of the Defendant, no recollection of the fact that he tried the case, and no recollection of the reasons for taking certain actions in the case. It is difficult to believe that there are that many capital cases in Ocala. Even then it is difficult to believe that an attorney would not recall a client who was sentenced to die. Obviously, Mr. Pierce did not spend a great deal of time or energy on the case if it so insignificant that he can not even recall it.

The actions of counsel at trial cannot be passed off as "tactical decisions" without stretching that distinction beyond all logical meaning. No lawyer would agree that it is a good "tactic" to stipulate that the state is correct and that the defendant is indeed guilty. Nor is it likely that any lawyer would agree that it is a good strategy to put the defendant on the stand for the purpose of making an in court confession to murder. In any event Mr. Pierce repeatedly stated that he did not remember the trial decisions he made and, therefore, that he could not say what tactical reasons, if any, they were based upon.

C

The Acts and Omissions Were Substantial Enough to Demonstrate Prejudice

As for the prejudice, it seems clear that if the members of the jury were not convinced of guilt after the presentation of

she state's case they certainly must have been convinced of it after the presentation of the "defense." Attorney Robert Link testified, without contradiction, that the acts and omisions of Mr. Pierce were so serious that they affected the outcome of the case. (Tr.MV-244,281). Mr. Link was of the opinion that any chance that Paul Magill had of receiving a life recommendation by the jury was sabotaged by his attorney's ineffectiveness in the guilt phase. (Tr.MV-245).

A review of the record will demonstrate that Mr. Link gave a reason for his opinion as to each act or omission. For example, of the many deficiencies he outlined, he thought that the failure to cross-examine the medical examiner was prejudicial because she would have established that the victim had a blood alcohol content of .12 and that the gunshot wounds were such that she must have died quickly. (TrMV-256-260). He also demonstrated that the failure to cross examine the chief investigating officer was prejudicial because he himself was of the opinion that the offense was impulsive."(TrMV-254-255). He explained that the act of calling the Defendant to the stand to confess during the guilt phase was serious and prejudicial because it served no apparent purpose and because Pierce invited questions about unrelated crimes and allowed the Defendant to conclude without objection on cross-examination that he was guilty of first degree murder. (Tr.MV -262-267). He also explained that the plea for second

degree murder made during the closing argument was ineffective because it ignored the Defendant's own contrary testimony. (TrMV-272).

At the very least, these acts and omissions when taken together with the absence of any trial preparation and Mr. Pierce's admitted lack of contact with the Defendant make a prima facie case of prejudice. Even under the standard in Knight a prima facie case of prejudice is enough if it is not rebutted.

D.

The State Had an Opportunity to Rebut the Claim but Failed to do so.

Judge Stancil's opinion that Pierce was not prepared for trial stands unrebutted since the State did not present any evidence during the hearing. Likewise, the State is not now in a position to disagree with Attorney Link's opinion that Pierce's representation fell measurably below that of competent counsel, because the State failed to challenge that opinion in any respect in the lower court.

POINT TWO

THE IMPOSITION OF THE DEATH PENALTY UPON A YOUTH WHO WAS UNDER THE AGE OF EIGHTEEN AT THE TIME OF THE OFFENSE CONSTITUTES EXCESSIVE AND DISPROPORTIONATE PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

At the outset it should be noted that this Court has expressly held that an argument of this nature may be raised in a

post-conviction motion filed pursuant to Fla.R.Crim.P. 3.850. Contrary to the State's argument in the lower tribunal the precedents of this Court allow the presentation of a post-conviciton claim that the capital sentencing statute is unconstitutional as applied to a certain class of cases. Henry v. State, 377 So.2d 692 (Fla. 1979), Hitchcock v. State, So.2d ___ 8 F.L.W. 169 (Fla. 1983).

The United States Supreme Court held in Gregg v. Georgia, 428 U.S. 153 (1976) that the death penalty does not invariably violate the Eighth Amdendment proscription against cruel and unusual punishment and in Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976) that the Florida Capital Sentencing Statute was not facially unconstitutional. These decisions firmly establish the general rules but the United States Supreme Court has recognized that there are indeed exceptions.[1] This case demonstrates the need for an exception in the case of children convicted of capital offenses.

The fact that the constitution does not generally prohibit states from treating juveniles as adults does not mean that every form of punishment acceptable for an adult would be acceptable

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[1] For example, the Supreme Court held in Coker v. Georgia, 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977) that death is an unconstitutionally excessive penalty for the crime of rape. Similarly, the Supreme Court decided in Enmund v. Florida, U.S. ___, 73 L.Ed.2d 1140 (1982) that the imposition of the death penalty on a person who aids and abets a felony in the course of which murder is committed by others but who does not himself kill, attempt to kill, or intend to kill constitutes a violation of the Eighth and Fourteenth Amendments.

for a juvenile certified for trial as an adult. The United States Supreme Court has consistently recognized that "death as a punishment is unique in its severity and irrevocability", Gregg, supra, and that the death penalty commands a special Eighth Amendment concern. Gardner v. Florida, 430 U.S. 349, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977), Beck v. Alabama, 477 U.S. 625 (1980). Thus, it follows that the death penalty is not necessarily acceptable for citizens who are legally defined by the State as "children" simply because they might, in certain situations, be subject to penalties approved for adults.

The United States Supreme Court has long recognized that as to some matters the Constitution requires a distinction between children and adults. As Mr. Justice Fankfurther said in May v. Anderson, 345 U.S. 528 (1953), "children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of the State's duty towards children." Id at 536. And the United States Supreme Court noted in Bellotti v. Baird, 443 U.S 662, 61 L.Ed.2d 797, 99 S.Ct. 3035 (1979) that "our acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults." Id at 635.

The determination by the lower court that the Defendant should in all respects be treated as an adult was not made upon the type of reasoned analysis envisioned by the United States

Supreme Court in Kent v. United States, 383 U.S. 541, 16 L.Ed.2d 84, 86 S.Ct. 1045 (1966). The Defendant was not certified for treatment as an adult upon any evidentiary finding that he was capable of assuming the responsibility of an adult. On the contrary, the decision to try the Defendant as an adult was made automatically under the provisions of §39.02(5)(c)(2) Fla. Stat. which provides that every juvenile charged by indictment with a capital offense shall be tried in the adult courts.

The statute providing for an automatic transfer of a juvenile indicted for a capital offense has been upheld generally,[2] but the Courts have never held that such an "automatic" devestiture of the child's right to be treated as a juvenile can also serve as a basis for the imposition of the death penalty. Certainly the argument for approving the applicaility of the death penalty to juveniles would be much stronger (assuming it is a valid argument at all) in a case where all eight of the standards set forth in Kent, supra, have been proven in a hearing, and the juvenile has been determined upon evidence to bear the same degree of responsibility as an adult. That is not the case here, however.

The fact that juveniles are entitled to separate treatment in some instances has not only been recognized in the opinions of the United States Supreme Court but has been noted as well in the

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[2] Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977) cert. den. 434 U.S. 1088.

applicable Florida legislation and court decisions. The Florida Juvenile Justice Act itself recognizes that one of its purposes is :

> To assure to all children brought to the attention of the courts either as a result of their misconduct or because of neglect or mistreatment by those responsible for their care, the care, guidance, and control, preferably in each child's own home, which will best serve the moral, emotional, mental, and physical welfare of the child and the best interest of the State. §39.001(2)(b) Fla. Stat. Stat. Ann.

Thus, the Florida Legislature has recognized that the emphasis in the treatment of juvenile offenders should be placed on the welfare of the child and not upon the traditional punitive considerations used in the disposition of an adult case.

The distinction between children and adults has been recognized in all of the other capital cases presented to this Court. As Mr. Justice Boyd noted in his dissent: "[The Court] has thus far vacated the death sentence of every defendant who has been under the age of eighteen. See Vasil v. State, 374 So.2d 465 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979); Thompson v. State, 328 So.2d 1 (Fla. 1976)". Mr. Justice Boyd did not advocate the absolute rule urged by the Defendant in the post-conviction argument under review, but he did recognize that in view of "society's special concern for its juveniles, great significance should be attached to the fact that a person accused of a capital felony is a minor, especially a minor who was unemancipated. Magill slip at 8. (Appendix D).

The Defendant submits that the courts must make some uniform distincition in this area of the law. No one would seriously argue that a five year old should be put to death for committing an act, however egregious it may have been. The imposition of the death penalty certainly constitutes cruel and unusual punishment in that instance. Thus, the task of the Court is not to determine whether the death penalty can be constitutionally applied to a child, but rather to determine the age below which the death penalty cannot be applied consistently with the Constitution.

The Defendant repectfully submits that the line should be drawn at the age of eighteen. Since 1962 the American Law Institute's Model Penal Code has embodied a recommendation that the death penalty should not be imposed on youthful offenders below the age of eighteen.[3] Revisors of the Model Code have recently reaffirmed that considered judgment, despite suggestions that the minimum age should be reduced.[4]

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[3] AMERICAN LAW INSTITUTE, MODEL PENAL CODE, §210.6(1)(d) (Proposed Official Draft, 1962) reads:

> (1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of a first degree if it is satisfied that :
>
> (d) the defendant was under eighteen years of age at the time of the commission of the crime.

[4] AMERICAN LAW INSTITUTE, MODEL PENAL CODE, §210.6, Comment 133 (Official Draft and Revised Comments, 1980).

The acceptance of the age of eighteen as the appropriate boundary between childhood and adulthood is uniformly established in both federal and state law. For example, the Twenty-Sixth Amendment of the Constitution guarantees the right to vote to any citizen who has attained the age of eighteen years. With respect to criminal responsibility the Florida laws define a child "as any person under the age of eighteen years."[5] That age has been accepted by the Florida Legislature as the age of civil responsiblity as well, for a child under the age of eighteen is legally incapable of handling his affairs.[6]

It would defy reason to hold that a child under the age of eighteen is capable of assuming a sense of responsibility which is so great that it justifies the imposition of the death penalty when we have held in other areas of the law that he does not yet have sufficient maturity[7] to make a contract or case a vote in an election. The line has been drawn at the age of eighteen in many other areas of the law. There is no reason why it cannot be drawn there in the Court's most difficult task of locating the boundaries of our most severe criminal penalty.

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[5] Fla. Stat. Ann. 39.01(7).

[6] Fla. Stat. Ann. 743.07.

[7] Under Florida law an even higher degree of chronological maturity is required to buy a drink in a bar. Fla. Stat. Ann 562.111 (must be age nineteen to possess alcoholic beverages).

For each of these reasons the Defendant respectfully submits that the penalty of death is unconstitutional as applied and that this Court should reverse the order of the lower court denying the Motion to Vacate the sentence.

POINT THREE

THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE CONSTITUTES A DENIAL OF THE DEFENDANT'S EQUAL PROTECTION RIGHTS AS HE IS THE ONLY JUVENILE OFFENDER AGAINST WHOM A DEATH WARRANT HAS BEEN SIGNED IN THE ENTIRE CLASS OF JUVENILE OFFENDERS

This argument may also be raised in a post-conviction motion. As in the preceding argument, the Defendant has presented a constitutional challenge to the application of the death penalty to a certain class of individuals. Henry v. State and Hitchcock v. State, supra.

This Court has apparently reviewed death sentences imposed against seven juveniles since the capital sentencing statute was approved by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976). The Defendant Magill is the only one of all of these juvenile offenders who has been the subject of a death warrant signed by the Governor. He is also the only one who has had his death sentence affirmed by this Court.

The fifteen year old capital offenders have all avoided the death penalty. The only two ever sentenced to death were George Vasil and Frank Ross. Vasil's sentence was reduced to life,

Vasil v. State, 374 So.2d 465 (Fla. 1979) and Ross received a new sentencing hearing which resulted in a life sentence. Ross v. State, 386 So.2d 1191 (Fla. 1980).

Of the sixteen year old capital offenders, the death sentence imposed against Henry Brown was reduced to life, Brown v. State, 367 So.2d 616 (Fla. 1979) and James Morgan received a new trial. Morgan v. State, 392 So.2d 1315 (Fla. 1981).

The remaining seventeen year olds also have a perfect record of ultimately receiving life sentences instead of the death penalty. This Court reduced the death sentences imposed against Larry Thompson and Robert Peavy to life, Thompson v. State, 328 So.2d 1 (Fla. 1976), Peavy v. State, ____ So.2d ____, (Fla. No. 62,115 December 8, 1983) and remanded Willie Simpson's case for a new trial, Simpson v. State, 418 So.2d 984 (Fla. 1982) after which he pled guilty to second degree murder and was sentenced to life.

That leaves only Paul Magill, a seventeen year old emotionally disturbed young man with no prior record, as the only juvenile offender actually facing the death penalty. The disparity which is obvious from these cases is even worse than it seems, for the cases do not take into account the many juveniles who did not initially receive a sentence of death.

The most fundamental objective of the capital sentencing statutes enacted after Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) was to attempt to provide some assurance that the death penatly was not applied arbitrarily.

The effort to create procedural safeguards and the attempt to apply them uniformly were among the primary reasons cited by the Court in upholding the new death penalty laws in Gregg v. Georgia, and Proffitt v. Florida, supra.

The disposition of this case can hardly viewed as being comparable to others like it. The treatment of Paul Magill constitutes a radical departure from the manner in which Florida juveniles have been treated in the past. For that reason, the Defendant submits that the disparity in his sentence constitutes a violation of his rights under the equal protection clause of the Fourteenth Amendment.

POINT FOUR

THE IMPOSITION OF THE DEATH PENALTY CONSTITUTES A DENIAL OF THE DEFENDANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS SINCE THE PENALTY OF DEATH WAS BASED IN PART UPON A NON-STATUTORY AGGRAVATING CIRCUMSTANCE

The Findings of Fact made by the trial judge on January 26, 1981, in support of the sentence of death include four aggravating circumstances. (Appendix C). The first of these findings was articulated by the trial court as follows:

> (1) That three felonies, namely, Murder in the First Degree, Involuntary Sexual Battery and used or threatened to use in the process thereof a deadly weapon, and Robbery and in the course thereof carried a firearm, were committed by the Defendant, PAUL EDWARD MAGILL. "(Appendix C).

The Defendant submits that the sentence of death must be vacated because the application of the non-statutory aggravating circumstance referred to above was a fundamental error committed in violation of his rights under the Eighth and Fourteenth Amendments.

It is conceded that reliance upon a non-statutory aggravating circumstance does not automatically invalidate a sentence of death. Barclay v. Florida, ___ U.S. ___ , 77 L.Ed.2d 1134 (July 6, 1983). It does render the sentence invalid, however, in a case such as this one where there are mitigating circumstances. The consideration of a non-statutory aggravating circumstance in that situation "so infects the balancing process created by the Florida statute that it is constitutionally impermissible for the [court] to let the sentence stand." Barclay at 77 L.Ed.2d 1148.

As the United States Supreme Court noted in Barclay, this Court has reversed sentences of death if the trial judge considered an improper circumstance when there are also some mitigating circumstances. See Elledge v. State, 346 So.2d 998 (Fla. 1977), Moody v. State, 418 So.2d 989 (Fla. 1982), and Riley v. State, 366 So.2d 19 (Fla.1979). Nothing in the recent decisions of the United States Supreme Court in Barclay, Zant v. Stevens, _____ U.S. _____ 77 L.Ed.2d 235 (June 22, 1983) and Wainwright v. Goode, ___ U.S. ___ 52 U.S.L.W. 3419 (November 29,

1983) can be fairly read to alter the conclusion that it is reversible error to consider a non-statutory aggravating circumstance in the presence of mitigating circumstances.

The Defendant submits that the sentence must be reversed in any event because the non-statutory aggravating circumstance cannot be applied consistently with the Constitution. The fact that the Defendant allegedly used a "gun" was part of the homicide itself and thus cannot be considered as aggravation sufficient to support the death penalty. Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976). Facts which are necessary to prove the elements of the offense cannot be used consistently with the Constitution to support the imposition of the death penalty.

For these reasons, the Defendant respectfully submits that the Court should reverse the judgment of the trial court denying the Motion to Vacate and direct the trial judge to resentence the Defendant and to exclude any consideration of the nonstatutory aggravating circumstance.

POINT FIVE

THE EXCLUSION FOR CAUSE OF A JUROR WHO EXPRESSED A CONSCIENTIOUS OBJECTION TO THE IMPOSITION OF THE DEATH PENALTY UPON YOUTHFUL OFFENDERS VIOLATED THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS

This argument has been made before this Court but it would be appropriate to reconsider it in light of the recent decision of the Eleventh Circuit Court of Appeal in Darden v.

Wainwright, ____ F.2d ____ (11th Cir. No. 81-5590 February 22, 1984). This Court has held that it is permissible to reargue an issue on post-conviction if there has been a change in the law since the time the issue was considered on direct appeal. Witt v. State, 387 So.2d 922 (Fla. 1980). The opinion of the Eleventh Circuit in Darden sets a standard which was not available to this Court or the Florida Supreme Court at the time the issue was initially resolved.

It is well settled that a death sentence "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." Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968). The Court said that prospective jurors cannot be excused from jury service on the basis of their opposition to the death penalty unless they make it

> unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt

The Eleventh Circuit has interpreted this rule in Darden, and several other intervening decisions to require that

> only the most extreme and compelling prejudice against the death penalty, perhaps only or very nearly a resolve to vote against it blindly and in all circumstances, is cause to exclude a juror on Witherspoon grounds. Darden v. Wainwright, Slip Op. at p. 4.

Juror Bonner did not make it "unmistakably clear" that she would automatically vote against capital punishment. In fact she said that she was in favor of capital punishment. (Tr-34) She started out merely by saying that the Defendant's age would "influence" her Tr-35, and it was only after the state attorney led her to believe throughout the entire questioning session that it would be improper to vote for a life sentence based upon the Defendant's age that she said she would have difficulty voting for a conviction. She was never advised that it would be proper to consider age as a mitigating circumstance.

This Court was of the opinion that the juror was properly excused because she had given an answer which indicated her inability to vote for a conviction. Magill v. State, 386 So.2d 1188, at 1189 (Fla. 1980). One of the major points of the Darden case, however, is that the determination to exclude may not be made solely on the basis of the juror's "answers". As the Court noted; "the answers alone do not dispose of the issue; the judge

must decide whether the responses make unmistakably clear the prospective juror's unbending opposition to capital punishment." Darden, Slip Op. at p. 7.

It is not "unmistakably clear" that Juror Bonner's beliefs would prevent her from imposing the death penalty, nor is it even clear that she opposed the death penalty for youthful offenders. She tried to ask the prosecutor how old the Defendant was so that she could answer his question more intelligently, but the prosecutor declined to provide that information. (Tr-35,36).

The answers ultimately given upon the information Mrs. Bonner was provided in the questions do not provide any justification for her excusal for cause under Witherspoon, supra. In the context of the entire questioning session her answers indicate no more than the fact that the capital punishment issue would influence her decision on the issue of guilt if she were not allowed to take the Defendant's age into consideration in assessing the penalty.

The Defendant contends that the excusal of the juror in question fails to meet the standards set by the Eleventh Circuit in Darden, supra. Since that decision was made subsequent to the direct appeal in this case the Defendant submits that the issue should be reconsidered on this post-conviction motion. The State contended that the Florida courts are not obligated to follow intermediate federal court opinions but in the next breath pointed out that it intended to take the Darden case to the United States Supreme Court. The State's own argument should

give this Court some pause for the decision may obviously be elevated from persuasive authority to binding authority.

For these reasons the Defendant submits that the trial judge was in error and that the Trial Judge should have granted the Motion to Vacate the Sentence.

POINT SIX

THE DEFENDANT'S PLEA OF GUILTY OF SECOND DEGREE MURDER, MADE DIRECTLY TO THE JURY BY TRIAL COUNSEL, WAS ACCEPTED BY THE COURT IN THE ABSENCE OF A DETERMINATION OF VOLUNTARINESS

From the commencement of the trial to the closing argument the Defendant's appointed attorney admitted that his client was guilty of murder. Likewise, the Defendant's testimony before the jury that he killed the victim was no more than an in court confession to the charge of murder.

The Defendant respectfully submits that the arguments of counsel and the Defendant's testimony were tantamount to a plea of guilty and that the tacit approval of this procedure by the court without a determination of voluntariness constituted a violation of Defendant's Fifth, Sixth and Fourteenth Amendment rights.

The Defendant entered a plea of not guilty to the offense charged in the indictment, but that appears to have been no more

than a mere formality in view of his attorney's approach to the case. During the opening argument counsel for the defendant told the jury:

> Mr. Oldham has told you the narrative type of thing of what he intends to prove. Ladies and gentlemen of the Jury, we don't deny that.. Tr-245
>
> Now, I haven't discussed with you during - - when we were picking the Jury, the burden of the proof. That's not important. We're not arguing the proof. We're not even arguing the guilt. Tr-246

Perhaps it seems too obvious, but counsel did not need a jury trial if he did not intend to argue the issue of guilt. Stated otherwise, the actions of counsel in this case are indistinguishable from the typical actions of an attorney in the entry of a guilty plea. The only difference is that the Defendant received no benefit and the Court made no inquiry of the Defendant as to whether his actions in making a plea of guilt directly to the jury were voluntary.

It is now well settled that trial judges in criminal cases have an obligation to make a factual finding that a guilty plea was entered freely and voluntarily and that a conviction entered upon a guilty plea must be reversed in the absence of such a finding. Boykin v. Alabama, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct.1709 (1969), Brady v. United States, 397 U.S. 742, 25 L.Ed.2d 747, 90 S.Ct. 1463 (1970). Surely no less can be required in a case where the defendant makes a plea of guilt directly to the jury.

For these reasons, the Defendant respectfully submits that the trial court committed constitutional error in failing to make a factual determination that the Defendant wished to admit guilt freely and voluntarily. The conviction imposed upon the jury's apparent acceptance of the plea should therefore be vacated and the Defendant should be granted a new trial.

POINT SEVEN

THE APPROVAL OF THE USE OF CERTAIN AGGRAVATING CIRCUMSTANCES PRIOR TO THE SENTENCING ON REMAND EFFECTIVELY DEPRIVED THE DEFENDANT OF HIS RIGHT TO A FAIR SENTENCING HEARING IN VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court originally vacated the sentence of death because this Court failed to render a specific analysis of the applicable mitigating circumstances. Magill, 386 So.2d at 1191. Nevertheless, the Court approved of the applicability of the aggravating circumstances supporting the sentence. This prejudgment by the Court prior to the resentencing hearing constitutes a violation of the Defendant's Eighth and Fourteenth Amendment rights.

Although it was unnecessary to do so, the Court approved of the trial judge's finding that the homicide was especially heinous, atrocious and cruel[8] as well as the trial judge's finding that the Defendant killed his victim to avoid

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[8] Fla. Stat. Ann. 921.141(5)(h).

identification.[9] The Court concluded that "it is apparent that the Trial Judge used a reasoned judgment and, in the absence of sufficient mitigating circumstances, the death penalty was justified" 386 So.2d at 1191.

The untimely expression of the Court's opinion clearly deprived the Defendant of his right to a fair and impartial sentencing hearing. Likewise, it deprived him of his right to a fair and impartial review of his death sentence following resentencing. This Court had already approved of critical findings of aggravation before they were made by the trial judge at the new sentencing hearing.

One of the primary reasons for upholding the Florida death penalty statute, was that it provided a guaranteed direct review of the sentence by the Florida Supreme Court. The United States Supreme Court said in Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976):

> "...Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of defendants. The Supreme Court of Florida reviews each death sentence to insure that similar results are reached in similar cases," Id at 258.
>
> "...it is apparent that the Florida Court has undertaken responsibility to perform its function of death sentence review with a maximum of rationality and consistency..." Id at 259.

[9] Fla. Stat. Ann. 921.141(5)(e).

> "...any suggestion that the Florida Court engages in only cursory or rubber stamp review of death penalty cases is totally controverted by the fact that it has vacated over one-third of the death sentences that have come before it." Id at 259.

The "rationality and consistency" of review which apparently impressed the Supreme Court of the United States in Proffitt was totally lacking in this case. Surely the United States Supreme Court did not intend to approve of a procedure whereby the death penalty would be imposed by some piecemeal method of reviewing the applicable factors.

Meaningful appellate review of the sentence itself is a necessary element of the constitutionality of the Florida capital penalty statute. The review can hardly be characterized as meaningful, in a case such as this one, where the Supreme Court has announced in advance that it will approve certain findings the Trial Court may make on remand.

Defendant respectfully submits that the Court should enter and order reversing the denial of the Motion to Vacate the sentence of death and allow him to present all aspects of the capital punishment issue at the same time in one hearing.

POINT EIGHT

THE CONSIDERATION BY THE SUPREME COURT OF A SECRET, EX-PARTE PSYCHOLOGICAL REPORT DENIED THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION AND HIS RIGHT TO A FAIR SENTENCING REVIEW REQUIRED IN CAPITAL CASES BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court considered a psychological screening report during the oral argument in the direct appeal from the Defendant's conviction and sentence. The report was not provided to appellate counsel for the Defendant, nor was she otherwise informed of its existence prior to the argument. The Defendant submits that the ex-parte consideration of the report constitutes a violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Gardner v. Florida, 430 U.S. 349, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977).

In Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), the Court held that the practice of receiving psychological screening reports, such as the one prepared in this case, does not automatically require the Court to vacate a sentence of death. The sharply divided en banc opinion of the Eleventh Circuit Court of appeals in Ford v. Strickland, ___ F.2d ___, (11th Cir. No 81-6200 January 7, 1983) supports the conclusion reached by the Court in Brown.

Unlike Brown and Ford, however, this case involves a claim that the Court actually used the report in its deliberations on the appeal. The Defendant's appellate counsel testified during hearing on the Motion to Vacate that one of the members of the

court directly used the psychological screening report in the course of the oral argument. (Tr.MV-220-222). The substance of the report was discussed in relation to the presence or absence of mitigating circumstances in the case, an issue that bore directly on the propriety of affirming or reversing the sentence of death imposed on Mr. Magill.

The primary reason for the denial of relief in Ford v. Strickland was the lack of evidence that the report was actually "used" by the court for any purpose relating to the sentence. In this case it is clear that the report was used in connection with relevant deliberations by the appellate court. Otherwise, there would not have been any reason to discuss it during the oral argument.

For each of these reasons, the Defendant submits that the facts supporting this claim are distinguishable from those before the Court in Ford v. Strickland. The reasoning of the Eleventh Circuit opinion as applied to the facts of this case compels a conclusion that the review of non-record material relating to the Defendant Magill should result in an order vacating his sentence of death

POINT NINE

THE SENTENCE OF DEATH MUST BE VACATED BECAUSE THE COURT FAILED TO FOLLOW THE MANDATORY PROCEDURES SET FORTH IN FLA. STAT. 39.111 (6) (1979) FOR JUVENILES INDICTED AS ADULTS

The Defendant was seventeen years old as of December 23, 1976, when the offense was committed, but he was indicted for a capital felony and thus was tried as an adult in the adult courts. The Trial Judge sentenced the Defendant to die on January 26, 1981, without following any of the procedures set forth in §39.111(6) Fla.Stat. (1979) for the treatment of juveniles transferred to adult court and juveniles directly indicted as adults. This was a fundamental error which requires an order vacating the sentence of death and a new sentencing hearing wherein these procedures are adhered to.

Section 39.111(6) applies to this case even though it was enacted after the commission of the offense. The law is procedural in nature and therefore applies to any sentencing which occurs after the effective date of the law. Johnson v. State, 371 So.2d 556 (Fla. 2d DCA 1979), Batch v. State, 405 So.2d 302 (Fla. 4th DCA 1981). In this case as in Johnson and Batch, the law was passed after the offense but before the sentencing.

The text of §39.111(6) Fla.Stat. (1979) refers to juveniles "transferred for criminal prosecution" but the courts have interpreted it to be applicable as well to juveniles directly indicted as adults. See Judge v. State, 408 So.2d 831 Fla. 4th DCA 1982), State v. Goodson, 403 So.2d 1337 (Fla. 1981). The

courts have held that §39.111(6) Fla.Stat. (1979) is mandatory, and that the failure to follow the procedures set forth in the statute is absolute reversal error. Eady v. State, 388 So.2d 9 (Fla. 2d DCA 1980), Proctor v. State, 373 So.2d 450 (Fla. 2d DCA 1979). The error is not rendered harmless merely because the trial judge considered a presentence investigation. Leach v. State, 407 So.2d 1066.

The sentence imposed by the trial judge was in violation of §39.111(6) Fla.Stat. (1979) and since the statute is mandatory, the sentence must be vacated. The Defendant submits that he is entitled to a new sentencing hearing and that the trial judge should be directed to follow the procedures set forth in the statute.

POINT TEN

THE EXECUTION OF THE DEFENDANT, IN VIEW OF THE OVERWHELMING MITIGATING CIRCUMSTANCES IN HIS CASE, CONSTITUTES EXCESSIVE AND DISPROPORTIONATE PUNISHMENT FORBIDDEN BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

Finally, the sentence of death should be vacated under the Eighth Amendment as exessive and disproportionate in light of the "relevant facets of the character and record of [this] individual offender [and] the circumstances of [his] particular case." Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976). The United States Supreme Court has recognized as "a precept of justice that punishment for crime should be graduated and proportioned to [the] offense." Weems v.

United States, 217 U.S. 349 (1910). The death sentence imposed in this case is not a fitting penalty in light of the character and background of the Defendant.

At the close of the resentencing hearing, the trial judge found the existence of the following three mitigating circumstances:

> a) the evidence shows that defendant Magill was 17 years of age at the time of the offense charged;
>
> (b) that the defendant Magill had no significant prior criminal record;
>
> (c) the defendant's father passed away on December 28, 1975.

The Defendant submits that these three factors far outweigh the aggravating circumstances and that the Court, therefore, committed constitutional error in imposing a sentence of death. The aggravating circumstances are those which could be found in most any felony murder case. The mitigating circumstances, on the other hand, are far more compelling.

The Defendant's young age should have been sufficient, standing alone, to persuade the Court to impose a life sentence in place of the death penalty. In Gregg v. Georgia, the United States Supreme Court singled out an offender's youth as among the factors which might most "mitigate against imposing capital punishment" 428 U.S. at 197.

The Defendant was not only an adolescent, but he was an emotionally disturbed adolescent with no prior criminal record.

The Court was not asked for leniency on behalf of a ruthless career criminal or a defendant with a demonstrated propensity for violent acts. Rather, the Court was asked to reverse the sentence of a seventeen year old first offender. This case is clearly not in a class with even the least aggravated death penalty cases presented to this court for review.

If the death penalty is to be applied at all, it should certainly not be applied in the presence of mitigating circumstances such as these.

CONCLUSION

The Order of the Trial Judge denying the Motion to Vacate the Judgment and Sentence should be reversed and the Defendant should be granted a new trial. Alternatively, the Court should vacate the sentence of death.

Respectfully submitted,

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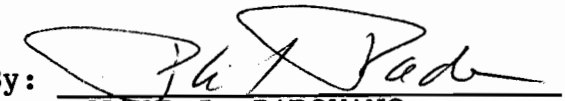
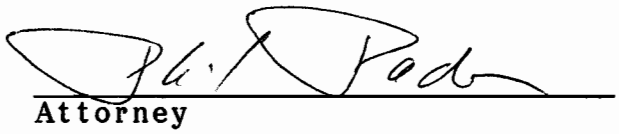
By: 
PHILIP J. PADOVANO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by Hand Deliver this 12th day of March 1984 at 8:30 a.m.to: Margene Roper, Assistant Attorney General, The Capitol, Tallahassee, Florida.



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