IN THE SUPREME COURT
OF FLORIDA

CHARLES M. KIGHT,

Appellant,

vs. Appeal Docket No. 65,749

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

WM. J. SHEPPARD
ELIZABETH L. WHITE
COURTNEY JOHNSON

SHEPPARD AND WHITE, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.	i
TABLE OF CITATIONS	iv
PRELIMINARY STATEMENT.	1
STATEMENT OF THE FACTS AND CASE.	2
POINTS ON APPEAL	5
SUMMARY OF THE ARGUMENT.	8
ARGUMENT	
I.	
THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE DERIVED FROM THE UNLAWFUL STOP AND ARREST OF THE APPELLANT	17
II.	
THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE ON SCENE IDENTIFICATION OF MR. KIGHT AT THE TIME OF HIS ARREST	28
III.	
THE TRIAL COURT ERRED IN ADMITTING AT TRIAL AN INCLUPATORY STATEMENT OBTAINED FROM THE APPELLANT WHICH WAS NOT FREELY AND VOLUNTARILY GIVEN AND WHICH WAS OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.	32
A. The Statements Made By The Defendant Were Obtained Illegally And Must Be Suppressed.	
B. The Appellant Did Not Waive His Fifth And Sixth Amendment Rights.	
IV.	
THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OBTAINED AS THE RESULT OF THE WARRANTLESS SEIZURE OF APPELLANT'S CLOTHING	38

V.

THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE THE TESTIMONY OF THE STATE'S WITNESSES OBTAINED AS THE RESULT OF A CONFLICT OF INTEREST. 41

VI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS INDICTMENT BASED UPON DISCRIMINATION IN THE SELECTION OF GRAND JURY FOREPERSON. 49

VII.

THE TRIAL COURT ERRED DURING JURY SELECTION IN ITS DISPOSITION OF CHALLENGES FOR CAUSE BASED ON EXPRESSED OPINIONS FOR AND AGAINST THE DEATH PENALTY. 53

VIII.

THE TRIAL COURT ERRED IN ADMITTING THE APPELLANT'S EXCULPATORY STATEMENT TO DETECTIVES WEEKS AND KESINGER. 56

IX.

THE TRIAL COURT ERRED IN ADMITTING WILLIAMS RULE EVIDENCE AND IN NOT LIMITING ITS CONSIDERATION 61

A. The Trial Court Erred In Admitting Evidence Of The Robbery Of Herman McGoogin.

B. The Trial Court Erred In Not Properly Instructing The Jury To Limit Its Consideration Of The McGoogin Robbery.

X.

THE TRIAL COURT IMPROPERLY RESTRICTED CROSS-EXAMINATION OF THE STATE'S WITNESSES. 66

A. The Trial Court Erred In Prohibiting Cross-Examination Regarding Mr. Kight's Mental Condition.

B. The Trial Court Erred In Restricting Cross-Examination Concerning Mr. Hutto's Participation In The McGoogin Robbery.

XI.

THE TRIAL COURT ERRED IN PROHIBITING APPELLANT FROM INTRODUCING EVIDENCE RELEVANT TO HIS THEORY OF DEFENSE THAT THE MURDER OF LAWRENCE BUTLER WAS THE INDEPENDENT ACT OF GARY HUTTO AND IN FAILING TO INSTRUCT THE JURY CONCERNING THIS THEORY . . 76

XII.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THEY COULD DISCUSS THEIR DELIBERATIONS WITH OTHERS PRIOR TO THEIR SENTENCING DELIBERATIONS 83

XIII.

IMPROPER CLOSING ARGUMENT BY THE STATE RENDERED APPELLANT'S SENTENCE FUNDAMENTALLY UNFAIR 86

XIV.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REJECTED EVIDENCE OF MR. KIGHT'S MENTAL RETARDATION AND DEPRIVED CHILDHOOD AS CIRCUMSTANCES MITIGATING HIS CRIME 90

XV.

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH IN THIS CASE 97

XVI.

THE TRIAL ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED UPON THE STATE'S FAILURE TO DISCLOSE CONCESSIONS MADE TO ITS WITNESSES IN EXCHANGE FOR THEIR TESTIMONY 99

XVII.

THE CUMULATIVE EFFECT TO THE ERRORS COMMITTED BELOW RENDERED MR. KIGHT'S TRIAL FUNDAMENTALLY UNFAIR 105

CONCLUSION 106

CERTIFICATE OF SERVICE 106

TABLE OF CITATIONS

Cases	Page
Adams v. Texas, 448 U.S. 38 (1980)	54
Alderton v. State, 438 So.2d 1000 (Fla. 2d DCA 1983).	40
Alford v. United States, 282 U.S. 687, 692 (1931)	67
Alvord v. State, 322 So.2d 533, 540 (Fla. 1975)	97
Andrews v. State, 443 So.2d 78,83 (Fla. 1983).	50
Armstrong v. State, 426 So.2d 1173 (Fla. 5th DCA 1983)	84
Bates v. State, 84 So.373 (Fla. 1919).	69
Baty v. Balkcom, 661 F.2d 391 (5th Cir. 1981)(Unit B)	45
Baxter v. State, 355 So.2d 1234 (Fla. 2d DCA 1978).	28
Block v. Rutherford, 468 U.S. ___,104 S.Ct. 3227 (1984)	39
Boyd v. United States, 142 U.S. 450 (1891).	64
Bradshaw v. State, 353 So.2d 188 (Fla. 1977).	68
Brady v. Maryland, 373 U.S. 83 (1963)	102, 103, 104
Brown v. State, 184 So.518 (Fla. 1938)	68
Brown v. State, 391 So.2d 729 (Fla. 3d DCA 1980)	57
Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981)	97

Cases	Page(s)
Bryant v. State, 386 So.2d 237 (Fla. 1980).	49
Bryant v. State, 412 So.2d 347, 350 (Fla. 1982)	81
Burch v. State, ___So.2d___,10 FLW 540 (Fla. October 3, 1985)	78
Caldwell v. Mississippi, ___U.S.___ 105 S.Ct. 2633 (1985)	86
California v. Green, 399 U.S. 149, 158 (1970)	67
Chandler v. State, 366 So.2d 64 (Fla. 2d DCA 1979).	77
Chambers v. Mississippi, 410 U.S. 284 (1972).	105
Chapman v. California, 386 U.S. 18 (1967)	102
Chimel v. California, 395 U.S. 752 (1969).	39
Coco v. State, 62 So.2d 892, 895 (Fla. 1953).	68
Coxwell v. State, 361 So.2d 148 (Fla. 1978)	67
Cribbs v. State, 297 So.2d 335 (Fla. 2d DCA 1974)	29, 31
Culombe v. Connecticut, 367 U.S. 568 (1961).	36
Cumbie v. State, 345 So.2d 1061 (Fla. 1977)	104
Cuyler v. Sullivan, 446 U.S. 335, 348 (1980)	45, 47
D'Agostino v. State, 310 So.2d 12 (Fla. 1975)	24, 25, 26

Cases | Page(s)

Daughtery v. State,
419 So.2d 1067 (Fla. 1982). 94

Davis v. Alaska,
415 U.S. 308, 316 (1974). 67

Deas v. State,
119 Fla. 839, 161 So. 729 (Fla. 1935) 88, 89

Douglas v. State,
89 So.2d 659, 661 (Fla. 1956) 57, 58, 59

Douglas v. State,
328 So.2d 18, 21-22 (Fla. 1976) 97

Downs v. State,
386 So.2d 788 (Fla. 1980) 85

Drake v. State,
441 So.2d 1079 (Fla. 1983) 72

Dunaway v. New York,
442 U.S. 200, 207, 209 (1979) 20

Durano v. State,
262 So.2d 733, 734 (Fla 3d DCA 1972). 85

Eddings v. Oklahoma,
445 U.S. 104, 114-115 (1982) 95

Edwards v. Arizona,
451 U.S. 477 (1981) 32,34,35,37, 43,46

Engle v. State,
438 So.2d 803 (Fla. 1983) 80

Fields v. State,
35 So. 185 (Fla. 1903) 75

Fields v. State,
402 So.2d 46 (Fla. 1st DCA 1981) 37

Fikes v. Alabama,
352 U.S. 191 (1957) 36

Fitzpatrick v. State
437 So.2d 1072 (Fla. 1983) 53

Florida v. Royer,
460 U.S. 491, 503 (1983) 25, 26

Cases | Page(s)

Fleming v. State,
270 S.E. 2d 185 (Ga. 1980) 47

Flynn v. State,
351 So.2d 377 (Fla. 4th DCA 1977) 80

Francis v. State,
473 So.2d 672 (Fla. 1985). 100, 102

Freeman v. State,
433 So.2d 9 (Fla. 2d DCA 1983) 23

Giglio v. United States,
405 U.S. 150 (1972). 102, 103

Glasser v. United States,
315 U.S. 60, 70 (1942) 45

Godbee v. State,
224 So.2d 441 (Fla. 2d DCA 1969) 38

Goodrov v. State,
365 So.2d 423 (Fla. 2d DCA 1979) 77

Graham v. State,
91 So.2d 662 (Fla. 1956) 68, 69

Grant v. State,
194 So.2d 612 (Fla. 1967) 86

Grisby v. Mabry,
758 F.2d 226 (8th Cir. 1985) 54

Hall v. State,
421 So.2d 571 (Fla. 3d DCA 1982) 37

Hargrave v. State,
366 So.2d 1, 5-6 (Fla. 1978) 96

Harper v. State,
411 So.2d 235 (Fla. 3d DCA 1982) 88, 89

Harris v. State,
396 So.2d 1180 (Fla. 4th DCA 1981) 35

Hawthorne v. State,
408 So.2d 801 (Fla. 1st DCA 1981) 80

Hicks v. State,
398 So.2d 1008 (Fla. 1st DCA 1981) 39

Higginbotham v. State,
29 So. 410 (Fla. 1900) 74

Cases	Page(s)

Hobby v United States,
468 U.S. __, S.Ct. __,
82 L.Ed.2d 260, 267 (1984) 50

Huckaby v. State,
343 So.2d 29 (Fla. 1977) 98

Jackson v. Denno,
378 U.S. 368,386, n.11 (1964) 69

Johnson v. Zerbst,
304 U.S. 458, 463 (1938) 34, 43

Jones v. State,
332 So.2d 615 (Fla. 1976). 98

Jurek v. Estelle,
623 F.2d 929 (5th Cir. 1980) 36

Kearse v. State,
384 So.2d 272 (Fla. 4th DCA 1980) 24

L.T.S. v. State,
391 So.2d 695 (Fla. 1st DCA 1980) 24

Lightbourne v. State,
438 So.2d 380 (Fla. 1983). 39

Livingston v. State,
458 So.2d 235 (Fla. 1984) 84

Lucas v. State,
417 So.2d 250, 251 (Fla. 1982) 97

McClain v. State,
408 So.2d 721 (Fla. 1st DCA 1982) 23

Mines v. State,
390 So.2d 332 (Fla. 1980). 95

Miranda v. Arizona,
384 U.S. 436 (1966). 32,34,35,37

Mitchell v. State,
31 So. 242 (1901) 75

Mooney v. Holohan,
294 U.S. 103 (1934) 103

Moreno v. State,
418 So.2d 1223 (Fla. 3d DCA 1982) 77

Cases	Page(s)

Motley v. State,
155 Fla. 545, 20 So. 2d 798 (Fla. 1945). . . . 81

Mullins v. State,
366 So.2d 1162 (Fla. 1979) 24

Napue v. Illinois,
360 U.S. 264 (1959) 102,103,104

Neil v. Biggers,
409 U.S. 188 (1972) 28, 30, 31

Nickels v. State,
106 So. 479 (Fla. 1925) 69

Nowlin v. State,
346 So. 2d 1020, 1024 (Fla. 1977) 70

Ohio v. Roberts,
448 U.S. 56, 63 n. 6 (1980) 67

Palmes v. State,
397 So. 2d 648, 653 (Fla. 1981). 68, 69, 70

Panzavecchia v. Wainwright,
658 F. 2d 337 (5th Cir. 1981) (Unit B) . . . 64

Pearce v. State,
196 So. 685 (Fla. 1940). 68

People v. Mroczko,
672 P.2d 835 (Ca. 1983) 47

Perri v. State,
441 So. 2d 606, 609 (Fla. 1983). 93

Peterson v. State,
372 So. 2d 1017 (Fla. 2d DCA 1979),
382 So. 2d 701 (Fla. 1980) 69

Pittman v. State,
25 Fla. 648, 6 So. 437 (Fla. 1889) 75

Pointer v. Texas,
380 U.S. 400 (1965). 67

Pope v. State,
441 So.2d 1073 (Fla. 1983) 94

Porterfield v. State,
472 So. 2d 882 (Fla. 1st DCA 1985) 102

Cases	Page(s)
Presley v. State, 57 So. 605 (Fla. 1912)	75
Raines v. State, 65 So.2d 558 (Fla. 1953)	84
R.B. v. State, 429 So.2d 815 (Fla. 2d DCA 1983)	23
Reddish v. State, 167 So.2d 858 (Fla. 1964)	36, 69
Rice v. State, 451 So. 2d 548 (Fla. 2d DCA 1984)	69
Richardson v. State, 246 So.2d 771 (Fla. 1971)	104
Rivers v. State, 425 So.2d 101 (Fla. 1st DCA 1982)	64
Rose v. Mitchell, 443 U.S. 545 (1979)	49
Salter v. State, 382 So.2d 892 (Fla. 4th DCA 1980)	68
Sims v. Georgia, 389 U.S. 404 (1967)	36
Singer v. State, 109 So.2d 7 (Fla. 1959)	86
Singleton v. State, 344 So.2d 911 (Fla. 3d DCA 1977)	35
Slater v. State, 316 So.2d 539 (Fla. 1975)	97
Stano v. State, 460 So.2d 890 (Fla. 1984)	95
State v. Chorpenning, 294 So.2d 54 (Fla. 2d DCA 1974)	36, 68
State v. Gonzales, 681 P.2d 1368 (Ariz. 1984)	79
State v. Neil, 457 So.2d 481 (Fla. 1984)	55

Cases	Page(s)
State v. Padrou, 425 So.2d 644 (Fla. 3d DCA 1983)	35
State v. Sepulvado, 362 So.2d 324, 327 (Fla. 2d DCA 1978). . . .	29
Stewart v. State, 51 So.2d 494 (Fla. 1951)	86
Stovall v. Denno, 388 U.S. 292 (1967)	29, 30
Teffeteller v. State, 439 So.2d 840 (Fla. 1983).	86
Tennell v. State, 348 So.2d 937 (Fla. 2d DCA 1977)	37
Terry v. Ohio, 392 U.S. 1 (1968)	20,21,22,24, 25,26
Terry v. State, 467 So.2d 761 (Fla. 4th DCA 1985).	68, 82
Thomas v. State, 403 So.2d 371 (Fla. 1981)	53
Tremain v. State, 336 So.2d 705 (Fla. 4th DCA 1976).	68,82
United States v. Agurs, 427 U.S. 97, 103 (1976).	100
United States v. Bagley, ___U.S.___, 105 S.Ct. 3375 (1985).	104
United States v. Beechum, 582 F.2d 898, 910 (5th Cir. 1978).	62,64
United States v. Benton, 637 F.2d 1052 (5th Cir. 1981).	62
United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)	20
United States v. Cross, 708 F.2d 631 (11th Cir. 1983).	50
United States Ex Rel. Barksdale v. Blackburn, 610 F.2d 253 (5th Cir. 1980)	49

Cases | Page(s)

United States v. Fontenot,
628 F.2d 921, 924 (5th Cir. 1980). 67

United States v. Goodwin,
492 F.2d 1141, 1155 (5th Cir. 1974). 62, 65

United States v. Hastings,
461 U.S. 499 (1983). 102

United States v. Perez Hernandez
672 F. 2d 1380 (11th Cir. 1982). 50

United States v. Sharpe, 470 U.S.____,
106 S.Ct.____, 84 L. Ed.2d 605 (1985). 22

United States v. Wade,
388 U.S. 218, 228 (1967) 30

Vale v. Louisiana,
399 U.S. 30, 33 (1970) 39

Wainwright v. Witt,
469 U.S.____, 105 S.Ct. 844 (1985) 53, 54, 55

Wakeman v. State,
237 So.2d 61 (Fla. 4th DCA 1970) 35

Washington v. Texas,
388 U.S. 14 (1967) 7, 103, 105

White v. State,
356 So.2d 56 (Fla. 4th DCA 1978) 80

Williams v. State,
68 So. 2d 583 (Fla. 1953). 86

Williams v. State,
110 So.2d 654 (Fla. 1959). 61, 62

Witherspoon v. Illinois,
391 U.S. 510 (1968). 53, 54

Zeigler v. State,
402 So.2d 365 (Fla. 1981). 82

RULES, STATUTES, CODES

Statutes

§90.402 Fla. Stat. (1983) 56

§90.404 (2)(a) Fla. Stat. 1983) 61

§901.151 Fla. Stat. (1983). 20

§918.06 Fla. Stat. (1983) 83

§921.141 (6)(b) and (f) Fla. Stat. (1983) 93,97

§924.33 Fla. Stat. (1983) 72

Rule(s)

Federal Rules of Criminal Procedure 44 (c) . . . 46

Federal Rules of Evidence 404 (a) 62

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STATE OF FLORIDA,

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Duval County, Florida

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant, Charles Michael Kight, will be referred to in this brief as "appellant" or "Mr. Kight". Appellee, the State of Florida will be referred to as "appellee", "the State", or "the prosecution". References to the pleadings contained in this Record on Appeal will be designated as "R", followed by the appropriate page number(s), set forth in brackets (Example: [R. 1]). References to the transcripts of pre-trial, trial, sentencing and post-trial proceedings in this case will be referred to as "Tr.", followed by the appropriate page number(s), set forth in brackets (Example: [Tr. 1]).

STATEMENT OF THE FACTS AND THE CASE

On December 7, 1982, Lawrence Butler, a taxi-cab driver was reported missing, having last been seen the day before. Seven days later, his body was found in a remote area of north Jacksonville by an individual riding his motorcycle in the wooded area [Tr. 1672-1763, 1771]. The apparent cause of Mr. Butler's death was multiple stab wounds to the upper region of his body [Tr. 1827].

Mr. Butler's cab subsequently was found in the St. Johns River [Tr. 1938]. An investigation into Mr. Butler's death was commenced by Detective Charles Kesinger of the Jacksonville Sheriff's Office [Tr. 1776-1783].

During the early evening hours, of December 7, 1982, appellant and his co-defendant were arrested for the armed robbery of Herman McGoogin on that date. [Tr. 2142-2143, 2153-2154]. Their arrest was the result of Mr. McGoogin identifying Mr. Hutto and Mr. Kight as the individuals who had robbed him at knifepoint, after he had picked them up as a fare in his taxi-cab [Tr. 2127-2129]. That evening Mr. Hutto made a statement inculpating Mr. Kight in the McGoogin robbery [Tr. 668-696]. Mr. Kight declined to be interrogated [Tr. 401].

The following day, the Office of the Public Defender was appointed to represent both men on the McGoogin robbery charge [Tr. 684]. Both men remained incarcerated at the Duval County Jail. Upon the discovery of Mr. Butler's body, suspicion focused upon appellant and Mr. Hutto as the perpetrators of that crime. Appellant was interrogated twice. On the second occasion,

Detective Ross Weeks went to the Duval County Jail for the stated reason of obtaining Mr. Kight's clothing for blood analysis. During the course of seizing Mr. Kight's clothing, Detective Weeks obtained an oral statement from Mr Kight, wherein Mr. Kight admitted his presence during the murder and incriminated Mr. Hutto [Tr. 526]. That statement was reduced to writing by Detective Kesinger, because Mr. Kight was unable to read and write, and signed by Mr. Kight [Tr. 583-587, 1906]. Both men were thereupon arrested for first degree murder [R. 1-2]. An indictment charging Mr. Hutto and Mr. Kight with first degree murder was returned on January 6, 1983 [R. 13].

Upon discovery of Mr. Kight's statement the Office of the Public Defender moved to withdraw as Mr. Kight's counsel, citing Mr. Kight's statement as the reason [R. 5].

Lengthy pretrial proceedings ensued [1] As the result of a motion filed by Mr. Kight's counsel, the Public Defender's Office was eventually disqualified from the representation of Mr. Hutto and substitute counsel was appointed [Tr. 929]. Subsequent to the appointment of substitute counsel, Mr. Hutto entered a plea of guilty to second degree murder, which required counsel for Mr. Hutto to disclose to the State the names of jailhouse informants, obtained by the Public Defender's Office, to whom Mr. Kight had allegedly confessed the slaying [R. 487]. A motion to exclude

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[1] Due to the complex nature of many issues raised in the pretrial and trial proceedings, specific facts relevant to the resolution of the various issues raised will be discussed within the context of each argument presented. Those facts will not be repeated here.

the testimony of these witness due to this conflict of interest was denied [R. 476].

The case proceeded to trial, with the bulk of the State's case being focused on the oral statements made by Mr. Kight to Detective Weeks and the jailhouse informants. Evidence of the McGoogin robbery was also admitted over objection [Tr. 2044-2046]. During trial, counsel for appellant attempted to cross-examine the State's witnesses concerning Mr. Kight's retardation and also attempted to introduce expert evidence to establish that it was more likely that Mr. Hutto planned and committed the murder than it was that Mr. Kight did [Tr. 1892, 2251-2255]. These efforts were thwarted by the trial court, which precluded any evidence of retardation from being heard by the jury during the penalty phase of the trial. During its close, the State stressed to the jury that counsel for Mr. Kight had promised to show that his client was retarded and that Mr. Hutto was the "ring-leader", but that counsel had failed to do so [Tr. 2379].

After the return of a verdict of guilt, the jury was dispersed prior to the sentencing hearing, with the instruction that they could discuss their deliberations with others if they so chose [Tr. 2468]. This instruction was objected to by appellant's counsel [Tr. 2469]. Some jurors chose to do so [Tr. 2503-2505]. Upon the conclusion of the sentencing hearing, the jury recommended the imposition of the death penalty and the trial court imposed a sentence of death [R. 636, 651, 679-683]. This appeal followed.

POINTS ON APPEAL

I.

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE DERIVED FROM THE UNLAWFUL STOP AND ARREST OF THE APPELLANT

II.

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE ON SCENE IDENTIFICATION OF MR. KIGHT AT THE TIME OF HIS ARREST

III.

THE TRIAL COURT ERRED IN ADMITTING AT TRIAL AN INCULPATORY STATEMENT OBTAINED FROM THE APPELLANT WHICH WAS NOT FREELY AND VOLUNTARILY GIVEN AND WHICH WAS OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS

IV.

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OBTAINED AS THE RESULT OF THE WARRANTLESS SEIZURE OF APPELLANT'S CLOTHING

V.

THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE THE TESTIMONY OF THE STATE'S WITNESSES OBTAINED AS THE RESULT OF A CONFLICT OF INTEREST

VI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS INDICTMENT BASED UPON DISCRIMINATION IN THE SELECTION OF GRAND JURY FOREPERSON

VII.

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VIII.

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IX.

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X.

THE TRIAL COURT IMPROPERLY RESTRICTED CROSS-EXAMINATION OF THE STATE'S WITNESSES

XI.

THE TRIAL COURT ERRED IN PROHIBITING APPELLANT FROM INTRODUCING EVIDENCE RELEVANT TO HIS THEORY OF DEFENSE THAT THE MURDER OF LAWRENCE BUTLER WAS THE INDEPENDENT ACT OF GARY HUTTO AND IN FAILING TO INSTRUCT THE JURY CONCERNING THIS THEORY

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XIII.

IMPROPER CLOSING ARGUMENT BY THE STATE RENDERED APPELLANT'S SENTENCE FUNDAMENTALLY UNFAIR

XIV.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REJECTED EVIDENCE OF MR. KIGHT'S MENTAL RETARDATION AND DEPRIVED CHILDHOOD AS CIRCUMSTANCES MITIGATING HIS CRIME

XV.

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH IN THIS CASE

XVI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED UPON THE STATE'S FAILURE TO DISCLOSE CONCESSIONS MADE TO ITS WITNESSES IN EXCHANGE FOR THEIR TESTIMONY

XVII.

THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED BELOW RENDERED MR. KIGHT'S TRIAL FUNDAMENTALLY UNFAIR

SUMMARY OF THE ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE DERIVED FROM THE UNLAWFUL STOP AND ARREST OF THE APPELLANT

There was no reasonable suspicion that Charles Kight had committed an illegal act at the time of his detention by Officer Scott Simmons of the Jacksonville Sheriff's Office on December 7, 1982. Because the initial investigatory stop of appellant and his subsequent detention was not grounded upon any articulable suspicion of criminal activity, it violated Mr. Kight's right to be free from an unreasonable seizure. All evidence obtained directly and indirectly from that evidence should have been excluded from Mr. Kight's trial. Failure to do so constituted reversible error.

II.

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE ON SCENE IDENTIFICATION OF MR. KIGHT AT THE TIME OF HIS ARREST

The identification of Mr. Kight as the perpetrator of a robbery by Herman McGoogin at the scene of Mr. Kight's arrest was impermissibly suggestive and should have been excluded in the trial against Mr.. Kight. The State failed to establish any independent basis for the subsequent in-court identification of Mr. Kight by Mr. McGoogin and accordingly, that evidence likewise should have been excluded from trial. Failure to do so constituted reversible error.

III.

THE TRIAL COURT ERRED IN ADMITTING AT TRIAL AN INCULPATORY STATEMENT OBTAINED FROM THE APPELLANT WHICH WAS NOT FREELY AND VOLUNTARILY GIVEN AND WHICH WAS OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS

Statements made by Mr. Kight to Detective Weeks on December 7, 1982, wherein Mr. Kight admitted knowledge of the Butler murder were obtained in violation of Mr. Kight's constitutional rights because such statements were obtained after Mr. Kight had invoked his rights to be free from custodial interrogation and to consult with his attorney. In addition, due to the coercive circumstances surrounding those statements and the established mental deficiency of the appellant, they were not freely and voluntarily made by appellant. For these reasons, failure to suppress those statements was reversible error.

IV.

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OBTAINED AS THE RESULT OF THE WARRANTLESS SEIZURE OF APPELLANT'S CLOTHING

After Mr. Kight had been arrested, Detective Weeks of the Jacksonville Sheriff's Office went to the Duval County Jail, where Mr. Kight was incarcerated and, without first obtaining a search warrant, seized the clothes which Mr. Kight was wearing. These clothes were subsequently analyzed to determine the existence of Lawrence Butler's blood on them and such evidence was used by the State to link Mr. Kight to the Butler murder. There was no exception to the warrant requirement by which to

justify the warrantless seizure. Evidence obtained from the seizure of this clothing should have been suppressed and the failure to do so was reversible error.

V.

THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE THE TESTIMONY OF THE STATE'S WITNESSES OBTAINED AS THE RESULT OF A CONFLICT OF INTEREST

Mr. Kight was denied the effective assistance of counsel when the Office of the Public Defender was assigned to represent both Mr. Kight and Mr. Hutto, despite the fact that Mr. Hutto had made a statement blaming Mr. Kight for the McGoogin robbery. The result of this clear conflict of interest was that Mr. Kight made incriminatory statements to law enforcement personnel. The further result of this conflict was that the Public Defender's Office obtained information from other clients incarcerated in the Duval County Jail and utilized this information, to Mr. Kight's detriment, to obtain a negotiated plea of guilty to second degree murder on behalf of Mr. Hutto. As the result of this prejudicial conflict of interest, the statements made by Mr. Kight should have been suppressed. In addition, the testimony of the jailhouse informants, the whose identities were provided to the State by counsel for Mr. Hutto, should have been excluded at Mr. Kight's trial. Failure to do so was reversible error.

VI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS INDICTMENT BASED UPON DISCRIMINATION IN THE SELECTION OF GRAND JURY FOREPERSON

Appellant clearly established historical discrimination, on the basis of sex and race, in the selection of the grand jury foreperson in the Fourth Circuit. Appellant also established that the role of the foreperson within the Fourth Circuit is of significant importance so that discrimination in the selection of the foreperson is violative the Due Process Clause of the United States Constitution. Since the State failed to rebut appellant's *prima facie* showing of discrimination in the selection of the grand jury foreperson, appellant's motion to dismiss the indictment on these grounds was reversible error.

VII.

THE TRIAL COURT ERRED DURING JURY SELECTION IN ITS DISPOSITION OF CHALLENGES FOR CAUSE BASED ON EXPRESSED OPINIONS FOR AND AGAINST THE DEATH PENALTY

The trial court erred by refusing to excuse for cause four jurors who expressed a commitment to imposing the death penalty in the event of conviction, to such an extent that their views would substantially impair their performances as jurors.

The trial court erred in granting prosecution challenges for cause of jurors who expressed their willingness to follow the applicable law despite their opposition to the death penalty.

The trial court erred in allowing challenges for cause, for opposition to the death penalty, to nine venirepersons, seven of whom were black, without a requested inquiry into the motives of the prosecutor.

VIII.

THE TRIAL COURT ERRED IN ADMITTING THE APPELLANT'S EXCULPATORY STATEMENT TO DETECTIVES WEEKS AND KESINGER

Although the appellant did not testify at trial, and thus never placed his credibility in issue, the State was allowed to introduce an exculpatory statement by the appellant claiming Gary Hutto was guilty. The State then impermissibly impeached that statement, resulting in reversible error.

IX.

THE TRIAL COURT ERRED IN ADMITTING WILLIAMS RULE EVIDENCE AND IN NOT LIMITING ITS CONSIDERATION

Evidence of Mr. Kight's participation in the McGoogin robbery was improperly admitted in the trial of Mr. Kight to prove the murder of Lawrence Butler. Such evidence was not probative of any of the issues present in Mr. Kight's murder trial and served only to prejudice the sympathies of the jurors against Mr. Kight. In addition, the instructions given by the trial court with regard to the jury's consideration of this issue did not properly limit the juror's consideration of such evidence. For this reason, appellant's conviction must be reversed.

X.

THE TRIAL COURT IMPROPERLY RESTRICTED CROSS-EXAMINATION OF THE STATE'S WITNESSES

During appellant's trial, the court improperly restricted the ability of counsel for appellant to cross-examine the State's witnesses concerning certain matters testified to on direct examination. Specifically, the trial court prohibited counsel from cross-examining the State's witnesses about Mr. Kight's retardation. This fact was critical for the jury to make a fair assessment of the totality of the circumstances surrounding this statement. Additionally, since the State attacked the credibility of Mr. Kight's statement, and in fact sought to show it was fabricated, this evidence was relevant to show Mr. Kight was incapable of fabrication. The restriction upon counsel's cross-examination of Herman McGoogin also was improper, since it was relevant to the subject matter of Mr. McGoogin's direct examination and supported Mr. Kight's theory that Mr. Hutto was responsible for the death of Lawrence Butler.

XI.

THE TRIAL COURT ERRED IN PROHIBITING APPELLANT FROM INTRODUCING EVIDENCE RELEVANT TO HIS THEORY OF DEFENSE THAT THE MURDER OF LAWRENCE BUTLER WAS THE INDEPENDENT ACT OF GARY HUTTO AND IN FAILING TO INSTRUCT THE JURY CONCERNING THIS THEORY

Mr. Kight's theory of defense was that Gary Hutto, acting on his own, planned and executed the murder of Lawrence Butler. In support of this theory appellant sought to introduce evidence that he suffered from mental retardation, which prevented him

from devising complex plans of action. Counsel for appellant specifically informed the trial court that he sought admission of this evidence, to establish Mr. Kight was merely present at the scene of the Butler murder. The refusal to permit this introduction of this evidence prevented the jury from considering the only reasonable theory of defense available to him. Exclusion of this evidence was thus, reversible error.

XII.

THE TRIAL COURT ERRED INSTRUCTING THE JURY THAT THEY COULD DISCUSS THEIR DELIBERATIONS WITH OTHERS PRIOR TO THEIR SENTENCING DELIBERATIONS

Between the return of the jury's verdict finding appellant guilty of murder in the first degree and the sentencing phase of appellant's trial, the trial court dispersed the jury, after first instructing them that they were free to discuss their deliberations with other people. Having been authorized to discuss their deliberations prior to the sentencing hearing, the jurors did so. The jurors thereby were subject to outside influences, which tainted their sentencing deliberations in this cause. Due to this taint, appellant's case should be remanded to the trial court for resentencing before a jury untainted by outside influences.

XIII.

IMPROPER CLOSING ARGUMENT BY THE STATE RENDERED APPELLANT'S SENTENCE FUNDAMENTALLY UNFAIR

During the closing argument to the jury, at the sentencing phaseof appellant's trial, the prosecutor made several comments calculated to appeal to the prejudice of the jury in rendering an

advisory sentence. These comments, and the failure of the trial court, upon proper motion, to properly instruct the jury regarding these comments, require reversal of the sentence.

XIV.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REJECTED EVIDENCE OF MR. KIGHT'S MENTAL RETARDATION AND DEPRIVED CHILDHOOD AS CIRCUMSTANCES MITIGATING HIS CRIME

The unrebutted evidence presented during the sentencing phase of appellant's trial did conclusively established that Mr. Kight is retarded. Other non-statutory circumstances were also established. In refusing to find any of these established circumstances as mitigating circumstances, the trial court abused its discretion. Appellant's cause should be remanded with the instruction that Mr. Kight be resentenced to life.

XV.

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH IN THIS CASE

Death is not an appropriate sentence in this case. Mr. Kight is a mentally retarded individual, who has suffered a lifetime of deprivation and poverty. The facts and circumstances do not support the imposition of death as punishment in this case.

XVI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED UPON THE STATE'S FAILURE TO DISCLOSE CONCESSIONS MADE TO ITS WITNESSES IN EXCHANGE FOR THEIR TESTIMONY

The court below should have granted a new trial when the existence of deals between the State and four key witnesses, the existence of which were denied by the State in response to a specific request by the appellant, were discovered after trial and brought to the attention of the court. Failure to grant a new trial was reversible error.

XVII.

THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED BELOW RENDERED MR. KIGHT'S TRIAL FUNDAMENTALLY UNFAIR

The cumulative effect of various errors in the appellant's trial combined to render that trial fundamentally unfair, in violation of the Fourteenth Amendment.

I.

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE DERIVED FROM THE UNLAWFUL STOP AND ARREST OF THE APPELLANT

On December 7, 1982, between 8:30 and 9:00 P.M., a taxi driver named Herman McGoogin picked up two passengers at the Silver Dollar Bar on Main Street in Jacksonville, Florida, [Tr. 411]. Mr. McGoogin testified that the passengers were white males, one of whom directed him to Clark Road [Tr. 412]. Mr. McGoogin only glanced at the two when they entered the cab, [Tr. 416], and he was unable to see the face of the man who sat directly behind him, [Tr. 423, 483], the man he later identified as Charles Kight.

The man sitting on the right-hand side of the passenger seat, whom Mr. McGoogin later identified as Gary Hutto, did all the talking, while the man directly behind Mr. McGoogin sat quiet, as they proceeded to a neighborhood in North Jacksonville [Tr. 461]. According to the pretrial testimony of Mr. McGoogin, the man directly behind him put a knife to his throat [Tr. 415]. McGoogin managed to grab the man's wrist and push the knife away. He then ran from the cab to the porch of a home, [Tr. 436]. The two men got out of the car and ran south (away from Clark Road) in the woods, [Tr. 439].

After an undetermined period of time, Mr. McGoogin met the police at a convenience store at the intersection of Main Street and Gun Club Road, which is south of the Main Street-Clark Road intersection, [Tr. 440-441].

The first officer to arrive was R. O. Pate, [Tr. 209]. Mr. McGoogin described the two men to Pate as two white males, both with blue Levi's pants, one with a blue Levi's jacket, and the other with a jacket of unknown color, [Tr. 442-444]. Mr. McGoogin indicated by pointing that the men had run south, [Tr. 473].

Sometime after Officer Pate's arrival, Officer Scott Simmons also arrived at the convenience store, [Tr. 252]. After listening to Mr. McGoogin for about two minutes, [Tr. 253], Officer Simmons drove north on Main, and turned west onto Clark, [Tr. 254]. Somewhere on Clark Road, Officer Simmons saw Mr. Kight. Officer Simmons stopped Mr. Kight because "[h]e had on a blue jacket and he had on blue Levi's and he also had blonde hair and that was one of the other things that the taxicab driver said at the time", [Tr. 255]. Officer Simmons questioned Mr. Kight regarding his identity and his presence, and frisked him, [Tr. 255]. After questioning Mr. Kight, Officer Simmons suspicions were dispelled [Tr. 256]. He returned Mr. Kight's belongings, and the two got out of Officer Simmons' car. Id. At this point, Officer Butler arrived. Officer Simmons described the subsequent events as follows:

> Q After Officer Butler arrived, what took place?
> A He heard on the radio that Officer Pate had found a suspect, a white male near the Expressway on Broward Road; excuse me, Clark Road, and he said this has got to be one of them because he's found the other one down the street. And so he took the knife and the belongings from him again and placed them on the hood of my car and put the suspect in the back of his car.
> Q Are you saying Officer Butler took those?

A Yes, sir

_Id_. On this basis, Mr. Kight was held until Mr. McGoogin arrived. Seeing Mr. Kight in the back of the police cruiser, Mr. McGoogin identified Mr. Kight. [Tr. 258].

The appellant was thereupon arrested for his alleged participation in the armed robbery of Herman McGoogin. Although the appellant was never convicted of that crime, the arrest impacted upon the conviction for the Butler murder in two critical ways. First, while the appellant was in custody for the McGoogin robbery, all the crucial evidence used against the appellant at the murder trial - including a knife introduced at trial as the murder weapon, a statement made by the appellant, the appellant's clothes, and four "jailhouse confessions" - was gathered by the State. Second, the alleged McGoogin robbery was introduced at the murder trial as _Williams_ Rule evidence against the appellant.

Since all the evidence introduced against the appellant was obtained as a direct result of his initial arrest for an unrelated crime, the legality _vel non_ of that arrest takes on a fundamental significance here. Because the initial investigatory stop of the appellant was not grounded on a reasonable belief, or any articulable facts that the appellant had committed a robbery, and because the stop evolved into an arrest which was

not supported by probable cause, all the evidence derived from the stop and arrest should have been excluded from use at trial.

Officer Simmons' initial contact with Mr. Kight is properly characterized as an investigatory detention pursuant to § 901. 151, Fla. Stat. (1983). His purpose was to ascertain Mr. Kight's identity and the circumstances surrounding his presence in the area. This detention constituted a seizure of Mr. Kight's person within the meaning of the Fourth Amendment. "'[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person,'... and the Fourth Amendment requires that the seizure be 'reasonable'." United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975), quoting in part, Terry v. Ohio, 392 U.S. 1 (1968).

Before the United States Supreme Court decided Terry v. Ohio, any act by the police in restraining a citizen amounted to a seizure under the Fourth Amendment to the United States Constitution, and therefore was invalid unless justified by probable cause. Dunaway v. New York, 442 U.S. 200, 207, 209 (1979). An exception do this general rule was created by Terry, which held that certain seizures are justifiable under the Fourth Amendment, if there is articulable suspicion that a person has committed or is about to commit a crime. While recognizing that when a police officer stops and frisks a citizen, he commits " a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment", Terry at 17, such police behavior does not necessarily trigger the

exclusionary rule even if probable cause is lacking. The question of whether such a search and seizure offends the Constitution is a two-part inquiry: first, " whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Id. at 19-20.

The narrowness of the question answered in Terry, at 15-16, is most clearly understood by direct reference to the language of the Court's holding:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. at 3031. (emphasis supplied). The Court expressly declined to address the "constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation". Id. at 19, n. 16.

The initial determination in this case is whether Officer Simmons had a reasonable suspicion, based on articulable facts, to stop Mr. Kight for questioning regarding the robbery of Mr. McGoogin. Second, assuming arguendo the stop was justified, the

question becomes whether the resulting investigation remained within the limited boundaries of reasonableness set forth in Terry and its progeny. It is the contention of the appellant that both questions must be answered in the negative.

The inquiry into the first issue is necessarily fact specific. However, assuming the facts to be as the leading actors describe them, the record demonstrates McGoogin was able to provide only the barest information to Simmons. He had not seen the face of the man he later identified as the appellant. He supplied no particulars other than that both white males wore blue jeans, and one wore a denim jacket. 2/ This information did not support a reasonable, articulable suspicion that the appellant had been involved in the robbery of McGoogin, and therefore Simmons' initial stop/seizure of the appellant. Cf, United States v. Sharpe, 470 U.S. ____106 S.Ct. ___, 84 L.Ed.2d 605 (1985).

The fact that Officer Simmons had the benefit of only the sparsest details from Mr. McGoogin does not end the inquiry. In order to determine the reasonableness of the stop, this Court must also consider the facts and circumstances known to Officer Simmons which should have quelled, and eventually did quell, suspicion regarding the appellant.

2/ Although Officer Simmons said Mr. McGoggin also said one of the suspects was blonde, Mr. McGoggin denied this [Tr. 443-444].

Officer Simmons was "[v]ery certain" that he was told the robbers ran toward the Interstate 95; that is, west. [Tr. 275-276]. Thus, it appears that Mr. McGoogin informed the police that the suspects headed south [Tr. 473] and west. However, at the time of the stop, Mr. Kight was north of Kentucky Road, walking east [Tr. 274]. Thus, the appellant was stopped at a location where there was no reason to suspect the robbers to be.

Further, Mr. McGoogin's description of the perpetrators was a very general one. The populace inhabiting the vicinity of the crime is, like the suspects, predominantly white [Tr. 278]. Blue jeans are commonly worn by the local residents. Id. It may be said to be the rule that jackets are worn on December nights, even in northeast Florida. All the officers testified that there were houses, apartments, gas stations, convenience stores, taverns, and other businesses in the area. Taking the record as a whole, viewed through the eye of common experience, it is apparent that Simmons simply stopped the first person he saw, even though there was nothing suspicious about Mr. Kight's behavior, the hour was not late, and Mr. Kight was not where a suspect should have been. Officer Simmons did not have any objectively reasonable suspicion of the appellant; rather, the appellant was seized on "mere" or "bare" suspicion. Such seizures of the person have been roundly condemned by the Florida courts. Freeman v. State, 433 So.2d 9 (Fla. 2d DCA 1983); McClain v. State, 408 So.2d 721 (Fla. 1st DCA 1982); R.B. v.

State, 429 So.2d 815 (Fla. 2d DCA 1983); Kearse v. State, 384 So.2d 272 (Fla. 4th DCA 1980); Mullins v. State, 366 So.2d 1162 (Fla. 1979).

The decision in L.T.S. v. State, 391 So.2d 695 (Fla. 1st DCA 1980), is instructive on the quantum of facts needed to justify a Terry stop in a case such as the one at bar. In L.T.S., a police officer received a radio report of a very recent robbery in the vicinity. The dispatch report advised officers to be on the lookout for at least two white males with curly hair. One to two minutes after receiving the report, at a point within three-quarters to one mile from the scene, the officer observed a car travelling away from the scene with three to four occupants, two to three of whom had "fairly bushy" hair. Id. at 695. The court found that the radio description was "lacking in specificity." The court noted, in language appropriate here, that " a vague description simply would not justify a law enforcement officer in stopping every individual who, or every vehicle which, might possibly meet that description." Id. at 696. The adjudication of delinquency was therefore reversed. As was the case in L.T.S., the vague description given Simmons would not give rise to an articulable suspicion to stop every person who might meet that description.

In D'Agostino v. State, 310 So.2d 12 (Fla 1975), this Court reversed the conviction of a man who was stopped and searched in the parking lot of a hotel, almost immediately after a burglary

in the hotel, on the basis of a description of the burglar as having "bare legs, and white socks and shoes," stating:

> All this is too flimsy upon which a sentence of ten years' imprisonment of this petitioner could possibly stand. To allow it would permit a game of 'blind man's bluff' and if the person caught turns out to have stolen property, then, contrary to all legal principles, this could be allowed to relate back as a reason for the arrest and search. To be sure, discovery here of apparently stolen goods upon a search would make it appear that some crime had perhaps been committed, but it would also lay a dangerous predicate for the arrest, search and seizure of innocent citizens which our Constitution and laws have jealously guarded through the years. Such a "hit and miss" approach arrest cannot be permitted.

Id. at 16. As here, the suspect in D'Agostino turned out to be the man sought. However, this fortuitous circumstance cannot be used to justify a stop based on insufficient facts. To hold otherwise threatens the liberty and right to privacy of all free citizens - both innocent and guilty.

Assuming arguendo, that the initial stop of the appellant was justified, the subsequent detention of Mr. Kight exceeded the allowable boundaries of a Terry stop. Officer Simmons' testimony makes clear that whatever suspicion he entertained regarding Mr. Kight was dispelled by questioning. At the time of Officer Butler's arrival, no reasonable suspicion remained - Mr. Kight was no longer a suspect. All Terry justification having evaporated, Mr. Kight should have been released. Florida v. Royer, 460 U.S. 491, 503 (1983). When Officer Butler, on the strength of nothing more than a radio report that another white

in the hotel, on the basis of a description of the burglar as having "bare legs, and white socks and shoes," stating:

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male had been stopped, seized the appellant's property and placed him in the back of this cruiser - from which the appellant could not escape - the Fourth Amendment was violated.

Officer Butler's re-seizure of the appellant was not supported by objective, articulable suspicion. More importantly, the seizure amounted to an arrest, entitled to full protection of the Constitution. Since the arrest was not based on probable cause, it was unlawful, and the fruits thereof should have been excluded at trial.

II.

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE ON SCENE IDENTIFICATION OF MR. KIGHT AT THE TIME OF HIS ARREST

On December 7, 1982, Officer Simmons stopped the appellant as a possible suspect in the robbery of Mr. McGoogin [Tr. 254, 255]. Officer Butler arrived, and placed the appellant in the back seat of his police cruiser, from which the appellant was not free to leave [Tr. 282, 285]. Mr. McGoogin arrived at the scene, viewed the appellant, alone in the cruiser, and identified him as one of the men who robbed him. [Tr. 258, 301, 358, 359]. Since Mr. McGoogin had not seen the face of the man he identified as the appellant [Tr. 483], he was forced to base his conclusion only on the appellant's hair [Tr. 301, 476, 477]. Mr. McGoogin was very excited [Tr. 334, 489]. The appellant was taken to the police station, and arrived at the office of the robbery division simultaneously with Mr. McGoogin [Tr. 394, 398,453]. These procedures were impermissibly suggestive, and the appellant's motion to suppress the identification [R. 214-215] should have been granted.

Where an out-of-court identification is made under circumstances unnecessarily suggestive and conducive to irreparable mistaken identification, evidence of that identification is inadmissible. Neil v. Biggers, 409 U.S. 188 (1972). See also, Baxter v. State, 355 So.2d 1234 (Fla. 2d DCA 1978). Additionally, where impropriety is shown in the out-of-court identification, any in-court identification is presumed to be tainted thereby, and thus inadmissible until the State shows, by clear and convincing evidence, that the in-court

identification has an independent basis. Cribbs v. State, 297 So.2d 335 (Fla. 2d DCA 1974). State v. Sepulvado, 362 So.2d 324, 327 (Fla. 2d DCA 1978).

Applying the facts of the instant case to the standards above leads ineluctably to the conclusion that both the in-and out-of-court identification evidence should have been suppressed. In the instant case the cab driver, Herman McGoogin, was taken to the scene where the suspects were being detained and was asked if he could identify them as the robbers. Appellant was being detained in the back seat of marked police cars with all the doors closed. Only the appellant and Mr. Hutto were in the custody of the police officers at the time Mr. McGoogin identified Mr. Kight and McGoogin clearly was informed that these men were apprehended as suspects to the crime [Tr. 358, 367]. Mr. McGoogin admitted throughout his testimony that he did not have a chance to see the appellant's face. Despite the fact that Mr. McGoogin admitted he did not see the appellant's face, his testimony was sought to be used to establish the identification of Mr. Kight as one of the robbers. Mr. McGoogin was asked to view appellant through the passenger window of the police cars with no illumination other than the dome light and a flashlight. Based on these facts, Mr. McGoogin's identification was inherently unreliable and the manner of show-up so suggestive as to render such identification inadmissible.

In Stovall v. Denno, 388 U.S. 293 (1967), the Court addressed the problem of police-initiated show-ups, holding, "The practice of showing suspects singly to persons for the purpose of

identification, and not as part of a line-up, has been widely condemned." Id at 302. Judicial aversion to this inherently suggestive police procedure has been clearly acknowledged by the United States Supreme Court:

> Whatever may be said of lineups, showing a suspect singly to a victim is pregnant with prejudice. The message is clear: the police suspect this man. That carries a powerfully suggestive thought. Even in a lineup the ability to identify the criminal is severely limited by normal human fallibilities of memory and perception. When the suspect is shown singly, havoc is more likely to be played with the best-intended recollections.

United States v. Wade, 388 U.S. 218, 228 (1967). Justice Powell, writing for the Court in Neil v. Biggers, enumerated five factors relevant to the determination of impermissible suggestiveness:

> (1) The opportunity of the witness to view the criminal at the time of the crime;
>
> (2) The witness' degree of attention;
>
> (3) The witness' prior description of the criminal;
>
> (4) The level of certainty demonstrated by the witness at the identification procedure; and
>
> (5) The length of time between the crime and the identification procedure.

Id. at 199. As stated earlier, in the facts of the instant case, Mr. McGoogin testified that he did not see the appellant's face.

The word "unnecessarily" as used with suggestiveness in the discussion above of due process standards, is especially pertinent here. In Stovall v. Denno, the defendant, once apprehended, was immediately taken to a hospital room where he

was identified by the woman he allegedly stabbed. He was the only black person in the room. The woman, who later recovered, was at the time fighting for her life. The Supreme Court found the procedure necessarily suggestive. In contrast, this case involved no such "need for immediate action", nor was the show-up in this case "the only feasible procedure." Id. at 302. To the contrary, "We have no such problem of compelling urgency here. There was ample time to conduct a traditional lineup. This confrontation was crucial." Biggers at 407. No reason appears to justify the procedure employed by members of the Jacksonville Sheriff's Office in arranging this show-up.

The show-up in this case having been shown to violate the relevant due process standard, it devolved upon the State to justify the admissibility of any in-court identification in this case. Not only is there no "clear and convincing evidence," Cribbs at 336, of an independent basis for identification here, the record demonstrates that Mr. McGoogin would not have identified Mr. Kight but for the improper show-up. The trial court's failure to grant appellant's motion to suppress the tainted identification was error, requiring reversal of appellant's conviction.

III.

THE TRIAL COURT ERRED IN ADMITTING AT TRIAL AN INCULPATORY STATEMENT OBTAINED FROM THE APPELLANT WHICH WAS NOT FREELY AND VOLUNTARILY GIVEN AND WHICH WAS OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS

Upon his arrest on December 7, 1982, on a charge of armed robbery of Herman McGoogin, the appellant was taken to the police station and placed in an interrogation room. [Tr. 375-377]. Detective R. T. Weeks read the appellant his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and the appellant declined to talk to the detective. At that point, questioning ceased. [Tr. 401].

On December 8, the Office of the Public Defender was appointed to represent Mr. Kight. On December 14, Officer Perry Riley of the Jacksonville Sheriff's Office interrogated the appellant at the jail regarding the missing taxi cab of Lawrence Butler [Tr. 948]. Officer Riley did not bother to find out whether the appellant had previously invoked his rights under Miranda and Edwards v. Arizona, 451 U.S. 477 (1981) [Tr. 949]. Appellant told the officer he had no knowledge of the murder. [Tr. 948].

Three days later, Detective Weeks, knowing full well that the appellant had refused to talk to the police ten days before, nevertheless removed appellant from his cell for the stated reason of seizing the appellant's clothing in order to have it tested for Mr. Butler's blood. [Tr. 524, 525]. According to the detective, the subsequent events occurred were as follows:

> Q Now, I believe you said you took Mr. Kight down to the jail property room for the

purpose of getting a change of clothing for him?

A Yes, sir.

Q What occurred, if anything, at that time?

A Well, we went to the property room and I asked for some clothing and the men there said okay, it will be just a few minutes. Since we were standing there, Mr. Kight said you are going to use me in a line-up, right? And I said no, sir. And he said I'm not afraid of the chair, you know, and I said what chair are you talking about? And he said the electric chair. He said because Hutto cut a guy's throat, he got his watch on and I said wait a minute. I said hold it right there. I said I want to advise you of your constitutional rights.

[Tr. 525]. The detective testified that he then orally advised the appellant of his rights, whereupon the appellant gave an inculpatory statement. [Tr. 526].

Upon obtaining the oral statement, Detective Weeks took the appellant to the police station to be interrogated by Detective Kesinger of the homicide division. [Tr. 526]. Detective Kesinger read the appellant his Miranda rights from a printed form. [Tr. 583]. The appellant then made another statement which was reduced to writing. [Tr. 587]. This statement was signed but not written by Mr. Kight because he is unable to read and write. [Tr. 1906] Before trial, the appellant moved to suppress the statement, and objected in a timely fashion to its introduction at trial. The court below, denied the appellant's motion and admitted it at trial. In doing so, the court committed reversible error.

A. The Statements Made By The Defendant Were Obtained Illegally And Must Be Suppressed

The United States Supreme Court in the landmark case of Miranda v. Arizona, declared that an accused has a Fifth, Sixth and Fourteenth Amendment right to have counsel present during custodial interrogation. The Court concluded that only when there has been a "knowing and intelligent" waiver of that right, may a custodial interrogation be conducted in the absence of counsel. The determination of whether a knowing and intelligent relinquishment has occurred is a matter which depends in each case "upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

More recently, in Edwards v. Arizona, 451 U.S. 477 (1981) the Supreme Court enunciated the absolute right of an accused to have counsel present at any custodial interrogation, stating:

> . . . [A] valid waiver of that right cannot be established by showing only that the accused responded to further police-initiated custodial interrogation... an accused having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him...

Id. at 484.

The police interrogation of Mr. Kight in the instant case was a direct violation of the principles enunciated in Miranda and Edwards. Mr. Kight was interrogated while in custody and after counsel had already been appointed. When arrested initially, Mr. Kight explicitly stated he would make no

statements and was appointed counsel. Accordingly, the interrogation of Charles Kight violated that portion of Edwards, which states: "... an accused having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has made available to him..." Id. All statements made by Mr. Kight were illegally obtained and should have been suppressed.

The dictates of Miranda, are reflected in many Florida decisions. If the defendant indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. Furthermore, questioning cannot continue after assertion by an accused, of his right to counsel. Wakeman v. State, 237 So.2d 61 (Fla. 4th DCA 1970); State v. Padron, 425 So.2d 644 (Fla. 3d DCA 1983). This prohibition applies where the assertion is made indirectly or by suggestion, as well as in the case of direct, positive assertion. Singleton v. State, 344 So.2d 911 (Fla. 3d DCA 1977); Harris v. State, 396 So.2d 1180 (Fla. 4th DCA 1981). In the instant case, Mr. Kight asserted his right to counsel at first appearance, and counsel was appointed. That right was never effectively waived. Additionally, he affirmatively invoked his right not to be interrogated at the time of his initial arrest. The interrogation of Mr. Kight in absence of counsel violated Florida court's application of Miranda and Edwards, supra. Accordingly, all statements made by Charles Kight during the interrogation were illegally obtained and should have been suppressed.

B. The Appellant Did Not Waive His Fifth And Sixth Amendment Rights

A defendant's mental incapacity or ignorance is a critical factor to be considered in determining whether a confession was involuntarily given under the circumstances. State v. Chorpenning, 294 So.2d 54 (Fla. 2d DCA 1974). A defendant, whose conviction is founded in whole or in part upon an involuntary confession is denied due process of law.

A number of United States Supreme Court cases have addressed the issue as to whether mental retardation is a factor to be considered in determining the voluntariness of a confession. In Culombe v. Connecticut, 367 U.S. 568 (1961), the Court, focusing upon the fact that the defendant was a "thirty three year old mental defective of the moron class with an intelligence quotient of sixty four and a mental age of nine to nine and a half years and wholly illiterate," Id. at 621, found the defendant's confession to have been involuntary.

In Sims v. Georgia, 389 U.S. 404 (1967), the Supreme Court again reversed a conviction based on a confession the court found to be involuntary, noting as one factor in its consideration: "He [Sims] is an illiterate with only a third grade education, whose mental capacity was decidedly limited." Id. at 407. See also Fikes v. Alabama, 352 U.S. 191 (1957), and Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980) (en banc).

Similarly, in Reddish v. State, 167 So.2d 858 (Fla. 1964), this Court reversed a conviction for first degree murder and held, "if for any reason a suspect is physically or mentally

incapacitated to exercise a free will or to fully appreciate the significance of his admissions, his self-condemning statements should not be employed against him." Id. at 863. Accord, Hall v. State, 421 So.2d 571 (Fla. 3d DCA 1982); Fields v. State, 402 So.2d 46 (Fla. 1st DCA 1981); Tennell v. State, 348 So.2d 937 (Fla. 2d DCA 1977).

The case law is clear that the mental capacity of a defendant is an important factor to be considered by the judge and the jury in determining the voluntariness of a confession. In the present case, the record does not reflect with "unmistakable clarity" that Mr. Kight"s confession was voluntary, nor does it establish that Mr. Kight knowingly and intelligently waived his right to counsel and right against self-incrimination. Rather, the record establishes that Detective Kesinger was aware, when he took the challenged written statement, that the appellant was an epileptic and that he could not read or write. [Tr. 1905]. The record also shows that the appellant made the statement after ten days in jail, during which time he was never spoken to individually by his court-appointed attorney. The appellant's sub-normal intelligence is well documented in this record.

The statement objected to here was obtained in violation of the Fifth and Sixth Amendments, as construed and enforced by Miranda and Edwards. The record does not show that the appellant knowingly, intelligently, and voluntarily waived those rights. On these grounds, the statement should have been excluded at trial. The trial court's admission at trial of this statement constitutes reversible error, mandating a new trial.

IV.

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OBTAINED AS THE RESULT OF THE WARRANTLESS SEIZURE OF APPELLANT'S CLOTHING

Ten days after Mr. Kight's arrest for the McGoogin robbery, Detective Weeks went to the Duval County Jail and seized Mr. Kight's clothing from him [Tr. 1857]. The pants seized by Detective Weeks were admitted into evidence over objection and later linked by a blood expert to the Butler homicide [Tr. 1857-1858, 1959-1965]. No warrant was sought by or obtained by the detective prior to making the seizure, although he had ample time to do so. Detective Week's motivation in making this warrantless seizure was based solely upon his desire to obtain incriminatory evidence against Mr. Kight. His actions constituted a clear violation of Mr. Kight's rights under the Fourth Amendment to the United States Constitution and Article I, Section 12, of the Florida Constitution.

In Godbee v. State, 224 So.2d 441 (Fla. 2d DCA 1969), the court outlined a few factors to be considered in determining whether or not a particular search and seizure constituted an unreasonable invasion of privacy:

> The reasonableness of any search without a warrant is measured from the standpoint of the conduct of the searchers and if their conduct is in some way reprehensible, or if they precipitate a search and are motivated therein solely by desire to hunt for incriminating evidence, or it they do so without any plausible explanation or justification, the invasion is an unreasonable one.

Id. at 443. Where such a search is used as a pretext to seize evidence illegally, the evidence will be suppressed. Hicks v. State, 398 So.2d 1008 (Fla. 1st DCA 1981).

The decisions of Block v. Rutherford, 468 U.S. __, 104 S.Ct. 3227 (1984) and Lightbourne v. State, 438 So.2d 380 (Fla. 1983), can be distinguished from the facts herein. In Block, pretrial detainees challenged the practice of the searching of their cells by jail officials outside their presence. In concluding that the officials were not required to allow detainees to be present during cell searches, the Court noted that such practice was a reasonable response to legitimate security concerns. Similarly, in Lightbourne, this Court held that no warrant is required, where police officers take private property in the possession of the arrestee at the time of his arrest.

The Lightbourne decision is a natural extension of Chimel v. California, 395 U.S. 752 (1969). In Chimel, the United States Supreme Court held that a warrant is not necessary to seize evidence incident to a lawful arrest which is within the immediate range of the arrestee. [3] The search incident to arrest exception to the warrant requirement is rationalized as necessary to prevent an assault on arresting officers and to prevent the destruction of evidence. Id. at 762-763. The search must be contemporaneous with the arrest and cannot be remote in time or place. Vale v. Louisiana, 399 U.S. 30, 33 (1970).

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[3] If the court concludes that Mr. Kight's initial detention and arrest was unlawful, the seizure of Mr. Kight's clothing must also be suppressed as the derivative fruit of that unlawfulness.

The warrantless seizure of Mr. Kight's clothing cannot be justified as a security measure, nor were there any other exigent circumstances which justified their seizure. There was no reason to believe the clothing would be destroyed, because it was the only clothing in Mr. Kight's possession at the jail. See, Alderton v. State , 438 So.2d 1000 (Fla.2d DCA 1983). Moreover, the fact that it was seized over ten days after Mr. Kight's incarceration clearly precludes any finding that it was seized incident to a lawful arrest.

The warrantless seizure of Mr. Kight's clothing was not justified by any exception to the warrant requirement. Accordingly, any and all evidence derived from the seizure, including the testimony concerning the analysis of the blood found on Mr. Kight's blue jeans, should have been suppressed. Failure to do so was reversible error.

V.

THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE THE TESTIMONY OF THE STATE'S WITNESSES OBTAINED AS THE RESULT OF A CONFLICT OF INTEREST

Charles Kight and Gary Hutto were both arrested on December 7, 1982 for the robbery of a taxi driver named Herman McGoogin. During interrogation by R.T. Weeks at the police station, shortly after the arrest, Mr. Hutto implicated Mr. Kight in the robbery [Tr. 668-696]. The Public Defender's Office was on notice about Mr. Hutto's statement because it was contained in Mr. Kight's Arrest and Booking Report [Tr. 696]. Nonetheless, without objection, the Honorable Edward P. Westberry [4/] appointed the Public Defender's Office to represent both Mr. Hutto and Mr. Kight [Tr. 684].

Even though Mr. Kight was in the Duval County Jail, charged with a life felony, he had no individual contact with an attorney from the Public Defender's Office for at least ten days [Tr. 721]. [5/] During this critical period, on December 14, Mr. Kight was interrogated by Officer Perry Riley at the jail concerning the missing taxi cab of Lawrence Butler. [Tr. 401, 948].

Three days later, Detective Weeks, knowing Mr. Kight had invoked his Fifth and Sixth Amendment rights, nevertheless

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4/ Judge Westberry is one of the few remaining non-lawyer judges in the Fourth Judicial Circuit.

5/ Mr. Kight was provided a standard printed advice form by the Public Defender's Office [Tr. 720-21]. Mr. Kight is unable to read. [Tr. 733].

took Mr. Kight from his jail cell for the stated purpose of seizing Mr. Kight's clothing [Tr. 524-25]. It was during this police-initiated contact that the appellant, who had not yet spoken to an attorney, made certain statements introduced against him at trial [Tr. 525-26]. Shortly after making his statement, the appellant was arrested for murder [R. 1-2]. It was not until December 22, that the Public Defender's Office recognized the conflict which existed in the representation of the two men. In a motion to withdraw from Mr. Kight's defense filed by the assistant public defender, only Mr. Kight's statement implicating Mr. Hutto was cited [R. 4].

The Public Defender's Office continued to represent Gary Hutto. During the period of this representation, the Public Defender gathered the names of jailhouse informants who would be willing to testify to statements against interest purportedly made by Mr. Kight. The acceptance of Mr. Hutto's plea agreement by the State was conditioned upon Mr. Hutto providing the names of these witnesses to the State [Tr. 927]. Once the Public Defender was forced to withdraw from Hutto's defense, these names were turned over to the newly-appointed counsel, Robert Link. [Tr. 929]. Mr. Link, in keeping with the plea negotiations, turned over the names to the State. [Tr. 955] The jailhouse informants eventually testified against Mr. Kight at trial. Prior to trial a motion to exclude the testimony of these witnesses was filed and denied [R. 414-415, 476].

The testimony of these witnesses should have been suppressed because it was directly derived from the conflict of interest of

Mr. Kight's former counsel - and counsel's resulting ineffective assistance. Mr. Kight was denied effective assistance of counsel in two ways. First, no attorney from the Public Defender's Office spoke with Mr. Kight individually for at least ten days, even though he was charged with a life felony. No Edwards notice was served by the Public Defender. [6] During the fifteen-day period that the Public Defender's Office nominally represented the appellant, he received no representation at all. Denied the "guiding hand of counsel", Johnson v. Zerbst, 304 U.S. 458, 463 (1938), the appellant, retarded and illiterate, held in the highly coercive environment of the jail, repeatedly subjected to police-initiated investigatory contacts, was ill-equipped to protect his own rights. Alone against the overwhelming forces of the State, he succumbed. Mr. Kight's statement to Weeks was a direct result of the failure of his counsel to make the smallest effort -- an Edwards notice -- to protect him. Mr. Kight's statement should have been excluded at trial.

Mr. Kight was denied the effective assistance of counsel in another manner. The Public Defender's Office labored under a conflict of interest, at the very outset, in attempting to represent both Hutto and Kight, and should have withdrawn from both defendants' cases immediately. By remaining in Mr. Hutto's case, the Public Defender's Office placed itself in a position

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[6] The Office of the Public Defender for the Fourth Circuit has a policy wherein notices are filed pursuant to Edwards v. Arizona, 451 U.S. 477 (1981) instructing law enforcement personnel not to interrogate their clients in the absence of counsel. This policy was not followed for Charles Kight.

completely antagonistic to the best interests of its former client. The only appropriate remedy was to withdraw as counsel. While the public defender did ultimately withdraw, it was not until after it had obtained the testimony of its other clients (Moody, Sims and Ellwood) which incriminated Mr. Kight.

Although it was plain at Mr. Kight's bond hearing on the robbery charge that, since Hutto was implicating Mr. Kight, a conflict existed, the Public Defender's Office was appointed to represent both men. When, ten days later, both were formally arrested for Butler's murder and Mr. Kight implicated Hutto, the assistant public defender was again appointed on both cases. When, five days later, the assistant public defender noticed the conflict, she withdrew from Mr. Kight's case, despite the fact that (never having represented Hutto before) the very same Assistant Public Defender, Ann Finnell, had previously represented Mr. Kight [Tr. 924-926]. The assistant public defender then gathered names of jailhouse informants against Mr. Kight, a former client, to further Hutto's plea negotiations. After building the case against a former client through the testimony of present clients, the assistant public defender turned the entire file over to Robert Link, [7/] who in turn provided the information to the State, to Mr. Kight's indisputable detriment.

[7/] Prior to entering private practice, Mr. Link has been Ms. Finnell's supervisor at the Public Defender's Office. [Tr. 952].

The Sixth Amendment guarantees to the criminally accused not only the right of counsel, but also the right to conflict-free counsel: "the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests." Glasser v. United States, 315 U.S. 60, 70 (1942). The right to conflict-free counsel does not automatically require reversal of a conviction of a defendant whose counsel represented conflicting interests. To obtain relief, a defendant "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance". Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). The former Fifth Circuit in Baty v. Balkcom, 661 F.2d 391 (5th Cir. 1981)(Unit B), defined "actual conflict of interest" as follows:

> An actual conflict exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing.

Id. at 396.

The existence of a conflict in the instant case, and its damaging effect upon the appellant's defense, is clear from the record. Judge Westberry appointed the Public Defender's Office to represent co-defendants on a robbery charge despite the fact that Mr. Hutto had made a statement blaming Mr. Kight for the crime. The Public Defender's Office did not move to withdraw. Nor did that office represent the appellant in any affirmative manner. No attorney visited the appellant to make certain that he, a former client and a man of subnormal intelligence, was fully

aware of his constitutional rights. No Edwards notice was filed. As the robbery charge evolved into a murder charge, the Public Defender's Office was again appointed to represent Mr. Hutto and the appellant. Though, again, inconsistent defenses were obvious, no move was made to withdraw for five days, and then the assistant public defender withdrew from representation of its former client, Mr. Kight. Instead of undertaking the representation of its former client, the Public Defender's Office built the State's case against him and, through Mr. Link, delivered that case to the State to protect Mr. Hutto.

A conflict such as this, with the irrevocable harm it engenders, could have easily been avoided. In the federal system, Fed.R.Crim.P. 44(c) has been promulgated to prevent the inherent dangers of multiple representation. That rule provides:

> Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Appropriate to the present context, the United States Supreme Court has noted:

> Seventy percent of the public defender offices responding to a recent survey

> reported a strong policy against undertaking multiple representation in criminal cases. Forty-nine percent of the offices responding never undertake such representation.

Cuyler, 446 U.S. at 346.

The Georgia Supreme Court has imposed a rule that in all capital cases, each defendant is to be provided with separate, independent counsel. See, Fleming v. State, 270 S.E. 2d 185, (Ga. 1980).

Similarly, in People v. Mroczko, 672 P.2d 835 (Cal. 1983), the California Supreme Court adopted a simple rule which will forever obviate the treacherous potential of joint representation. In a well-reasoned opinion, based on facts not applicable here, the Mroczko court held that separate and independent counsel must be appointed for jointly charged indigent defendants at the outset of criminal proceedings.

Like all good policy, the Mroczko rule is grounded on hard experience. The appellant urges this Court to conclude that the time has come for such a rule in the courts of Florida. This Court should take advantage of the opportunity offered by the instant case to deal with conflict cases in a firm and forthright manner. Whether this Court prefers a rule of inquiry such as Fed.R.Crim.P. 44(c), or a per se rule, the recurring problems engendered by joint representation must be addressed and prevented.

How the instant case may have proceeded had separate counsel been appointed upon the initial arrest of Hutto and Kight cannot be known. It is clear, however, that Mr. Kight was not provided conflict-free counsel. Counsel for Mr. Kight sought to alleviate

the prejudicial impact of this conflict by filing a motion to exclude the testimony of the witnesses, but this motion was denied [R. 476]. Appellant was thus denied the only effective remedy to correct this conflict. For this reason, Mr. Kight should be granted a new trial with the testimony of these witnesses excluded.

VI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS INDICTMENT BASED UPON DISCRIMINATION IN THE SELECTION OF GRAND JURY FOREPERSON

The trial court erred in denying Defendant's Motion to Dismiss the Indictment for unlawful selection of grand jury and grand jury forepersons. [R. 335-336, 533-534]. The leading case of Rose v. Mitchell, 443 U.S. 545, stands for the proposition that discrimination in selecting the members of a grand jury is forbidden by the United States Constitution. Id. at 747. Rose also supports the position that where the discrimination occurs in the selection of the grand jury foreperson, a conviction obtained from the tainted indictment must be reversed. Id. at 755.

The burden of establishing a prima facie case for discrimination on selecting grand jurors and a grand jury foreperson is virtually identical. The defendant must show substantial under-representation of an identifiable group, that is a cognizable, distinct class, which is singled out for different treatment under the laws as written or applied. Next, the degree of under-representation must be proven by comparing the total population of the group to the total number called to serve on grand juries or as foreperson. When the defendant has established the prima facie case of discrimination through statistical evidence, the burden then shifts to the State to to rebut the showing of discrimination. Id. at 755. See also, Bryant v. State, 386 So.2d 237 (Fla. 1980), and United States Ex Rel. Barksdale v. Blackburn , 610 F.2d 253 (5th Cir. 1980).

There is no question that women and blacks have long been

recognized as a distinct class. Discrimination in the selection of grand jury forepersons on this ground is impermissible. United States v. Perez Hernandez. 672 Fd.2d 1380 (11th Cir. 1982); United States v. Cross, 708 F.2d 631 (11th Cir. 1983). Although the United States Supreme Court has declared that discrimination in the selection of the foreperson sitting on a federal grand jury will not require a subsequent conviction to be set aside, it expressly stated, " The ministerial role of the office of federal grand jury foreman is not such a vital one that discrimination in the appointment of an individual to that post significantly invades the distinctive interests of the Due Process Clause." Hobby v. United States, 468 U.S. ___, S.Ct. __, 82 L.Ed.2d 260, 267 (1984), (emphasis added).

Moreover, in the present case, as distinguished from the facts of Andrews v. State, 443 So.2d 78, 83 (Fla. 1983), appellant introduced the testimony of various circuit judges regarding the role of the foreperson in the grand jury process establishing the significance of that position. The Honorable John Santora testified:

> You review the names of the grand jurors to see if a name is familiar to you, the name being the person that you know of your own knowledge as a leader in the community and you discuss it with the State Attorney to make a determination of who would be most qualified. You are looking for someone with education and experience to be qualified to serve as foreman of the grand jury, someone hopefully who has had experience in the community in the field of leadership and, hopefully, you get someone that is best suited to serve as foreman from the panel.

[Tr. 1015].

Judge Santora also expressed his opinion that the position of grand jury foreperson was important because:

> . . . [H]e is going to be in charge of the grand jury for a period of six months as a general rule and he is going to be determining with the consent and guidance of the other members who is going to be investigated, what is going to be investigated, what witnesses are going to be called, he is chairman, he is foreman, like any other body of people he acts as chairman of that group and generally takes part in the questioning of witnesses and the selection of what Court Reporter will be used, what interpreter will be used and whether or not he wants a prosecuting attorney present, he has authority to exclude him, he is more powerful than the State Attorney at that particular time.

[Tr. 1023]. (emphasis added). This opinion was joined in by Judges Martin, Harding, and Adams. [Tr. 1028, 1030, 1035 - 1037, 1048, 1064].

Appellant, through facts stipulated to by the State, also clearly established that blacks and women were under represented as forepersons on the grand jury in this case [Tr. 376 - 384]. During the time period covered there were 36 grand juries convened; there were 22% black and 78% white registered voters and 46% male and 54% female registered voters. The composition of grand jury members, however, differed greatly. In the same time period 55% of the grand jurors were male while only 45% were female; 77% were white while only 23% were black. Of the 36 forepersons, 97.2% were male and 94.4% were white. The under-representation of females and blacks as forepersons was clearly established to a significant degree. Since appellant met his *prima facie* burden of establishing discrimination, the burden shifted State to rebut this presumption by showing that racially

neutral selection procedures have produced this disparity. Having failed to meet its burden, appellant's motion to dismiss should have been granted.

VII.

THE TRIAL COURT ERRED DURING JURY SELECTION IN ITS DISPOSITION OF CHALLENGES FOR CAUSE BASED ON EXPRESSED OPINIONS FOR AND AGAINST THE DEATH PENALTY

This Court has had occasion to set forth the applicable law with regard to a challenge for cause of a venireperson who is committed to the imposition of the death penalty in the event of a conviction at the guilt phase. Thomas v. State, 403 So.2d 371 (Fla. 1981); Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983). In Fitzpatrick this Court recognized that this issue is simply the reverse of the question addressed in Witherspoon v. Illinois, 391 U.S. 510 (1968), and that the Witherspoon standard applied whether the venireperson was unalterably opposed to the death penalty or unalterably committed to it. 437 So.2d at 1075-1076. Since the Witherspoon standard was modified in Wainwright v. Witt, 469 U.S. ___, 105 S.Ct. 844, 83 L.Ed. 2d 841 (1985), this Court should apply the Witt standard to reverse-Witherspoon cases, such as Fitzpatrick, so that a trial court should, upon motion, exclude for cause a venireperson when the trial court is left with the definite impression that the venireperson's pro-death penalty views would "substantially impair" the juror's ability to perform his or her duties. Witt, 105 S.Ct. at 850-851.

The trial court committed reversible error in failing to exclude White [Tr. 1491-1501], Andrews [Tr. 1550-1558], Dinkins [Tr. 1599-1602], and especially Bird [Tr. 1687-1698].

The trial court also erred when it excluded for cause seven jurors who voiced opposition to the death penalty, but who stated they would be able to adhere to their oaths as jurors. In doing so, the trial court thereby violated the principles of Witherspoon v. Illinois, 391 U.S. 510 (1968), Adams v. Texas, 448 U.S. 38 (1980), and Wainwright v. Witt, 469 U.S. __, 105 S.Ct. 844, 83 L.Ed 2d 841 (1985). See, also, Grigsby v.Mabry, 758 F.2d 226 (8th Cir. 1985), (en banc),

The recent decision in Witt does not denigrate the importance of an impartial jury. It maintains the limitations on the power of the State to exclude jurors opposed to capital punishment. The responsibility remains with the trial court to distinguish between "prospective jurors whose opposition to capital punishment will not allow them apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial" 105 S.Ct. at 850-851.

Witt does, however, modify the standard a trial judge should use in making this determination. Excludable jurors no longer have to indicate an "automatic" refusal to vote for the death penalty, nor must they indicate bias with "unmistakable clarity", as Witherspoon suggested. A prospective juror may now be excluded for cause if the trial court is left with the definite impression that the venireperson's views would "prevent or substantially impair the performance" of a juror's duties in accordance the oath and the court's instructions. Id.

The trial court further erred in excusing for cause nine

venirepersons who did not meet the Witt threshold: Antolec [Tr. 1331-1347]; Mote [Tr. 1363-1385]; Reed [Tr. 1397-1409]; Bowes [Tr. 1433-1441]; Heying [Tr. 1506-1514]' Ross [Tr. 1526-1541]; Atwater [Tr. 1638-1649]; Thompson [Tr. 1670-1679]; and Jones [Tr. 1708-1717]. Based on the responses of these potential jurors, their exclusion was unwarranted, and a new trial is mandated.

Lastly, the trial court reversibly erred in excusing for cause jurors with anti-death penalty scruples, when seven of the nine were black, without an inquiry into the prosecutor's motives regarding the race of the venirepersons. State v. Neil, 457 So.2d 481 (Fla. 1984).

VIII.

THE TRIAL COURT ERRED IN ADMITTING THE APPELLANT'S EXCULPATORY STATEMENT TO DETECTIVES WEEKS AND KESINGER

On December 17, 1982, the appellant gave a statement regarding the Butler murder to Officer R.T. Weeks at the Duval County Jail [Tr. 1883]. The statement was later reduced to writing by homicide detective C.M. Kesinger [Tr. 1910]. That same day, the appellant was formally arrested by Detective Weeks and Detective Kesinger for the murder of Butler. [R. 1-2].

At the trial below, the State, over timely and specific objection [Tr. 1860-1878] introduced the statement through Detectives' Weeks and Kesinger. Because the statement was introduced solely to show that the appellant had made contradictory statements about the murder, it was thus pure impeachment. Because the appellant never placed his credibility in issue, the statement was not probative of any fact in issue. Therefore, it was irrelevant, and highly prejudicial. It's admission at trial was error, and reversal is warranted.

The analysis of this question begins with the nature of the appellant's statement. The appellant told Detectives Weeks and Kesinger, in essence, that Gary Hutto killed Mr. Butler. [Tr. 1883]. The statement is exculpatory, and does not tend to make more likely any of the elements of the offenses for which the appellant was tried. Thus, it was irrelevant and inadmissible. §90.402 Fla. Stat. (1983).

A criminally accused's pre-trial exculpatory statements may be admitted at trial, even if the defendant does not take the

stand, for the limited purpose of showing the statement was false, and calculated to defeat prosecution. An obvious example of this doctrine is a case in which a defendant, before trial, gives as an alibi his absence from the state at the time of the crime. The prosecution may introduce that statement, together with evidence showing that the defendant had actually been in the state on the day the crime occurred. Similarly, "a false denial that he owned a weapon of they type employed in committing the crime" may be disproved to show an attempt to avoid prosecution. Douglas v. State, 89 So.2d 659,661 (Fla. 1956); Brown v. State, 391 S0.2d 729 (3d DCA 1980). The introduction of the appellant's statement is not justified by this doctrine.

The proper disposition of this issue is controlled by this Court's decision in Douglas, which addressed the related issue of the admissibility of a defendant's failure to reply or deny culpability in the face of an accusation of guilt.

Lamar Douglas was tried for the murder of Jack Johnson. The State introduced evidence that after Johnson's disappearance, but before the body was discovered, the following conversation took place between Douglas and his father, Tom:

> "Q. All right, now, son, go ahead and state just what Tom said now. A. Tom asked him, said, 'Lamar, what did you do with Jack Johnson?' Lamar told him that he was still around and he said, 'No, he ain't, you killed him, didn't you?' And Lamar said, 'No, he's around,' and he took off.
>
> Q. And he left? A. Yes"

Id. at 661. Douglas was convicted of first degree murder.

On appeal to this Court, the State attempted to justify its introduction of the defendant's exculpatory statement by relying on the same principle offered by the prosecutor at the trial below, namely on the grounds that if established consciousness of guilt on the part of the accused, because "he makes a statement which is calculated to deceive or is subsequently shown to be false". Id. [Tr. 1869]. Without disapproving the cited principle of law, the Douglas Court held that it did not apply to the facts of the case before it. The crucial consideration for the Douglas Court was that, in order to prove the falsity of Douglas' statement, it was necessary to prove Douglas' guilt. Such an approach was not justified as proof of consciousness of guilt:

> A circumstance which is dependent upon proof of defendant's guilt for its evidentiary value does not tend to prove guilt.
>
> This is quite different from a case in which one accused of crime might deny guilt and then offer a false alibi, a false denial that he owned a weapon of the type employed in committing the crime or a similar statement that could be disproved independently of the proof of the commission of the crime by the defendant. Under such circumstances evidentiary value could be given proof of the false statement and proof of its falsity as a separate circumstance tending to show defendant's guilt.

Id. (emphasis added).

The pertinent facts of Douglas are indistinguishable from those of the present case. The appellant's challenged statement was, in effect, "I didn't kill Butler. Hutto did". In order to prove the falsity of that statement, it was necessary to prove

the guilt of the appellant. Such a theory of admissibility was specifically rejected in Douglas, and should be rejected here.

The rule in Douglas is a sound one. To interpret the "consciousness of guilt" theory as broadly as the State does here would allow the State to attach virtually any statement by an accused which is contradicted by prosecution evidence, as a lie showing "consciousness of guilt". The rule cited by the State may not be extended to include the instant case.

Finally, the record demonstrates that the State's ostensible justification for admitting the appellant's exculpatory statement was not the true purpose. It was, in truth, a character attack -- an assault of his credibility. The clearest support for this contention is found in the words of the prosecutor in presenting the statement to the jury during closing argument:

> When you go back there, ladies and gentlemen, look carefully at the statement. Look at who Mr. Kight says does everything, every single little thing. Look how Mr. Kight leaves out any of his involvement or any of his knowledge or any of his actions. See if you believe that this statement is reasonable, and if it's credible given all the factors and given what we know and weigh that especially when you consider the testimony of Mr. McGoogan.
>
> Mr. McGoogan told you the identity of the man who had the knife the very next night. It was that man, Charles Kight. Consider that when you read this statement. See if you think the statement is credible, if it's believable.

[Tr. 2371-72] (emphasis added).

> Consider that testimony when you look at this statement. See if you think the

> <u>statement is believable in light of what Mr. McGoogan says.</u>

[Tr. 2378] (emphasis added).

> See if you believe with all those factors that this statement is honestly the truth, that Mr. Kight was telling Detective Kesinger the truth. Read it carefully. Find one piece of involvement that Mr. Kight says he had and see if you think that's believable. Find one thing that Mr. Kight says in here that he did and see if you think that's believable.

[Tr. 2381].

The State's closing argument speaks for itself. The appellant's exculpatory statement was not admitted to show an attempt to avoid prosecution. Instead, it was used as an attack upon the credibility of the appellant, to show that he was a liar and thus, of bad character. Since the appellant's credibility was never in issue, the statement was irrelevant and a highly prejudicial comment upon his invocation of his Fifth Amendment right to decline to testify. The conviction must therefore be reversed, and a new trial ordered.

IX.

THE TRIAL COURT ERRED IN ADMITTING WILLIAMS RULE EVIDENCE AND IN NOT LIMITING ITS CONSIDERATION

A. The Trial Court Erred in Admitting Evidence of the Robbery of Herman McGoogin

During the appellant's trial the State, over timely objection, introduced the testimony of Herman McGoogin relating to a crime alleged to have been committed by Mr. Hutto and Mr. Kight on the day after the Butler murder. Mr. McGoogin testified, in essence, that on December 7, 1982, he picked up the appellant and Gary Hutto, and was robbed by them at knifepoint. [Tr. 2118-2126]. The trial court's specific ruling with regard to this testimony was as follows:

> THE COURT: All right. The Court finds that the evidence is admissible. I rule it to be admissible. I find the similarity of the facts as stated by Miss Watson to be accurate. The Court is impressed that the offenses as described took place on the same day in the same general location in taxicabs driven by black drivers, that a knife was used in each, that the taxi driver was taken to the same general area where the offenses took place.
>
> The Court finds and rules that the evidence will be admissible on the issue of intent, the issue of plan, on the issue of knowledge and specifically on the issue of absence of mistake and accident.

[Tr. 2062].

The evidence relating to the McGoogin robbery was introduced solely to show bad character or propensity to commit crimes, in violation of the principles established in Williams v. State, 110 So.2d 654 (Fla. 1959) and codified in §90.404, Fla. Stat. (1983).

It is well established under Florida and federal law that evidence of prior crimes is inadmissible if its only purpose is

to show bad character or propensity to commit crimes. §90.404 (2)(a), Fla. Stat. (1983); Williams v. State, 110 So.2d 654 (Fla. 1959); Fed. R. Evi. 404 (a); United States v. Benton, 637 F.2d 1052 (5th Cir. 1981). This rule is founded on the principle that even though such evidence may be relevant because a man of bad character is more likely to commit a crime than one of good character, it is prohibited as evidence because it is inherently prejudicial. "Without an issue, other than mere character to which the extrinsic offenses are relevant, the probative value of those offenses is deemed insufficient in all cases to outweigh the inherent prejudice". United States v. Beechum, 582 F.2d 898, 910 (5th Cir. 1978).

The trial court admitted Mr. McGoogin's testimony on the theory that evidence of the robbery was relevant to intent, plan, knowledge, and absence of mistake and accident. The various exceptions to the general rule against extrinsic act evidence ". . . are not magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names". United States v. Goodwin, 492 F.2d 1141, 1155 (5th Cir. 1974). The grounds for admission of this evidence must therefore be examined for their applicability to this case.

Initially, it should be noted that neither accident nor mistake were, or could have been, issues in the appellant's trial. Intent to commit the crime in light of the facts of the Butler slaying likewise was not in dispute, and could not have been. Similarly, the knowledge exception did not provide grounds

for admission of this evidence. The McGoogin robbery did not tend to show that the appellant was aware of any material fact relating to the killing of Mr. Butler. Finally, the extrinsic act did not establish a plan to commit murder.

The introduction of evidence of an unrelated, uncharged crime was error. The evidence merely tended to show bad character and a propensity to commit crimes such as the one charged. The error was inherently prejudicial, and the conviction below should be reversed.

B. The Trial Court Erred In Not Properly Instructing the Jury to Limit Its Consideration of the McGoogin Robbery

At the trial below, the State introduced the testimony of Herman McGoogin and Officer Scott Simmons regarding the appellant's alleged participation in the armed robbery of Mr. McGoogin. Before this evidence was presented to the jury, it was proffered to the trial court, which ruled that under §90.404, Fla. Stat. (1983), it was admissible. Counsel for appellant argued the evidence was probative of identity only. [Tr. p.2156-2157]. After the witnesses testified, the court instructed the jury that it was authorized to consider the collateral crime evidence:

> For the limited purpose of proving that the defendant had the motive, intent and knowledge of the robbery of Lawrence D. Butler, that his identity is established, it's offered for that proof and that there is no absence of mistake or accident by the defendant in the robbery of Lawrence D. Butler.

[Tr. 2158]. This instruction allowed the jury to consider the

collateral crime evidence for a far wider range of issues than was proper, and was therefore error. Section 90.404 (2), of the Florida Statutes (1983), makes clear that collateral crime evidence may not be introduced solely to prove the bad character of the accused or his propensity to commit crimes such as the one charged. However, such evidence may be admitted if it is relevant to prove a <u>material fact in issue</u>, such as motive, intent, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident. Because evidence of unrelated crimes is <u>inherently prejudicial</u>, <u>United States v. Beechum</u>, 582 F.2d 898, 910, (5th Cir. 1978), <u>Boyd v. United States</u>, 142 U.S. 450 (1891), the trial court should carefully instruct the jury regarding the limited purpose or purposes for which it is admitted, both after the evidence is received and at the close of all the evidence. <u>Rivers v. State</u>, 425 So.2d 101 (Fla. 1st DCA 1982); <u>Panzavechia v. Wainwright</u>, 658 F.2d 337 (5th Cir. 1981) (Unit B); §90.404 (2) (b)2.

Assuming <u>arguendo</u> that the collateral crime evidence was probative of the identify through <u>modus operandi</u>, of the individual[s] who <u>robbed</u> Lawrence Butler, it was not relevant to the other grounds which the trial court authorized the jury to consider. The appellant's trial presented no issue of mistake or accident regarding the Butler robbery. Evidence of participation in one robbery does not tend to show a <u>motive</u> to participate in another. Similarly, neither intent nor knowledge were material facts <u>in issue</u> at trial. Identity, through <u>modus operandi</u>, was therefore, the only possible fact in issue to which

the McGoogin evidence might relate. See, United States v. Goodwin, 492 F.2d 1141 (5th Cir. 1974).

The question here is not whether the McGoogin evidence was admissible. Assuming it was relevant to the identity of the appellant as Mr. Butler's robber, it was not relevant to any other fact in issue. Because collateral crime evidence is inherently prejudicial, the jury must be given instructions which carefully limit the jury's use of such evidence. Rather than guiding the discretion of the jury, the trial court's instruction allowed the jury to consider the collateral crime evidence for a host of improper reasons. An instruction which specifically authorizes the jury to make improper use of the evidence is more harmful to the defendant than no instruction at all. Where, as here, the trial court's instruction does not properly limit the discretion of the jury in considering evidence of collateral crimes, reversal and retrial is the appropriate remedy.

X.

THE TRIAL COURT IMPROPERLY RESTRICTED CROSS-EXAMINATION OF THE STATE'S WITNESSES

A. The Trial Court Erred In Prohibiting Cross-Examination Regarding Mr. Kight's Mental Condition

During direct examination, the State was permitted over objection to elicit details concerning an oral statement made by Mr. Kight to Detective Weeks on December 17, 1982, wherein he implicated himself and his co-defendant in the death of Mr. Butler. [Tr. 1862-1886]. The State introduced this statement for the purpose of establishing that it was fabricated to remove blame from Mr. Kight. On cross-examination, counsel for Mr. Kight attempted to question Detective Weeks about the mental state of Mr. Kight, including his level of intelligence [Tr. 1890-1891].[8/] Upon prompting from the trial court, the State objected, arguing that Mr. Kight's retardation was not a relevant fact in the jury's consideration of his statement [Tr. 1891].

Counsel for Mr. Kight argued that cross-examination on the issue of retardation was proper as going to the weight to be given the statements by the jury, stating,"...[t]he issue to be determined by the jury is the total circumstances under which the statement was made which would include anything that would fall within the definition of total circumstances and his mental state would be one of those circumstances and his mental state would be

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[8/] As will be discussed in detail in this brief, Charles Kight has been diagnosed as retarded since early childhood.

one of those circumstances making up the total circumstances." [Tr. 1892]. Despite counsel's argument, the State's objection was sustained and counsel was not permitted to cross-examine Detective Weeks about Mr. Kight's mental condition [Tr. 1892]. The refusal of the court to permit such cross-examination was reversible error.

Initially, it should be noted that the right to full and fair cross-examination is an "absolute and fundamental" one. Coxwell v. State, 361 So.2d 148 (Fla. 1978). See also Pointer v. Texas, 380 U.S. 400 (1965). It is, "... the greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158 (1970), Ohio v. Roberts, 448 U.S. 56, 63 n.6 (1980). "The presumption favors free cross-examination", United States v. Fontenot, 628 F.2d 921, 924 (5th Cir. 1980), because, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974).

Great latitude must be afforded counsel in conducting his cross-examination:

> Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory, and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply.... It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop.

Alford v. United States, 282 U.S. 687, 692 (1931). Full and fair

cross-examination is particularly critical where an individual is charged with murder in the first degree. Coco v. State, 62 So.2d 892, 895 (Fla. 1953). It should extend to the entire subject matter of the witness' testimony on direct examination, and to all matters that may "modify, supplement, contradict, rebut or make clearer the facts testified to in chief." Id. Rulings which limit or restrict a defendant's cross-examination of state witnesses are subject to close appellate scrutiny. Salter v. State, 382 So.2d 892 (Fla. 4th DCA 1980).

In general, the Florida courts have not permitted evidence of retardation to be introduced by a defendant to establish the lack of requisite intent to commit a crime. Bradshaw v. State, 353 So.2d 188 (Fla. 1981); Terry v. State, 467 So.2d 761, 765 (Fla. 4th DCA 1985); Tremain v. State, 336 So.2d 705 (Fla. 4th DCA 1976). Nonetheless, a defendant's mental incapacity remains a factor to be considered by the jury in determining what weight a confession made by a suspect should be given. Graham v. State, 91 So.2d 662 (Fla. 1956); State v. Chorpennig, 294 So.2d 54 (Fla. 2d DCA 1974). Although the trial court has the threshold obligation to determine whether the confession was voluntarily given, once the court has made its determination, "... the defendant has the right to have the testimony repeated before the jury, not that they may pass on its admissibility, but that the jury may consider the surrounding circumstances in determining what weight should be given it." Graham, at 664 (citations omitted). Accord Palmes v. State, 397 So.2d 648, 653 (Fla. 1981); Pearce v. State, 196 So. 685 (Fla. 1940); Brown v. State,

184 So. 518 (Fla. 1938); Nickels v State, 106 So. 479 (Fla. 1925); Bates v. State, 84 So. 373 (Fla. 1919).

The constitutional obligation of the trial court to conduct a voluntariness hearing outside the presence of the jury does not effect the defendant's right to inquire into the circumstances of his confession. As noted, in Jackson v. Denno, 378 U.S. 368, 386, n.11 (1964):

> A finding that a confession is voluntary prior to admission no more affects the instructions on or the jury's view of the reliability of the confession than a finding in a preliminary hearing that evidence was not obtained by an illegal search affects the instructions on or the jury's view of the probativeness of this evidence.

The procedure in Florida is clear. Initially, the trial court must determine whether the State has demonstrated the voluntariness of a defendant's confession by a preponderance of evidence. The record must support a finding of voluntariness with " unmistakable clarity." Rice v. State, 451 So.2d 548 (Fla. 2nd DCA 1984); Peterson v. State, 372 So.2d 1017 (Fla. 2nd DCA 1979), aff'd, 382 So.2d 701 (Fla. 1980). Upon the trial court's determination, however, the question remains for the jury whether they believe the statements made by the accused. Certainly, retardation is a factor which is relevant to the jury's determination. Palmes, 397 So.2d at 653; Graham, 91 So.2d at 664; Reddish v. State, 167 So.2d 858 (Fla. 1964).

There can be no dispute in the present case that counsel was in fact restricted from cross-examining Detective Weeks concerning the totality of appellant's retardation. This restriction prevented the jury from hearing the totality of the

circumstances surrounding Mr. Kight's confession. [9]

Nor can it be argued that the error committed in this case was harmless. In Palmes this Court set forth the standard for determining whether error committed in this context was harmless and concluded:

> When the error affects a constitutional right of the defendant, the reviewing court may not find it harmless 'if there is a reasonable possibility that the error may have contributed to the accused's conviction or if the error may not be found harmless beyond a reasonable doubt.' Nowlin v. State, 346 So.2d 1020, 1024 (Fla. 1977).

Id. at 654. The Palmes Court concluded that the error in refusing to permit the defendant to testify about why he made a confession was nonetheless harmless because, "[s]ubstantially the same matter ...[was] presented to the jury through testimony of the same or some other witness." Id.

Such is not the case, here. The trial court completely restricted any reference to Mr. Kight's retardation through the guilt phase of the proceeding, despite the proffered testimony of Dr. Harry Krop, a clinical psychologist, that Mr. Kight had been diagnosed as retarded since early childhood. [Tr. 2226-2231] The court's ruling thus deprived appellant any opportunity to submit evidence of his mental condition as it pertained to the circumstances surrounding his confession. This error severely prejudiced appellant because it prevented him to show how and why the statement was made, facts which were crucial to the jury's

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[9] Counsel was also restricted from cross-examining Richard Lee Ellwood concerning the factor of Mr. Kight's retardation. [Tr. 2031]

determination of the weight to be given the statement. The court's ruling also deprived appellant the opportunity to rebut the State's theory that the confession made by appellant was a fabrication.

An additional reason exists for finding that the error herein was not harmless. During closing argument the State repeatedly emphasized the statements made to Detective Weeks by appellant, arguing:

> When you go back there, ladies and gentlemen, look carefully at the statement. Look at who Mr. Kight says does everything, every single little thing. Look how Mr. Kight leaves out any of his involvement or any of his knowledge or any of his actions. <u>See if you believe that this statement is reasonable, and if it's credible given all the factors and given what we know and weigh that</u> especially when you consider the testimony of Mr. McGoogin.

[Tr. 2371-2372] (emphasis added).

....

> Think about his knowledge about the location of the rings when you consider his involvement, his statement. Do you honestly believe that he had so little involvement when you consider all the evidence that he did take the Sheriff's Office to the rings, the cab, this type of factor.
>
> Mr. Kight, the innocent, unknowing bystander that he makes himself out to be during this statement.

[Tr. 2373].

....

> He said I can explain everything. There were two guys that just came through, and he gave them the perfect description of himself and Mr. Hutto. He said there were two guys. He did exactly the same thing that night that he did when he gave the statement.

[Tr. 2378]. During its final close in the guilt phase of Mr. Kight's trial, the State spent virtually its entire argument devoted to attacking the truth of Mr. Kight's statement to Detective Weeks [Tr. 2414-2428, 2429-2431]. Yet prior to their deliberations as to Mr. Kight's guilt or innocence, the jury had absolutely no opportunity to learn the circumstances of the most critical piece of evidence in the State's arsenal against Mr. Kight.

In Drake v. State, 441 So.2d 1079 (Fla. 1983), this Court had the opportunity to address the harmless error rule, codified in §924.33, Fla. Stat. (1983) in the context of the admission of an unlawfully obtained statement by a capitally charged defendant. During interrogation by police, the defendant in Drake paused in response to a question during interrogation later deemed to have been unlawful. On close, the State argued to the jury that the pause by Mr. Drake in responding to the interrogation was an indication that he was lying. This Court reversed the conviction, concluding that the use of this evidence during closing argument prevented a finding of harmless error.

As in Drake, the prosecutors in the trial below repeatedly attacked the credibility of Mr. Kight's statement and even emphasized that counsel had promised, but failed to prove retardation, stating "Now, Mr. Sheppard, when he presented his evidence, told you that he was going to show you a lot of such as Mr. Hutto being a ring leader and his client was retarded... There was not one shred of evidence introduced by Mr. Sheppard to show that." [Tr. 2379]. What the prosecution failed to inform

the jury was that the trial court had specifically excluded any cross-examination on the retardation issue. Thus, the jury was left with the unmistakable impression that Mr. Kight was, in fact, not retarded and that they were not to consider his retardation for any reason. In light of these facts, prejudicial error has been established, requiring the reversal of Mr. Kight's conviction.

B. The Trial Court Erred in Restricting Cross-Examination Concerning Mr. Hutto's Participation in the McGoogin Robbery

On direct examination the State elicited from Mr. McGoogin the details of the robbery on December 7, 1982. During cross-examination, counsel sought to inquire what Gary Hutto was doing while Mr. Kight had the knife around Mr. McGoogin's throat [Tr. 2136]. When the witness began to testify that Mr. Hutto was pressing his hand around Mr. Kight's hand, an objection to the testimony was made and sustained. Outside the presence of the jury, Mr. McGoggin testified that while Mr. Kight had the knife to his throat, Mr. Hutto was urging Mr. Kight to kill him:

> A With the knife around my throat right here (indicating), the guy sitting on the right-hand side in the back seat asked this man here what in the hell is he going to do with the knife around my throat.
> Q How did you interpret that?
>
> . . .
>
> Q What did you interpret this other fellow on the right-hand side to say?
> A What did he do?
> Q Yes, sir, just tell me what he did and then how you interpreted it.
> A The guy was sitting over here behind me in the passenger's seat, in the back seat, asked this man here what in the hell he's going to do. About that time he put his hand

on him, pressing the knife against my throat. I taken my hand, this hand here (indicating), put it on his wrist and pushed the knife from around my neck. At the time I got this I opened the door of my cab and my left foot is out and I'm getting strength to remove this knife from around my throat. When the knife fell and I jerked some kind of way and it nicked.

Q Nicked your hand?

A Like -- just like a fingernail, and busted the skin on it and I got out of the cab and ran.

Q When this fellow on the right said to the fellow what in the hell are you going to do and pushed the knife --

A The knife was on my throat.

Q But the other fellow appeared to be trying to pull the knife away?

A Push it.

Q What did you understand the man on the right meant when he said what in the hell is he going to do?

A Well, was he going to kill me, I guess.

Q Did it appear to you that he was trying to dare the guy to do what.

. . .

Q When he said what in the hell are you going to do now --

A I understand that, but when the fellow on the right -- did the fellow on the right when he said what in the hell are you going to do, did it appear to you that he was talking to this man?

A Yes.

Q And it appeared to you that the fellow on the right was encouraging this man to cut you?

A Yes.

Q And he was kind of daring him?

A Yes.

[Tr. 2055-2057].

The excluded testimony of Mr. McGoogin should have been submitted to the jury as it was clearly relevant to the subject matter of the witness' direct examination. In <u>Higginbotham v. State</u>, 29 So. 410 (Fla. 1900), the Florida Supreme Court held

that the physical or mental condition or appearance of a person, or his manner, habit, or conduct may be proved by the opinion of an ordinary witness, founded on observation. See also, Pittman v. State, 25 Fla. 648 (Fla. 1889); Mitchell v. State, 31 So. 242 (Fla. 1901); Fields v. State, 35 So. 185 (Fla. 1903); and Presley v. State, 57 So. 605 (Fla. 1912). Clearly, the line of questioning pursued by the defense was proper in that the defense was seeking to elicit from Mr. McGoogin what he observed during the robbery. Failure to permit this cross-examination was reversible error.

XI.

THE TRIAL COURT ERRED IN PROHIBITING APPELLANT FROM INTRODUCING EVIDENCE RELEVANT TO HIS THEORY OF DEFENSE THAT THE MURDER OF LAWRENCE BUTLER WAS THE INDEPENDENT ACT OF GARY HUTTO AND IN FAILING TO INSTRUCT THE JURY CONCERNING THIS THEORY

In the present case the theory of appellant's defense was that co-defendant Gary Hutto, acting on his own, planned and executed the murder of Lawrence Butler. This theory was consistent with statements made by Mr. Kight to Detective Weeks to the effect that he was merely present when Mr. Hutto murdered Lawrence Butler, and that Mr. Hutto was the actual murderer. In support of this theory, counsel for Mr. Kight attempted to introduce evidence that Mr. Kight was mentally incapable of devising the scheme to direct Mr. Butler to a deserted area and kill him. Counsel specifically informed the trial court that the purpose in admitting such evidence was to establish that Mr. Kight was merely present when Mr. Hutto committed the murder, but did not participate in it. [Tr. 2251, 2253] Evidence of Mr. Kight's retardation was also sought to be admitted to rebut the State's theory that Mr. Kight had fabricated his statement incriminating Mr. Hutto. [Tr. 2251, 2255]

Despite the critical nature of this evidence, going to the heart of both the State's and the appellant's theory of the case, the trial court refused to permit the jury to hear

and consider it. [10] The trial court also refused to grant a requested jury instruction on this theory [R. 558].

Mr. Kight was substantially prejudiced by the exclusion of evidence as to his mental condition and by the trial court's subsequent refusal to instruct the jury on his theory of defense. Where the trial court refuses to permit defense witnesses to testify as to issues which are at the heart of the defendant's theory of defense, that error is harmful. Goodrov v. State, 365 So.2d 423 (Fla. 2d DCA 1979). Moreover, where evidence tends in any way, even indirectly, to prove a criminal defendant's innocence, it is error to deny its admission. Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982); Chandler v. State, 366 So.2d 64 (Fla. 2d DCA 1979).

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[10] During the presentation of appellant's defense, counsel for Mr. Kight proffered the testimony of Dr. Harry Krop a clinical psychologist, who described Mr. Kight as ". . . a very dependent person, a very passive person, a person easily influenced, a person who has the need to impress others and would generally be a follower in almost any situation." [Tr. p.2229-2230]. According to Dr. Krop, Charles Kight is mentally retarded, with an IQ of 69, whose typical response when faced with conflict would be to avoid ". . . the conflict either by passively withdrawing, running away or, in fact, drinking himself or drugging himself to a point where he's not aware of what's going on around him." [Tr. p.2229, 2231, 2236]. Dr. Krop's opinion was concurred with by Dr. Ernest Miller, a psychiatrist whose testimony was also proffered by Mr. Kight's attorney [Tr. 2241-2242].

Counsel also sought to cross-examine the State's witnesses concerning their knowledge of Mr. Kight's mental condition [Tr. 2031], as well as Mr. Hutto's involvement in the McGoogin robbery [Tr. 2136], but was precluded from doing so.

The concept that a criminally charged defendant must be permitted the opportunity to present testimony on all matters relevant to a defense is not a new one. In Washington v. Texas, 388 U.S. 14 (1967), the United States Supreme Court invalidated a state statute which precluded a defendant from calling an accomplice as a witness on his behalf. In Washington, the defendant's theory of the defense was that his accomplice, not he, had committed the murder for which he was accused. At trial, he was precluded from presenting this theory because of a statute which prohibited accomplices from testifying on one another's behalf. Declaring the procedure constitutionally infirm, the Court stated, "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." Id. at 23.

Recently, in Burch v. State , ___So.2d___, 10 FLW 540 (Fla. October 3, 1985) this Court had the opportunity to discuss the right of an individual to present his theory of defense to the jury. In Burch, the defendant appealed his conviction and sentence of death, after the trial court precluded him from introducing evidence regarding his client's long-term consumption of PCP, and its affects on the ability of his client to form the specific intent to commit murder. This Court noted, "The theory of appellant's defense was that he had voluntarily ingested a highly dangerous drug phencyclidine (PCP) for a period of months

before the homicide. . . and was incapable of forming a specific intent." 10 FLW at 540. It then concluded that the failure to permit the defendant to present evidence on this theory was reversible error.

A recent Arizona Supreme Court decision also supports appellant's contention that his retardation was not only relevant but also central to his defense that he was merely present when Lawrence Butler was murdered and was not a participant. In State v. Gonzales , 681 P.2d 1368 (Ariz. 1984), the lower court precluded proffered expert testimony of a doctor that the defendant's intelligence quotient was so low as to render him retarded. The defendant was convicted of unlawful imprisonment. On appeal, the Court reversed, finding that the trial court failed to recognize the relevance of the expert testimony regarding essential information, by which to assess the defendant's credibility and his contention that he was not involved in the crime.

At trial, the defendant in Gonzales had attempted to introduce expert testimony to support his contention that he was merely present when the crime occurred, but did not participate in it. The court held that the expert testimony, as it would relate to the defendant's planned defense, was relevant since it could explain why he did not assist the victim while the crime of rape was being committed. Id. The court further held that where a defendant's mental condition has probative value to a material issue in dispute, expert testimony, if excluded, will constitute

a denial of due process. Id. Thus, evidence that will enhance the jury's ability to judge the defendant's credibility should not be excluded.

In Terry v. State , 467 So.2d 761 (Fla. 4th DCA 1985), the court, in reversing a manslaughter conviction, held that expert opinion evidence regarding "battered woman's syndrome" was admissible for a claim of self defense. The court, in Terry, reasoned that the expert testimony on the "battered woman syndrome" would have been offered to aid the jury "in interpreting the surrounding circumstances as they affected the reasonableness of her belief" Id. at 764 (citation omitted) and concluded that to deny the admission of this testimony was error. Accord, Hawthorne v. State, 408 So.2d 801 (Fla. 1st DCA 1981). As in Terry, the testimony as to Mr. Kight's low intelligence in this case would have aided the jury in interpreting the surrounding circumstances with regard to his theory of defense.

In White v. State , 356 So.2d 56 (Fla. 4th DCA 1978), the court held that the trial court's erroneous exclusion of alibi testimony went to the very heart of the defendant's defense and the effect of this error was to deny the defendant to be heard in his own defense. See also, Flynn v. State, 351 So.2d 377 (Fla. 4th DCA 1977). Here, as in Terry and Flynn, the exclusion of testimony regarding Mr. Kight's mental capacity was erroneous in that the testimony went to the very heart of Mr. Kight's theory of defense, namely that Gary Hutto had committed the murder.

The trial court's ruling with regard to this proffered evidence also prevented the jury from hearing evidence relevant

to rebut the State's theory of the case. Throughout the trial, the State attempted to show that the statement made by Mr. Kight to Detective Weeks, which blamed Gary Hutto for the crime, was a fabrication designed to avert blame from Mr. Kight. The State was permitted to present evidence and to argue the issue of the credibility of Mr. Kight's statement, yet Mr. Kight was prohibited from introducing evidence of his low intelligence - a major factor for the jury in deciding whether Mr. Kight had in fact fabricated his statement. The State during its close made clear reference to the failure of counsel to present evidence concerning his theory of defense [Tr. 2379], yet was permitted to argue that Mr. Kight's statement was fabricated by him to avoid culpability.

The trial court refused to permit the jury to hear evidence regarding appellant's theory of defense, and therefore, it also refused to instruct the jury on this theory [R. 558]. The law is well-established in Florida that, "[w]here there is <u>any</u> evidence introduced at trial which supports the theory of the defense, a defendant is entitled to have the jury instructed on the law applicable to his theory of defense when he so requests." <u>Bryant v. State</u>, 412 So.2d 347, 350 (Fla. 1982), (emphasis added); <u>citing</u>, <u>Motley v. State</u>, 155 Fla. 545, 20 So.2d 798 (Fla. 1945). In the present case, the failure to instruct the jury on appellant's theory of defense arose from the refusal of the trial court to admit any evidence on this issue and thus, constituted error.

In raising the present argument, counsel for appellant is not unmindful of Zeigler v. State, 402 So.2d 365 (Fla. 1981) and Tremain v. State, 336 So.2d 705 (Fla. 4th DCA 1976) and other cases, which stand for the proposition that the mental state of an accused is inadmissible where the accused seeks to introduce such evidence to establish the lack of intent to commit a crime. Simply put, mere retardation cannot establish lack of specific intent to commit a murder. In the present case, however, Mr. Kight was not seeking to introduce evidence of his retardation to disprove intent. Instead, he was attempting to establish that, based upon his inability to conceptualize complex plans of behavior, it was more likely than not that Mr. Hutto, acting on his own, had planned and carried through the killing of Lawrence Butler. This type of evidence was precisely the type of evidence which would have established a reasonable doubt as to Mr. Kight's guilt. Its exclusion deprived Mr. Kight of the only reasonable theory of defense available to him. For this reason, his conviction must be reversed.

XII.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THEY COULD DISCUSS THEIR DELIBERATIONS WITH OTHERS PRIOR TO THEIR SENTENCING DELIBERATIONS

On June 4, 1984, the jury returned a verdict guilty to the charge of first degree murder in this case. On that date, the trial court continued the sentencing proceedings until June 13, 1984, [11/] and instructed the jury:

> No juror can ever be required to talk about the discussion that occurred in the jury room except by court order. I am going to tell you that you may talk to anyone you wish concerning your discussions in the jury room. You may also refrain from doing so. The Court suggests that if you wish to speak about your deliberations that you wait until after the second stage of this trial; however, you have the right to speak to anyone and you cannot be compelled to speak to anyone without an order of this Court or a court of competent jurisdiction.

[Tr. 2468] (emphasis added). A timely objection to this instruction was made and overruled [Tr. 2469]. A motion to discharge the jury pursuant to §918.06, Fla. Stat. (1983), was likewise denied [Tr. 2485-2486].

The language of the instruction was clear. It authorized the jury to speak to whomever they chose concerning their deliberations, even though those deliberations were not yet complete. Given the authorization to the jurors that they were free to discuss this case and their views about capital punishment with others, they did so. At least one juror acknowledged she had spoken with others about the death penalty [Tr. 2503].

[11/] The sentencing hearing subsequently was continued until July 13, 1984.

Another juror revealed that he had discussed the case to the homicide detective responsible for the case [Tr. 2504]. Other jurors acknowledged reading in the newspaper about the death of another cab driver [Tr. 2505].

In direct contrast with the action taken in this case, it was the responsibility of the trial court to admonish the jury that is was their duty not to converse among themselves or with anyone else on any subject connected to the trial. §918.06, Fla. Stat. (1983). The right to have the jury deliberate, free from distraction or improper influence, is a paramount right, which must be closely guarded. Livingston v. State, 458 So.2d 235 (Fla. 1984). In Livingston, the defendant challenged his conviction, after the trial court permitted the jury to separate for a weekend during the middle of their deliberations as to his guilt. This Court agreed that such procedure was improper and ordered a new trial.

In Raines v. State, 65 So.2d 558 (Fla. 1953), a frequently cited opinion, this Court ruled that dispersal of the jury in a non-capital case was prejudicial to the defendant. In Raines the trial court gave the jurors a 15 hour absence with no restraints at all. This Court held that this procedure created an environment conducive to juror prejudice and reversed the conviction.

When it is clear that the jurors did not deliberate free from outside influences, as when jurors expressly indicate conversations with outsiders, the court should not hesitate to reverse the resulting conviction. Armstrong v. State, 426 So.2d

1173 (Fla. 5th DCA 1983); Durano v. State, 262 So.2d 733, 734 (Fla. 3d DCA 1972). Two recent decisions of this Court have allowed the jury to be dispersed in a capital case. In Downs v. State, 386 So.2d 788, (Fla. 1980), the jury was allowed to disperse after determining guilt but before sentencing. This procedure was approved solely because the trial court had specifically directed the jury to avoid any outside influences. Id. at 794. In the instant case, not only did the court fail to give such directions, but it actually took the opposite course of action and expressly instructed the jury it could expose itself to outside influences.

Similarly, in Engle v. State, 438 So.2d 803 (Fla. 1983), the trial court allowed the jurors to separate during deliberations over defendant's guilt. This Court refused to reverse the decision because, again, the trial court had given the jury the proper admonishing instructions. Id. at 808-809. In the instant case, the trial court did not admonish the jury not to discuss the case, but in fact, affirmatively told the jury they could discuss the case.

In conclusion, the appellant's fundamental right to an impartial sentencing jury was denied. The jury was specifically told they could discuss the case with others and they did so. Given these facts, Mr. Kight's sentence should be reversed and the case remanded for resentencing before an impartial jury.

XIII.

IMPROPER CLOSING ARGUMENT BY THE STATE RENDERED APPELLANT'S SENTENCE FUNDAMENTALLY UNFAIR

A number of improper comments made by the State in closing argument during the sentencing phase of Mr. Kight's trial were improper and prejudiced appellant's right to a fair trial. The failure of the trial court to sustain a number of objections made by the defense or to grant a mistrial based on these improper prosecutorial comments requires this Court to reverse the sentence of death imposed upon Mr. Kight and remand this case back to the trial court to hold a new sentencing hearing before a jury, unless the State can establish that the improper arguments had no effect on the sentencing process. Caldwell v. Mississippi, ___U.S.___, 105 S.Ct. 2633 (1985); Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Grant v. State, 194 So.2d 612 (Fla. 1967); Singer v. State, 109 So.2d 7 (Fla. 1959); Williams v. State, 68 So.2d 583 (Fla. 1953); Stewart v. State, 51 So.2d 494 (Fla. 1951).

An examination of the actual statements made by the State during its closing argument establishes intentional effort by the State to prejudice the sentiment of the jury against Mr. Kight:

> We know that Mr. Butler's body lay in that state and that the defendant and his friend Charles Gary Hutto took the taxicab and went and pushed it off of the end of the Trout River Bridge, and we know by that time that Mr. Butler was dead because the Medical Examiner told all of you that he probably lingered for about five minutes, long enough to know what's going on, long enough to see his life pass before his eyes, long enough to realize that this is the end.
>
> MR. SHEPPARD: I object to that argument. It assumes facts not in evidence, your Honor.

[Tr. 2640-2641]

. . .

But in a felony murder, consider the nature of the person who is killed as in a robbery. For example, a minute market clerk, what do you have in a minute market? You have a person who is a clerk, who is doing something that everybody does, going to work, he's making a living, he's pursuing a livelihood, he's at a store doing a job, he does it and he's completely innocent of any wrongdoing and completely unexpecting, and completely believing and as he's standing there doing his job, just doing what everybody does, going along in the normal course of events, somebody comes in and unexpectedly out of the blue and decides to change the course of that person's life and that innocent clerk doesn't do anything when that robber walks in with a gun and says get back in the cooler and give me all of the money and then blows him away.

That's why felony murder is such a scary thing because you don't expect it, people don't expect--

MR. SHEPPARD: Your Honor, I object to this line of argument on the grounds that this is really no appreciable issue, it's matter of legislation, they passed this as an aggravating circumstance, and to go into the wisdom of it is improper.

THE COURT: I will overrule the objection. This is argument and fair comment.

[Tr. p.2644-2645].

. . .

Charles Kight killed lawrence Butler; it hurt his widow, her family, you know: children he may have had.

MR. SHEPPARD: I object to the appeal for sympathy for the victim's family as improper argument.

MISS WATSON: Your Honor, I am going to tell them not to consider that, I am trying to work around to that.

THE COURT: I will sustain the objection.

> MISS WATSON: At any rate, ladies and gentlemen, there are a large number of people, including the defendant's family, they're hurt, too, and well, what I was going to get around to saying is that unfortunately sympathy doesn't have any part in your verdict, nor does mercy.
> MR. SHEPPARD: I object to that as a misstatement of law, Your Honor, as it relates to the non-limitation of the statutory mitigating circumstances.
> THE COURT: I will overrule the objection.

[Tr. p.2659].

> Justice in this case, ladies and gentlemen, is to recommend the death penalty. The defendant, Charles Kight, showed no mercy for Lawrence Butler. He could have left him alive out there, but he didn't. He administered the death penalty to Lawrence Butler. Lawrence Butler never ever had legal processes to go through, or the benefit of twelve people to test and try to decide his fate. He never had all of those advantages, He was killed right there on the spot.
> If the death penalty is appropriate in any case, it is appropriate in this case.
> MR. SHEPPARD: I object on the grounds it expresses a personal opinion and is improper argument.
> THE COURT: I will overrule the objection.

[Tr. p.2660].

The prosecutor's arguments were not only an improper appeal to the jury for sympathy but highly prejudicial. The natural effect of these improper comments was hostility toward Mr. Kight. In Harper v. State, 411 So.2d 235 (Fla. 3d DCA 1982), citing, Deas v. State, 119 Fla. 839, 161 So. 729 (Fla. 1935), the Third District Court of Appeal strongly addressed this sort of prosecutorial misconduct in the following manner:

> When it is made to appear that a prosecuting attorney's argument to the jury consists of an appeal to prejudice or sympathy calculated to unduly influence a trial jury, the trial judge should not only sustain an objection at the time to such improper conduct when objection is offered, but should so affirmatively rebuke the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by improper arguments. Harper v. State, 411 So.2d at 237, citing Deas v. State, 119 Fla. 839, 161 So. 729 (Fla. 1935).

Harper, at 237 (emphasis added).

In the present case, the trial court not only failed to rebuke the prosecutor, it refused to sustain objections to these improper comments. The prejudicial closing arguments made by the prosecution during the sentencing phase of Mr. Kight's trial requires reversal of his sentence of death.

XIV.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REJECTED EVIDENCE OF MR. KIGHT'S MENTAL RETARDATION AND DEPRIVED CHILDHOOD AS CIRCUMSTANCES MITIGATING HIS CRIME

During the sentencing phase of his trial, appellant introduced unrebutted evidence, which conclusively established that Mr. Kight is mentally retarded, and has suffered extreme physical abuse and neglect as a child. Dr. Harry Krop, a clinical psychologist testified that he had conducted examinations of Mr. Kight and had examined his previous psychiatric history. Dr. Krop testified that, throughout Mr. Kight's life, there had been a "consistent finding" that Mr. Kight has been functioning at or around the retarded range of intelligence [Tr. 2595]. Additionally he testified that Mr. Kight was emotionally disturbed and was " ... developmentally at about the eighth or tenth year level." [Tr. 2597-2598, 2599]. 12/ He further opined that, " . . . in situations in which he [Mr. Kight] was required to think about things, plan things, use reasoning, common sense, that he would intellectually be at a very, very difficult functioning level [Tr. 2592].

With regard to the tendency of Mr. Kight to be easily dominated and influenced by other people, Dr. Krop stated, "My opinion would be that he would be very passive, he would be very dependent, he would be very easily influenced, he could be easily

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12/ Dr. Krop's opinion was supported by the proffered testimony of Dr. Ernest Miller during the guilt phase of the trial proceedings.

manipulated." [Tr. 2593]. According to Dr. Krop, Mr. Kight is an extremely immature person, who cannot function on his own without some type of assistance. He further stated, "Probably what usually happens with these individuals is they put themselves up with individuals who are also borderline, not intellectually but basically marginal characters in society, individuals who would easily manipulate and take advantage of individuals who are dependent personalities." [Tr. 2594].

The school records of Mr. Kight, tragically reveal the pattern of his childhood:

> 1966 - Emotionally disturbed child . . . Because of school policy, placed in 2nd grade.
>
> 1967 - Michael is definitely retarded. He does not have the capacity to achieve any level of work. . . Needs to be in a special class.
>
> 1974 - Kight read[s] on a first grade level. 13/

[Defendant's Penalty Phase Exhibit 1]. These records also indicate that although Mr. Kight was unable to master any of the fundamental learning skills, such as reading and writing, he was nonetheless "placed" in the next grade at the end of each school year because of school policy [Defendant's Penalty Phase Exhibit 1]. He did not complete school. [Tr, 2560-2561, 2567]

Mr. Kight's mother, Ellen Warren, and his sister, Catherine Murillo, also testified about Mr. Kight's retardation and the circumstances surrounding his life. Ms. Warren testified that Charles Kight was first abused by his natural father, when he was two weeks old. On that occasion, her parents removed the child,

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13/ Mr. Kight was 15 years old when this entry was made.

". . . so that Wesley wouldn't be able to hurt Michael any more." [Tr. 2574-2575] From infancy, Charles Kight observed and became a victim of a cycle of deprivation, retardation, physical abuse and abandonment. His natural father was sent to prison and later abandoned the family. [Tr. 2548-2549, 2551-2552] He was taken from his mother and placed in a foster home, where he suffered more physical abuse. [Tr. 2553, 2574-2575]

Ms. Murillo described in detail a typical beating administered to Mr. Kight and his mother by his stepfather, after the children's return from foster care:

> I remember one time he beat him [Mr. Kight] because my mother had told him to do something that day and he didn't do it exactly the way it was supposed to have been done, like cleaning the bedroom, and my dad came home and had been drinking and he started beating him and all that my brother was wearing was a pair of shorts and at that time he held Mike completely upside-down, he held him completely upside-down by his ankles and he was just beating him.
>
> Q With a belt?
>
> A Yes, sir, and my mother had to make him stop.
>
> Q Were you ever present with your brother when your stepfather beat your mother?
>
> A Yes, I was.
>
> Q How often did that occur?
>
> A Quite a few times.
>
> Q How would he beat her?
>
> A With his fists that I saw. I remember one time he beat her so bad I went to the bathroom and I stepped out just in time to see her walk by my bedroom door and I

> ran to get to the room and her face was so covered with blood I couldn't recognize her.

[Tr. 2579].

The purpose of introducing testimony of Mr. Kight's retardation and deprived childhood was to establish the statutory mitigating circumstances set forth in §921.141(6)(b)(e) and (f), Fla. Stat. (1983), which are: 1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; 2) the defendant acted under extreme duress or under the substantial domination of another person; and 3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. [14] In addition, this evidence was introduced to establish the non-statutory mitigating circumstances of retardation and emotional disturbance as the result of deprivation and abuse as a child.

Although the trial court permitted the introduction of this

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[14] The evidence presented regarding Mr. Kight's mental condition fell squarely within the definition of impaired capacity as set forth by this Court in Perri v. State, 441 So.2d 606, 609 (Fla. 1983), namely, ". . . whether the mental condition of the defendant was less than insanity but more than the emotions of an average man, whether he suffered from a disturbance which interfered with, but did not obviate, his knowledge of right and wrong." (Emphasis added). In devising this definition the Court recognized that an individual may be legally responsible for his actions but nonetheless, ". . . deserve some mitigation of sentence because of his mental health." Id.

evidence, it found that it had been "outweighed" by other evidence and therefore, declined to find Mr. Kight's mental condition constituted a mitigating circumstance. [Tr. 2735]. This declaration was particularly puzzling in light of the fact that the State had presented no rebuttal witnesses at the sentencing phase of the trial. Moreover, since the court had completely excluded the admission of any evidence concerning Mr. Kight's retardation during the guilt phase, there was absolutely no rebuttal evidence by which to "outweigh" the testimony relative to this issue. Additionally, the trial court did not find that the mitigating circumstance was present, but was outweighed by other aggravating circumstances. Instead, it found that this mitigating circumstance did not exist at all. While the weight to be given testimony is generally for the trier of fact, there must exist some evidence before the court declines to find a mitigating circumstance, which is unrebutted, on the grounds that the circumstance is not supported by the evidence.

This Court expressed its broad standard of review with regard to the determination of mitigating circumstances in Pope v. State, 441 So.2d 1073 (Fla. 1983), when it held, "So long as all the evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion." Id. at 1076. It has often been stated by this Court, "...[I]t is within the province of the trial court to decide whether a particular mitigation circumstance in sentencing has been proven and the weight to be given it." Daughtery v. State, 419 So.2d 1067, 1071 (Fla. 1982) This Court has

acknowledged, however, that there must be <u>some</u> standard by which to insure relevant mitigating circumstances are not rejected arbitrarily or capriciously.

In Mines v. State, 390 So.2d 332 (Fla. 1980), this Court addressed the refusal of the trial court to consider the mitigating circumstance of extreme emotional disturbance, where the "unrefuted medical testimony" established that the defendant had a mental condition. Id. at 337. (emphasis added). In reversing the defendant's conviction, this Court held the trial court's refusal to be error, noting, "The evidence clearly establishes that appellant had a substantial mental condition at the time of the offense." Id. Accord, Eddings v. Oklahoma, 455 U.S.104, 114-115 (1982)(trial court cannot give mitigating circumstance no weight by excluding it from consideration).

A more recent case provides guidance with regard to the precise standard to be employed in determining whether certain mitigating circumstances have been established. In Stano v. State, 460 So.2d 890 (Fla. 1984) this Court discussed the standard, stating, ". . . [I]t was the court's duty to resolve the conflicts here, and his determination should be final if it is supported by competent substantial evidence." Id. at 894 (emphasis added).

Under the reasoning of Stano, a finding not supported by substantial, competent evidence constitutes an abuse of discretion, which must be reversed, if it affects the sentencing process. In the present case, the Court found two aggravating and two mitigating circumstances. Thus, it cannot be said that

the failure to find retardation as a mitigating factor did not affect the sentencing process. Resentencing is therefore required.

Because the trial court below did not find that a mitigating circumstance had been established, but was outweighed by other existing aggravating cirumstances, appellant herein is not merely arguing that the trial court committed error in the weighing process. Cf, Hargrave v. State, 366 So.2d 1, 5-6 (Fla. 1978). Nor does this case raise the question of whether the evidence was sufficient to establish a mitigating circumstance, since the evidence presented here was unrebutted by the State. Indeed, an examination of the trial court's order indicates that it found the following facts in its analysis of mitigating circumstances, based upon Dr. Krop's testimony: 1) the appellant is mentally retarded; 2) the appellant's mental age is that of an eight year old; and 3) the appellant is easily led by others [R. 661]. Despite the undisputed presence of these facts, the court declined to find any of these factors as statutory or non-statutory mitigating circumstances.

In the absence of "competent substantial evidence" that Mr. Kight did not suffer from a mental deficiency, arising from retardation and abuse as a child, the refusal of the trial court to find this fact in mitigation was error.

XV.

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH IN THIS CASE

It is the role of this Court to make an independent assessment of the appropriateness of the death penalty in each case:

> This Court's role after a death sentence has been imposed is 'review', a process qualitatively different from sentence 'imposition.' It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying Section 921.141 and our case law.... The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide.

Brown v. Wainright, 392 So.2d 1327, 1331 (Fla. 1981); Accord, Lucas v. State, 417 So.2d 250, 251 (Fla. 1982); Douglas v. State, 328 So.2d 18, 21-22 (Fla. 1976); Alvord v. State, 322 So.2d 533, 540 (Fla. 1975).

In Slater v. State, 316 So.2d 539 (Fla. 1975), this Court enunciated a principle which is deeply rooted in our American system of justice:

> 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.

Id. at 542. This Court further held in Slater that the imposition of the death penalty against a defendant convicted of first degree murder which occurred during a robbery was unconstitutionally applied, where the accused had been an accomplice and the "triggerman", who entered a plea of nolo contendre, received a sentence of life imprisonment.

In Huckaby v. State, 343 So.2d 29 (Fla. 1977) this Court held that an offender's history and background may be deemed relevant to the existence of mitigating factors. The factors relevant for a determination of whether death was appropriate in this case are that Mr. Kight was abused as a child; he comes from a broken home; he has lived a meager existence of poverty and homelessness; he was extremely intoxicated at the time of the offense; and he is an individual with a mental deficiency.

In Jones v. State, 332 So.2d 615 (Fla. 1976), this Court held that the death sentence was excessive where the record reflected that the defendant suffered a paranoid psychosis to such an extent that the full degree of his mental capacities at the time of the murder were not fully known. The facts of Jones are virtually identical to those in the present case both with respect to the characteristics of the defendants themselves (mentally incapacitated) and the crimes for which they were convicted (death attributed to multiple stab wounds).

In light of the aforementioned cases, the death sentence in Mr. Kight's case was inappropriate. Mr. Kight's co-defendant was permitted to plead guilty to second degree murder and escape the sentence of death, despite the lack of mitigating circumstances which were proven as to Mr. Kight. The imposition of a death sentence herein clearly was not equal justice under the law, nor was it just in light of all the mitigating factors presented. For this reason, Mr. Kight's sentence of death must be reversed and this case remanded for the purpose of sentencing Mr. Kight to life imprisonment.

XVI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED UPON THE STATE'S FAILURE TO DISCLOSE CONCESSIONS MADE TO ITS WITNESSES IN EXCHANGE FOR THEIR TESTIMONY

Appellant has set forth a detailed statement of facts and discussion of law on this issue in his previously filed Motion for Leave to File Petition for Writ of Error Coram Nobis and respectfully requests leave of this Court to adopt the arguments contained therein. Briefly stated, additional facts relevant to the resolution of this issue are as follows. At trial, the State's theory of the case was that Mr. Kight had actually killed Mr. Butler, but had made an exculpatory statement blaming his co-defendant for the crime. In order to prove its case, the State called as witnesses Victor Hugo, Charles Sims, Richard Ellwood, and Fred Moody, all of whom were former inmates at the Duval County Jail. These men testified that during various times in Mr. Kight's incarceration at the jail, he told them that he had committed the murder and was going to blame Mr. Hutto for it.

Prior to trial, a specific request was made and granted seeking information about any agreements or concessions between the State and these witnesses. [R. 17-18, 412-413, 474]. The State <u>specifically</u> denied the existence of any concessions and permitted these men to testify that they had no expectation of any assistance or reward from the State as the result of their testimony [Tr. 2005-2006, 2021-2022, 2041]. [15/] The jury was

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[15/] Richard Ellwood did admit that the Assistant State Attorney had offered him assistance in obtaining a parole release date but stated he had not requested it, stating he didn't "come here to get help from nobody" [Tr. 2041].

told that these men had come forward because, in the words of Victor Hugo, "justice should be teached." [Tr. 2007].

Upon the return of a jury verdict, appellant raised the only discovery violation which he was then aware of in a motion for new trial [R. 584-585]. At that time, counsel was unaware of the existence of the concessions which have now been discovered. Three of the four witnesses were released from incarceration as the direct result of the actions of the Assistant State Attorney responsible for prosecuting Mr. Kight.[16/] The record establishes a pattern of undisclosed understandings by the State and its witnesses.

Present in this case is the knowing suppression of favorable evidence following a specific request for its disclosure by the defense. The standard to be applied where a prosecutor knowingly uses perjured testimony is whether ". . . there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976). If so, the tainted conviction cannot stand.

Recently in Francis v. State, 473 So.2d 672 (Fla. 1985), this Court addressed a challenge to a conviction arising from the State's failure to provide the complete details concerning an agreement between the State and one of its witnesses concerning

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16/ A more complete discussion of the actions undertaken on behalf of these men by the State is contained in appellant's Motion for Leave to File Petition for Writ of Error Coram Nobis and appellant realleges any factual assertions contained in that petition.

pending criminal charges. The defendant in Francis asserted that his conviction should be reversed because the State had failed to disclose the full extent of its efforts to assist its witness in obtaining a favorable disposition of charges against her. He did not allege, however, that he was unaware of these concessions and the witness was in fact cross-examined extensively concerning concessions made. Counsel for the defendant also argued these concessions strenuously in his closing argument. Based upon these facts this Court upheld the defendant's conviction, stating:

> The State argues that the material fact in the present case was the preferred treatment to be given Duncan by the State, that the nondisclosed evidence of the exact details of how Duncan was to be rewarded for her assistance did not deprive Francis of due process of law or a fair trial, and that the relevant facts that Duncan had made a deal with the State were made known to the jury. We agree. The record reveals that it was made abundantly clear to the jury that Duncan was motivated by her own self interest to testify. Moreover, any error in regard to this matter was harmless in view of the overwhelming evidence of Francis' guilt independent of Duncan's testimony.

Id. at 675 (emphasis added). Concurring in result only, Justice Overton expressed the following reservation:

> I concur in result only. I am deeply concerned about the conduct of the prosecutor in this case who was simultaneously representing an essential state witness in a pending post-conviction relief proceeding during the course of this trial. . . . I find the prosecutor's conduct in failing to fully disclose his actions in this matter to be error. Because the information disclosed to the jury reflected the substantial involvement of the state in attempting to obtain a reduced sentence for the witness, I conclude the error is harmless under the test

> expressed in United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), and Chapman v. California, 386 U.S. 18, 87 S.Ct 824, 17 L.Ed.2d 705 (1967). Nevertheless, I strongly believe the conduct of the prosecutor, in actively representing this witness without full disclosure, was improper. Clearly, there is a strong inference from this record that the prosecutor represented Duncan to obtain favorable testimony by her in this case. Such conduct, in my view, adversely affects the credibility of our justice system.

Id. at 677 (emphasis added).

In contrast to the facts in Francis, the jury never heard any evidence concerning the concessions made to the witnesses because counsel had no way of knowing what those concessions were. In addition, the testimony of these witnesses formed the backbone of the State's prosecution of Mr. Kight. Without their testimony as to Mr. Kight's alleged confession, a conviction could not have been secured. The suppressed evidence went directly to the credibility of the State's witnesses and would have borne heavily upon the jury's estimate of the truthfulness and reliability of their testimony. Napue v. Illinois, 360 U.S. 264 (1959). These witnesses had the expectation of assistance from the State, but they steadfastly denied such expectation without correction by the State. Given these facts, appellant's conviction must be reversed. Porterfield v. State, 472 So.2d 882 (Fla. 1st DCA 1985).

In Giglio v. United States, 405 U.S. 150 (1972), the United States Supreme Court considered whether the due process criteria of Napue and Brady v. Maryland, 373 U.S. 83 (1963) required reversal and a new trial when the defense "discovered new

evidence indicating that the Government had failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government". Giglio, 405 U.S. at 150-151. Giglio, like the instant case, arose pursuant to a motion for new trial based on newly discovered evidence, Id. at 152. The Giglio Court cited the principles set forth in Mooney v. Holohan, 294 U.S. 103 (1934), and Napue, and noted that under Brady, suppression of material evidence is grounds for a new trial without regard to the good or bad faith of the prosecution, Giglio, Id. at 153-154. The Court found the undisclosed promise to have been material to the defense:

> Here, the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

Id. at 154-155. The Court concluded that reversal was required.

Here, as in Giglio, the suppressed evidence was relevant to the credibility to several witnesses. The testimony of the jailhouse witnesses were of great importance to the case against Mr. Kight, and the jury was entitled to know of any agreements they made with the State. Without this impeaching material, the jury was led to believe that these witnesses were acting out of a sense of justice, when in reality, they were testifying to further their own self-interests. Such material was critical for a full resolution of the witnesses' credibility for, as noted in Washington v. Texas, 388 U.S. 14, 22-23 (1967), "To think that

criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large." There is a reasonable likelihood that the false testimony could have affected the judgement of the jury, Napue, 360 U.S. at 271, and its suppression denied Mr. Kight fundamental fairness.

Mr. Kight has alleged facts which constitute a clear Brady violation evidenced by the failure of the State to disclose material evidence upon specific request by the defense and the State's failure to correct false testimony at trial regarding State-witness agreements. The cases discussed above make clear that such facts are grounds for a new trial. The facts relied on here were unknown to the trial judge and to the defense. They could not be discovered until the State carried through with its end of the agreements by seeking to aid the witnesses in obtaining their secretly bargained for freedom. This constitutional violation of Mr. Kight's discovery request requires reversal of his conviction as the State's noncompliance with his request was prejudicial. Cumbie v. State, 345 So.2d 1061 (Fla. 1977); Richardson v. State, 246 So.2d 771 (Fla. 1971). 17/

17/ The resolution of this issue is unaffected by the recent decision of United States v. Bagley, ___ U.S. ___, 105 S.Ct. 3375 (1985), which involved the unintentional nondisclosure of certain impeachment materials. In Bagley, the Court rejected the use of an "automatic rule" of reversal upon the finding of a Brady violation, and reaffirmed the standard set forth in Mooney and Napue. Bagley, at n.8

XVII.

THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED BELOW RENDERED MR. KIGHT'S TRIAL FUNDAMENTALLY UNFAIR

In Chambers v. Mississippi, 410 U.S. 284 (1972), the United States Supreme Court expressly acknowledged that while an isolated error committed by a trial court may not render the trial of a criminal defendant fundamentally unfair, the cumulative effect of multiple errors may give rise to such a claim. Id. at 291. In Chambers, the accused asserted ". . . that he was denied 'fundamental fairness guaranteed by the Fourteenth Amendment' as a result of several evidentiary rulings." Id. at 290, n.3. His claim, the substance of which the court accepted in its opinion rested upon ". . . the cumulative effect of those rulings in frustrating his efforts to develop an exculpatory defense." Id. See, also, Washington v. Texas, 388 U.S. 14 (1967).

As in Chambers, certain critical evidentiary rulings by the trial court below operated to deny Mr. Kight his right to a fundamentally fair trial. Specifically, the cumulative effect of the restriction upon cross-examination of material State witnesses, the refusal to permit appellant to present evidence in support of his theory of defense, the failure to exclude evidence obtained as the result of ineffective assistance of counsel, and the allowance of inflammatory and prejudicial statements by the State during its closing argument at sentencing, in combination served to deny appellant's right to a fundamentally fair trial. His conviction and sentence must therefore be reversed.

CONCLUSION

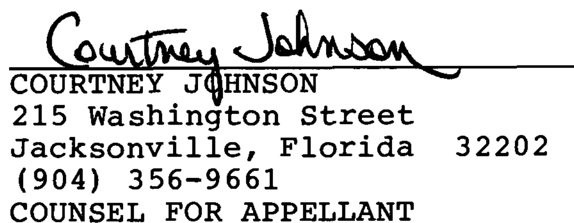
Based upon the facts and legal principles set forth herein, this Court should reverse Mr. Kight's conviction and remand this case for a new trial free from the errors which rendered his conviction and sentence invalid.

Respectfully submitted,

SHEPPARD AND WHITE, P.A.

ELIZABETH L. WHITE

WM. J. SHEPPARD



COURTNEY JOHNSON
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Andrea Smith Hillyer, Esquire, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301; by ~~hand~~/mail this 4th day of November, 1985.

ATTORNEY