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

REPLY BRIEF

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I.

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

The State relies upon four cases which have upheld investigatory stops by police because there were circumstances which created a reasonable suspicion of criminal activity. Ewing v. State, 480 So.2d 200 (Fla. 5th DCA 1985); Payne v. State, 480 So.2d 202 (Fla. 1st DCA 1985); United States v. Montoya DeHernandez, 473 U.S._, 87 L.Ed 2d 381 (1985); United States v. Sharpe, 470 U.S._, 84 L.Ed 2d 605 (1985). However, in each of these cases, the police observed suspicious activity, which, when combined with their experience, formed a reasonable suspicion of criminal activity. In the instant case, Mr. Kight was merely walking down the street, a white male in a predominately white neighborhood, at a reasonable hour of the night, and in a place where it was not reasonable to expect the robbers to be. The State also cites to United States v. Hensley, 469 U.S._, 83 L.Ed 2d 604 (1985) as a case upholding an investigatory stop based merely on a "BOLO" flyer, from another State. Significantly, however, the Court in Hensley required that the "BOLO" itself be based on a reasonable suspicion in order to satisfy the Fourth Amendment. Id. at 616.

Finally, the appellee's use of United States v. Crews, 445 U.S. 463 (1980) is inappropriate in this case. Crews did not concern itself with the problem of an unduly suggestive identification procedure of an accused. Instead, the

photographic procedures were entirely proper in Crews, but the defendant claimed that because his photograph was the result of an unlawful arrest, the subsequent in-court identification of him should be suppressed. The Crews Court noted, "Accordingly, this case is very different from one like Davis v. Mississippi, 394 U.S. 721, 22 L.Ed.2d 676, 89 S.Ct. 1394 (1969), in which the defendant's identity and connection to the illicit activity were only first discovered through an illegal arrest or search." Id. at 475. Crews by its own terms is, therefore, not controlling.

II.

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

Contrary to the State's assertion, appellant does not allege that all show-up identifications can never be valid. The test for determining the legality of an out-of-court identification is whether the police employed any unnecessarily suggestive procedure in obtaining the out-of-court identification. If so, the Court, considering all the circumstances, must determine whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. Blanco v. State, 452 So.2d 520 (Fla. 1984). The facts of the instant case clearly show impermissible suggestiveness, in the show-up identification of Mr. Kight.

State relies upon five cases which have upheld the validity of suggestive show up identification. Cromartie v. State, 419 So.2d 757 (Fla. 1st DCA 1982). Cross v. State, 432 So.2d 780 (Fla. 3d DCA 1980); Lauramore v. State, 422 So.2d 896 (Fla. 1st DCA 1982); Bilinski v. State, 463 So.2d 424 (Fla. 3d DCA 1985); Baxter v. State, 355 So.2d 1234 (Fla. 2d DCA 1978). The State's reliance on the Cross decision is misplaced because it did not deal with the suggestiveness problem of a show-up identification; the Court merely alluded to the identification as buttressing the arresting officers' determination of probable cause. Lauramore, Bilinski, and Baxter, while relevant are not controlling because in those cases, the courts found that the identification

procedures, although suggestive, were not impermissibly suggestive. Crucial to the courts' resolution to this issue was the determination that the procedures employed did not give rise to a substantial likelihood of misidentification. In Baxter and Lauramore, the victim was able to see the defendant's face during the crime and give a detailed description of the defendant. Thus, there was no substantial likelihood of misidentification. In Cromartie, three witnesses viewed the defendant in broad daylight committing the crime, so again, there was no substantial chance for misidentification. Bilinski does not recite the facts, but clearly upheld the identification because it was not "impermissibly" suggestive.

Finally, appellee alleges that any suggestiveness in the show-up identification was cured by the positive in court identification. Citing, Rahme v. State, 474 So.2d 1236 (Fla. 5th DCA 1985). However, Rahme does not stand for such a bold proposition. Rahme did not hold that a positive in court identification would cure an "impermissibly" suggestive show-up identification; only a suggestive show-up identification. Id. at 1236. Therefore, although there was a positive in court identification, Rahme does not mandate that this court hold that it cured the "impermissibly" suggestive show-up identification of Mr. Kight.

The instant case is distinguishable from the cases cited by the State, primarily because Mr. McGoogin did not observe the robber's face, and the incident occurred at night, making it impossible for Mr. McGoogin to provide a detailed description of

his assailants. Additionally, Mr. McGoogin identified Mr. Kight while appellant was seated in the rear section of a police car. Mr. McGoogin was told that Mr. Kight had been detained as a suspect. Given these facts, there was a substantial likelihood of misidentification arising from unduly suggestive procedures employed by the police herein.

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.

The State attempts to justify the admissibility of the appellant's statements to Detective Weeks at the Duval County Jail and, later, to Detective Kesinger at the police station, on various grounds. None of the State's arguments provide a legal excuse for the violation of the appellant's rights under Miranda v. Arizona, 384 U.S. 436 (1966).

The State, citing United States v. Edwards, 415 U.S. 800 (1974), contends the police had a right to seize and search the appellant's clothing. This Fourth Amendment question, not relevant to Miranda (which was decided under the Fifth, Sixth, and Fourteenth Amendments), is addressed in Issue IV. Assuming arguendo that the Fourth Amendment allowed the seizure and search of the appellant's clothing, the Fifth and Sixth Amendments prohibit the means used in carrying out that seizure. The use of these impermissible means resulted in the statement challenged here.

The State, without explanation, offers Michigan v. Mosley, 423 U.S. 96 (1975), [1/] in support of the constitutionality of the use of the appellant's statement to Detectives Weeks and

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[1/] Significantly, Mosley deals only with the Fifth Amendment prong of the Miranda question. The right to counsel was neither raised or addressed in the Mosley decision. Id. at 101, f.n. 7.

Kesinger. An analysis of the facts of Mosley and the instant case reveals that the State's reliance upon the Mosley decision is misplaced.

In Mosley, the defendant was arrested for two local robberies. He was advised of his Miranda rights, and he refused to waive them, at which time questioning ceased. Id. at 97. More than two hours later, the defendant, still incarcerated for the robbery charges, was questioned regarding an unrelated homicide. Significantly, before questioning, Mosley was again given Miranda warnings, this time with regard to the homicide investigation. He initially denied involvement in the killing, but after being confronted with a statement by an accomplice, he gave a statement implicating himself. Id. at 97-98.

The Mosley court identified the pertinent question to be whether his right to cut off questioning was scrupulously honored. Id. at 104. The Court repeatedly noted that Mosley was provided with a fresh set of Miranda warnings before both periods of questioning. Id. at 104-106. The Court summarized its analysis as follows:

> This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.

Id. at 105-106 (emphasis added).

The Mosley Court relied on this factor in distinguishing Westover v. United States, 384 U.S. 436 (1966), a companion case to Miranda. In Westover, the defendant was arrested and interrogated, without advisory warnings, about various local robberies. After two hours of questioning, the FBI took over. The federal agents gave advisory warnings, then questioned Westover for two hours regarding unrelated California robberies, after which Westover confessed to the California robberies. The Westover Court held the confession inadmissible because "the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation", and that the warnings by the federal agents were insufficient because "the warnings came at the end of the interrogation process". 384 U.S. at 496, 497; 423 U.S. at 106. By contrast, the Mosley court emphasized that the defendant had received full Miranda warnings "at the very outset of each interrogation", the initial interrogation had been brief and had been suspended for a significant interval before the second interrogation began. Mosley at 106-107.

It is clear that the provision of Miranda warnings prior to questioning is central to the decision in Mosley. This point, which is crucial to the proper resolution of this issue, is brought into sharper focus by the United States Supreme Court's decision in Mathis v. United States, 391 U.S. 1 (1968). The defendant in Mathis was serving a state prison sentence when he was questioned by a federal agent. The agent did not warn Mathis

of his rights prior to questioning. Oral statements and documents elicited by this interrogation were later used as evidence against the defendant in a prosecution for knowingly filing false claims against the government. The defendant had not been arrested for that crime at the time of his interrogation. Id. at 2-3.

Mathis objected to the use of the unwarned statements, relying on Miranda. The government sought to avoid Miranda by arguing that Mathis, like the appellant here, was in jail on an entirely separate offense. The Mathis court rejected that argument in language, which is instructive here:

> The Government also seeks to narrow the scope of the Miranda holding by making it applicable only to questioning one who is "in custody" in connection with the very case under investigation. There is no substance to such a distinction, and in effect it goes against the whole purpose of the Miranda decision which was designed to give meaningful protection to Fifth Amendment rights. We find nothing in the Miranda opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody.

Id. at 4-5. Mathis, like the appellant, was "in custody" for Miranda purposes during the murder interrogation even though it was unrelated to the charges for which he was incarcerated. Mathis, unlike Mosley, did not receive proper advisory warnings before the second round of questioning; this factual distinction is the reason for the different results of those cases. Mathis and Mosley, read together, stand for the proposition that a suspect incarcerated for one charge (and who has invoked his

Miranda rights regarding that charge) may be questioned regarding another, unrelated, investigation if, and only if, the suspect is given advisory warnings prior to the questioning on the unrelated charge.

In view of the relevant case law, it is apparent that the facts of the instant case are much closer to those in Mathis than, as the State contends, Michigan v. Mosley. The appellant invoked his Miranda rights regarding the robbery of Mr. McGoogin upon his arrest and during his first appearance, when counsel was appointed. He was incarcerated on the robbery charge when a week after his arrest, he was interrogated by Detective Riley regarding the murder of Mr. Butler.[2/]

Three days after the initial interrogation of appellant, Detective Weeks removed the appellant from his cell to seize his clothing to have it tested for the presence of Mr. Butler's blood. [Tr. 524-25]. There is no record evidence that Detective Weeks provided the appellant with Miranda warnings before taking the defendant from his cell. While Detective Weeks had the appellant in his custody to seize the appellant's clothing, to be used as evidence against him regarding the murder of Mr. Butler, the appellant made the statements which are challenged here.

[2/] Detective Riley read the appellant his Miranda rights. The appellant replied he knew nothing of the murder [Tr. 948-949].

Mathis makes clear that the appellant was "in custody" for Miranda purposes when he made the challenged statements to Detective Weeks. The State argues, however, that the actions of Weeks do not constitute interrogation. The State's unnecessarily restrictive definition of "interrogation" is inappropriate in view of the purposes the Miranda guidelines were intended to serve, and does not comport with the decisional authority on this question.

The concept of "interrogation" was defined by the United States Supreme Court in Rhode Island v. Innis, 446 U.S. 291 (1980). The Court in Innis declined to construe Miranda "so narrowly" as to limit it to "police interrogation practices that involve express questioning of a defendant while in custody." Id. at 298. The Court observed that the purposes underlying Miranda were much broader than mere regulation of question-and-answer by police:

> The concern of the Court in Miranda was that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. The police practices that evoked this concern included several that did not involve express questioning. For example, one of the practices discussed in Miranda was the use of line-ups in which a coached witness would pick the defendant as the perpetrator. This was designed to establish that the defendant was in fact guilty as a predicate for further interrogation. A variation on this theme discussed in Miranda was the so-called "reverse line-up" in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime, with the object of inducing him to confess to the actual crime of which he was suspected in

> order to escape the false prosecution. Ibid. The Court in Miranda also included in its survey of interrogation practices the use of psychological ploys, such as to "posi[t]" "the guilt of the subject," to "minimize the moral seriousness of the offense," and "to cast blame on the victim or on society." It is clear that these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation.

Id. at 299 (citations omitted). The Innis Court set forth the fundamental principles to be employed in determining whether a police practice constitutes interrogation for Miranda purposes:

> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.

Id. at 300-301 (emphasis added).

In Toliver v. Gathright, 501 F. Supp. 148 (E.D. Va. 1980), the rule in Innis was applied to exclude a confession made by a mentally retarded suspect at the jail, when the confession was elicited by the act of a police officer (Weaver) in informing the defendant that a co-defendant had implicated him in the crime:

> Whether or not Weaver intended to induce petitioner to make a statement, he must certainly have known that it was at least likely, if not probable, that Toliver would so respond. Confronting an accused with incriminating evidence is a common and traditional method of prompting a recalcitrant suspect to confess. That it is also frequently an effective tactic may be judged from the volume of cases involving confessions so induced. As the trial judge noted, and as Weaver surely knew, it is a "common reaction" for an accused to respond to incriminating evidence by speaking. Faced with evidence indicating that the police already believe him to be guilty, an accused may conclude that he has nothing to lose by making a statement, or may fear that silence will be taken as an admission of guilt.
>
> A statement such as that made by Weaver is especially likely to evoke an incriminating response where, as in the present case, the suspect's mental capacity is severely limited.

Id. at 153.

Innis and Toliver were followed in Tierney v. State, 404 So.2d 206 (Fla. 2d DCA 1981) (officer "interrogated" defendant, who had invoked Miranda rights, by informing him of co-defendant's statement). See, also, Horton v. State, 285 So.2d 418, 419 (Fla. 2d DCA 1973), State v. Slifer, 447 So.2d 433 (Fla. 1st DCA 1984); Lornitis v. State, 394 So.2d 455, 458 (Fla. 1st DCA 1981).

The variety of forms police interrogation may assume is limited only by the ingenuity of the police.[3/] It is clear that the action of Detective Weeks in removing the appellant from his cell and escorting him to the property room of the jail to seize

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[3/] See, generally, Kamisar, What Is "Interrogation?" When Does It Matter? 67 Geo. L. J. (1978)

the appellant's clothing constituted interrogation for the purposes of Miranda. The appellant, like the defendant in Toliver, is mentally retarded. He had been incarcerated, and thus isolated and subjected to a coercive, police-dominated atmosphere, for 10 days. The appellant had become the focus of the investigation - Detective Riley had interrogated him three days before regarding Mr. Butler's death. Detective Weeks, a robbery detective, personally escorted the appellant to the property room to seize his clothing to analyze it for traces of the victim's blood. This task could have been performed by any correctional officer, but Detective Weeks chose to do it himself. In response to the appellant's statement that he was not afraid of the chair, Weeks asked, somewhat disingenuously, "what chair?" These facts all lend credence to the conclusion that the police should have known that confronting the appellant with the incriminating evidence in this manner was "reasonably likely to elicit an incriminating response" from the appellant. Detective Weeks' actions were the functional equivalent of interrogation within the meaning of Innis.

The State argues that the appellant was informed of his Miranda rights by Detective Weeks. This contention ignores the fact that no warnings were given until after the appellant had given the essence of his statement. Miranda contemplates effective advisory warnings. The warnings provided to the appellant, after the interrogation and his initial statement, were too little and too late:

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first.

United States v. Bayer, 331 U.S. 531, 540 (1946). There is no clear and convincing evidence of a break in the causative chain between the initial illegality and the subsequent statements by the appellant. It would be manifestly unfair to allow the State to "cure" a Miranda violation through the simple expedience of belated warnings, when there is no lapse of time between the illegality and the statement, and when all the coercive elements remain.

IV.

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

The warrantless seizure of Mr. Kight's clothing under the circumstances of this case was unlawful. The seizure of Mr. Kight's clothing was a direct casual link leading to his arrest on the murder charge. Thus, it is illogical to characterize this seizure as incident to the lawful arrest of Mr. Kight on the murder charge.

The decision of United States v. Edwards, 415 U.S. 800 (1974), does not justify the warrantless seizure under the circumstances of this case. In Edwards, the normal processes incident to arrest and custody had not been completed when the authorities seized the defendant's clothes. Id. at 804. Furthermore, the Court in Edwards dealt with a seizure of evidence which the authorities had probable cause to believe was material to the crime for which the defendant was arrested. Id. at 805, 806. Lastly, the Court still maintained a reasonableness standard as to the delay between the arrest and the subsequent seizure.

The instant case is distinguishable, initially, because the normal processes incident to arrest and custody for the robbery charge had been completed before the seizure of Mr. Kight's clothing. More importantly, the authorities did not act under probable cause that the clothing was material evidence of the crime for which he was arrested. The authorities were searching for evidence of an independent crime, of which Mr. Kight had not

been arrested. Finally, if this Court holds that the seizure was a normal incident of a custodial arrest, the evidence should still be suppressed because the delay of 10 days between arrest and seizure was unreasonable.

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.

The State's assertion that no right to counsel existed at first appearance is clearly erroneous under both federal and state law. The United States Supreme Court recently held in Michigan v. Jackson, __ U.S. __, 54 U.S.L.W. 4334 (1986) that the right to counsel attaches at arraignment. In Florida, arraignment and first appearance are functional equivalents. Ex Parte Jeffcoat, 146 So.827 (Fla., 1933). Moreover, Fla. R. Crim. P. 3.130(b) specifies the right of a defendant at first appearance to representation. This principle was recently reaffirmed in State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984), where the Court held that the right to counsel attaches at least as early as first appearance and should occur within 24 hours of arrest. Id. at 1185.

Appellee's reliance on Roman v. State, 475 So.2d 1228 (Fla. 1985) is without merit. Roman concerned police questioning of a defendant in a non-custodial environment. The court determined that in such circumstances, a police officer need not comply with an attorney's request to cease questioning. In contrast, appellant was arrested, booked and remained incarcerated throughout the period of investigation and interrogation. He was clearly "in custody" when the challenged statements were made.

Despite appellee's contentions, appellant was deprived of effective assistance of counsel from the moment of his first appearance on the robbery charge. This ineffective assistance is underscored by the fact that appellant received no individualized communication from an attorney of the Public Defenders Office for ten days after his arrest for a life felony [Tr. 722]. Appellant's only instruction from the Public Defender's Office was a printed form given to all arrested persons at first appearance. Moreover, Public Defenders Office policy did not mandate inquiry into whether appellant could read and comprehend the information [Tr. 724]. Since Mr. Kight is illiterate, this written form was of no assistance to him.

Although appellee is correct that State v. Youngblood, 217 So.2d 98 (1969) demonstrates that appointment of the Public Defenders Office to both Mr. Hutto and Mr. Kight did not automatically create a conflict of interest, a conflict was created when Mr. Hutto made statements inciminating Mr. Kight. On the night of their arrests for robbery, Mr. Hutto made a statement to a police detective clearly incriminating Mr. Kight [Tr. 390-91]. Despite Mr. Hutto's statement, the Public Defenders Office failed to respond to the conflict which arose almost immediately upon their arrests.

Appellee's reliance on Olds v. State, 302 So.2d 787 (1974) is misplaced. In Olds, two co-defendants were represented by the same Public Defenders Office. One co-defendant plea bargained in exchange for his testimony as a witness against the other co-defendant. At trial, the attorney attempted to cross-examine

this witness, but was halted because of the court's concern with a breach of the attorney/client privilege. Appellant does not assert his statements to third parties themselves violate an attorney/client privilege. Rather, they must be excluded because the Public Defenders Office violated the attorney/client privilege by producing statements to the State that were to be used against appellant, a former client. The fact that the identities of the individuals to whom Mr. Kight allegedly made these statements was made part of Mr. Hutto's negotiated plea is further evidence that this conflict operated to the detriment of Mr. Kight.

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 forepersons [R. 335-336, 533-534]. The leading case of Rose v. Mitchell, 443 U.S. 545 (1979), stands for the proposition that discrimination in selecting the members of a grand jury is forbidden by the United States Constitution. Id. at 552. 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 565.

The burden of establishing a prima facie case for discrimination in selecting grand jurors and grand jury forepersons 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 rebut the showing of discrimination. Id. at 565. 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).

The appellee launches a broadside attack on appellant's statistical evidence and the methodology utilized to develop it. The attack is misplaced because it ignores the instructional precedent of Rose v. Mitchell, 443 U.S. 545 (1979), which provided guidelines relating to making out a prima facie case of discrimination in the selection of grand jury forepersons. Appellant, following Rose guidelines, made out a prima facie case and appellee was required to rebut this showing by proving that racially neutral selection procedures produced the disparity. Its failure to properly rebut requires reversal.

Andrews v. State, 443 So.2d 78 (Fla. 1983), decided on a record factually distinguishable from the instant one, does not preclude reversal. The testimony of testifying judges herein is more persuasive to appellant's position than that in Andrew, supra, or United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982). Additionally, it is well established that "conclusory statements by judges...that there was no discrimination in jury selection will not rebut a prima facie showing; there must be some proof." United States ex rel. Barksdale v. Blackburn, 610 F.2d 253 at 271 (5th Cir. 1980) (citations omitted).

The appellee's position that the disparity is explainable in terms of appellant's expert using long term data belies the holding of this court in Bryant v. State, 386 So.2d 237 (Fla. 1980). Bryant held that statistical analysis such as that employed here must show discrimination over a "significant period

of time." Id. at 240. That is what this record reflects.

Statistics speak in the instant case and this court should listen. Of 36 grand juries convened, the following reflects the statistical evidence never rebutted by the State.

REGISTERED VOTERS				GRAND JURORS			
Race		Sex		Race		Sex	
White	Black	Male	Female	White	Black	Male	Female
78%	22%	46%	54%	77%	23%	55%	45%

FOREPERSONS

Race		Sex	
White	Black	Male	Female
94.4%	5.6%	97.2%	2.8%

The statistical showing above mandates reversal.

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.

Appellant relies on the argument previously submitted in the initial brief.

VIII.

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

In answer to the appellant's claim that his exculpatory statement to Detectives Weeks and Kesinger was introduced at trial for the improper purpose, the State argues that this statement shows consciousness of guilt on the part of the appellant. Thus, the State claims, the statement was not impeachment, but rather was substantive evidence admissible during the prosecution's case in chief.

In its answer brief, the State claims that the appellant has attempted to distinguish Douglas v. State, 89 So.2d 729 (Fla. 1956). To the contrary, the appellant relies on Douglas, and cites it to this Court as the controlling law on this issue and as authority for reversal of his conviction. Douglas holds that an exculpatory statement may not be admitted and proven false, to show consciousness of guilt, if, to prove the statement false it is necessary to prove the guilt of the defendant: "A circumstance which is dependant upon proof of defendant's guilt for its evidentiary value does not tend to prove guilt." 89 So.2d at 661. Thus, under Douglas, the appellant's statement was not admissible to show consciousness of guilt.

The State further attempts to justify the admission of the statement by arguing that it proves the appellant's presence at the crime. This Court should reject this argument for two reasons. First, presence was not a disputed issue. The appellant had not filed a notice of intent to claim an alibi, and

thus could not contest the issue of his presence. Indeed, "mere presence" was the crux of appellant's defense.

More significantly, the State's argument should be rejected as pretextual. The true reason for offering the statement is easily seen in the State's closing argument, in which the prosecutor repeatedly invited the jury to consider the believability of the statement.[4/] The prosecutor never argued to the jury that the statement proved presence. Closing argument makes clear beyond any doubt that the State introduced the appellant's exculpatory statement solely to set up a straw man to tear down through the alleged jailhouse confessions. That evidence was pure impeachment, in an attempt to show the defendant to be a liar and a man of bad character. Since the defendant had not put his credibility in issue, this was improper, and highly prejudicial. By arguing that the statement proved the non-issue of presence, the State attempted to do indirectly what it could not do directly - that is, attack the credibility and character of the defendant. The admission of the appellant's statement is error, and reversal is warranted.

[4/] The pertinent passages of the prosecutor's argument were set forth in the initial brief, and need not be repeated here.

IX.

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

Assuming arguendo that the evidence of the robbery of Herman McGoogin, admitted during the appellant's trial for the murder of Lawrence Butler, was relevant to the issue of the identity of the murderer of Mr. Butler, the trial court erred in instructing the jury that the evidence could be considered for a wide range of issues.

The State argues the evidence was relevant to "plan, identity, intent, modus operandi and a common scheme or plan." This argument ignores the fact that the trial court instructed the jury that the evidence could be considered relative to motive, intent, "knowledge of the robbery of Lawrence D. Butler," identity, and absence of mistake or accident [Tr. 2158]. The robbery of Mr. McGoogin does not show a motive for the murder of Mr. Butler, or the intent of the appellant to commit a murder during the course of an unrelated robbery. The robbery of Mr. McGoogin is not probative of the knowledge of the robbery of Mr. Butler. Finally, it is obvious that mistake or accident was never an issue at the appellant's trial. Admitting this undisputably damaging evidence without the careful limiting instructions required by Florida law constituted reversible error.

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.

The State, in its brief, implicitly acknowledges that the trial court did in fact restrict defense counsel's cross-examination of Detective Weeks concerning Mr. Kight's mental state at the time he made certain incriminatory statements to the detective. It advances two arguments in support of its position that this restriction was not error. First, it argues that Detective Weeks did not "know" about Mr. Kight's low intelligence. Additionally, it argues that the testimony sought to be elicited went beyond the scope of direct examination.[5/] The State's first argument is refuted by the record before this Court. Its second argument cannot stand in light of the recent United States Supreme Court decision in Crane v. Kentucky, _U.S._, 54 U.S.L.W. 4598, Case No. 85-5238 (June 9, 1983).

Prior to advising Mr. Kight of his constitutional rights, Detective Weeks asked Mr. Kight his educational level and Mr. Kight stated he went to ninth grade [Tr. 582]. Upon questioning Mr. Kight, he also learned that Mr. Kight was under a doctor's care for seizures and that Mr. Kight could not read or write [Tr. 583, 594, 1905]. After reducing Mr. Kight's statement to writing, Dectective Weeks read the statement to Mr. Kight, " ...

[5/] These arguments were not raised below. Instead, the State argued that this fact was not "relevant" to the jury's consideration of Mr. Kight's statement.

because he [Mr. Kight] indicated that he could not read ..." [Tr. 592]. In pretrial proceedings, Detective Weeks testified about Mr. Kight's level of intelligence as follows, "I would say below normal intelligence, somebody that said he went through ninth grade and if you had asked me to judge him as to whether he would ever have graduated, I would say he would have had to apply himself and work very hard to finish high school." [Tr. 649].

The State's argument that cross-examination regarding Mr. Kight's retardation went beyond the scope of direct examination simply ignores the analysis which must be undertaken as to this issue. Whenever the State introduces testimony concerning an accused's confession, the accused has the absolute right to inquire on cross-examination about the circumstances surrounding that confession. There is no requirement that the accused recall the witness to elicit this testimony.

This principle of law was recently reinforced in Crane v. Kentucky, supra. In Crane, the defendant was convicted of first degree murder arising from the death of a liquor store clerk during an "apparent robbery." After the defendant's arrest, he confessed to the robbery, but later claimed that his confession was the result of impermissible coercion. Upon the conclusion of a hearing, the trial court concluded that the confession was voluntary and held that it could be admitted. The case then proceeded to trial.

During his opening statement, the prosecution stressed the defendant's confession. "In response, defense counsel outlined what would prove to be the principle avenue of defense advanced

at trial - that, for a number of reasons, the story petitioner had told the police should not be believed." Id. at 5499.[6/] Counsel then argued that the circumstances surrounding the confession cast doubt on its credibility.[7/] At the State's request, counsel was thereupon prohibited from introducing any evidence surrounding the circumstances of the confession, reasoning that the issue of voluntariness had been resolved against the defendant. At trial, the defendant was convicted.

On appeal, the Supreme Court reversed, concluding that the exclusion of this evidence "...deprived petitioner of his fundamental Constitutional right to a fair opportunity to present a defense." Id. at 4600. The Court further concluded that, while voluntariness of the confession is one for the Court, the credibility of the statement is a jury question. The Court further held:

[6/] Subsequently, like the prosecutor in Crane, the State sought and obtained a ruling prohibiting defense counsel from introducing any testimony concerning the circumstances surrounding the confession.

[7/] In the present case, the State sought to introduce Mr. Kight's statement for the purpose of showing that it was incredible and unworthy of belief. See, Issue VIII, supra. In response, Mr. Kight's counsel sought to introduce evidence that Mr. Kight was retarded and thus, incapable of fabricating this statement, stating "The State is being allowed to attack it [the statement]. I, therefore, have a right to enhance his credibility....[T]he State's theory of this case is that he fabricated this confession and that they introduced in evidence and now they are attacking it and what I want to introduce the issue on whether or not he has the intellectual capacity to fabricate the confession..." [Tr. 2251-2252]. By excluding this evidence, the trial court permitted the State to attack the credibility of this statement while at the same time precluding the right of defense counsel to establish that it was in fact credible. The credibility of Mr. Kight's statement thus became a crucial trial issue.

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the state were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing."

Ibid (citations omitted)(emphasis added). Significantly, the Court referred to Florida's procedure as set forth in Palmes v. State, 397 So.2d 648, 653 (Fla. 1981). In Palmes, this Court stated:

> The question of the admissibility in evidence of an extra-judicial confession is for the court to decide, based on all the circumstances of the confession. Once a confession is admitted into evidence, however, the defendant is entitled to present to the jury evidence pertaining to the circumstances under which the confession was made. The reason for this rule is that it is the jury's function to determine the weight to be accorded the confession in determining guilt.

Id. at 653 (citations omitted).

Clearly, once the State introduced Mr. Kight's confession, it "opened the door" for defense counsel to explore why the confession was made. Indeed, as stated by counsel below, such cross-examination was appropriate because, "[t]he issue to be

determined by the jury is the total circumstances under which the statement was made which would fall within the definition of total circumstances and his mental state would be one of those circumstances making up the total circumstances" [Tr. 1892]. If accepted, the State's argument would permit the prosecution to introduce a confession, and then prohibit cross-examination concerning its circumstances. This procedure has never been permitted by any court and indeed, the State has introduced no case law or other authority to support its position. It cannot do so because to permit such procedure would rob a trial of any vestige of "procedural fairness" and would be in direct conflict with the Confrontation Clause of the United States Constitution.

Finally, this Court should bear in mind that the trial court below did not merely exclude cross-examination regarding Mr. Kight's retardation. It also prohibited counsel from introducing any testimony on this issue in the form of the testimony of Dr. Harry Krop and Mr. Kight's mother, Ellen Warren [Tr. 2226-2231]. In so doing, it deprived Mr. Kight of his "fundamental Constitutional right to a fair opportunity to present a defense." Crane, supra, at 4600.

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

The State argues that the testimony of Mr. McGoogin concerning certain statements made and actions undertaken by Gary Hutto, Mr. Kight's co-defendant was inadmissible. This argument is premised upon the State's incorrect assumption that lay opinion testimony is inadmissible in the State of Florida. To

the contrary, § 90.701, Fla. Stat. (1985), by its express terms permits the introduction of lay opinion testimony. Specifically, that statute provides:

> If a witness is not testifying as an expert, his testimony, about what he perceived may be in the form of inference and opinion when:
>
> (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions and his use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
>
> (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

(emphasis added).

The testimony of Mr. McGoogin clearly met this standard. Mr. McGoogin "perceived" that Gary Hutto was urging Charles Kight to harm him. Yet this significant fact was concealed from the jury. As a result, the jury was left completely uninformed about Mr. Hutto's apparent domination of Mr. Kight during the McGoogin robbery and was left to conclude that Mr. Kight planned and perpetuated this robbery on his own. The exclusion of this evidence constituted 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 independently, planned and executed the murder of Mr. Butler. It was further his defense that he was merely present, but did not actively participate in Mr. Butler's murder. In support of this theory, counsel for Mr. Kight attempted to introduce evidence that Mr. Kight was mentally incapable of devising the scheme to kill Mr. Butler. The purpose in admitting such evidence was two-fold: First, to establish that Mr. Kight was merely present when Mr. Hutto committed the murder, but did not participate in it; second, to rebut the State's theory that Mr. Kight had fabricated his statement incriminating Mr. Hutto [Tr. 2251, 2253, 2255].

Appellee has misconstrued the intentions behind the attempted introduction of this evidence. There was no attempt by counsel for Mr. Kight to "ambush" the State with an insanity defense, nor was there an attempt to prove lack of specific intent to commit the crime. Accordingly, Fla. R. Crim. P. 3.216(b) is not dispositive of this situation. Likewise, case law cited by appellant, dealing with notice and lack of notice as invited error, are inapplicable to the present case. Morgan v. State, 53 So.2d 394 (Fla. 1984); Pope v. State, 441 So.2d 1073 (Fla. 1983).

Furthermore, the evidence profferred by appellant is not inadmissible under the line of cases which hold that the mental state of an accused is inadmissible when sought to prove lack of intent to commit a crime. See, Zeigler v. State, 402 So.2d 365 (Fla. 1981); Tremain v. State, 336 So.2d 705 (Fla. 4th DCA 1976). This was not the purpose for which appellant sought to proffer the evidence of Mr. Kight's mental state.

The importance of allowing an accused to present substantive evidence was recently stressed by the United States in Crane v. Kentucky, __ U.S. __, 54 U.S.L.W. 4598, 4600, Case No. 85-5238 (June 9, 1986), when it held that the trial court's refusal to permit counsel for the accused to introduce substantive evidence concerning the circumstances of his confession, " ... contributed to an evidentiary ruling that deprived petitioner of his fundamental Constitutional right to a fair opportunity to present a defense." Crane makes clear that an accused must be permitted to introduce evidence to the jury which is relevant to a determination of guilt or innocence. Counsel for appellant below was preclused from doing this.

Appellee asserts that any error as a result of the exclusion of the profferred evidence was harmless. This conclusion is based solely on appellee's interpretation of the effect of this evidence and the inferences which should be drawn from it. Appellee contends that the evidence is not supportive of appellant's defense. This assertion is contrary to conclusions which a jury could logically reach after hearing the profferred testimony of Dr. Krop and Dr. Miller [Tr. 2229-2231, 2236, 2241-2242].

The profferred evidence should have been admitted. The exclusion of the evidence greatly inhibited appellant in the presentation of his defense and thus cannot be considered harmless error. It is the jury's role, not appellee's, to hear the evidence, weigh all factors, and determine if it supports the proposition sought to be proven.

XII.

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

Appellant takes exception to appellee's allegation that defense counsel objected to the removal of a juror merely to create an issue on appeal. The juror in question, Mr. Perry, was removed because he had other engagements which were pressing him for time [Tr. 2506]. The Court felt that he could not sit fairly. Appellant's objection was to the decision to remove Mr. Perry in lieu of a continuance [Tr. 2511]. The removal of the juror and the objection were completely independent of the failure to admonish the jury before separation. Appellee does not attempt to justify, nor can it, the fact that another juror talked with others about the death penalty and the acknowledgement of other jurors that they read articles in the newspaper concerning the death of another cab driver [Tr. 2503, 2505].

Appellee cites to three cases, which have no bearing upon this appeal: Pope v. State, 441 So.2d 1073 (Fla. 1983); Snook v. State, 478 So.2d 403 (Fla. 3d DCA 1985), United States v. Curry, 471 F.2d 419 (5th Cir. 1973). Appellant has made no attempt to "sandbag" any error for use on appeal, and in no fashion "invited" the error of which is now complained. Appellee's inappropriate comments on this issue are without merit.

Appellant does not question the validity of Fla. R. Crim. P. 3.370 in other situations, but the Supreme Court of Florida has held that juries must be sequestered in a capital case after deliberations have begun. Livingston v. State, 458 So.2d 235 (Fla. 1984). Furthermore, appellant recognizes the case-by-case application of Livingston as discussed in Franklin v. State, 472 So.2d 1303 (Fla. 1st DCA 1985). Although in Franklin, the Court found that the separation of the jury did not give grounds for reversal, it also noted that a specific caution was given by the trial judge to avoid external influences. Such cautioning was completely absent in the instant case.

Appellee next cites to Oats v. State, 446 So.2d 90 (Fla. 1984) as a case holding that dispersal of the jury was not reversible error. Again, as in Franklin, however, the trial court in Oats had given due admonition throughout the course of the trial. Id. at 93. In contrast, Mr. Kight's jury in the instant case was allowed to disperse not only without admonition, but with positive instructions that they could subject themselves to external influences.

In Ford v. State, 374 So.2d 496 (Fla. 1979), this Court did hold that there is no automatic right to jury sequestration in a capital case. This rule, however, must be examined in light of the later Livingston decision. This Court in Livingston specifically held:

> We hold that in a capital case, after the jury's deliberations have begun, the jury must be sequestered until it reaches a verdict or is discharged after being ultimately unable to do so.

Id. at 239.

Furthermore, the lack of sequestration in the present case is not the primary error challenged. Rather, the failure to admonish the jury and the actual positive instruction that the jury could expose themselves to external influences is the error for which reversal is sought. This error denied appellant's fundamental right to an impartial sentencing jury. 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.

Improper comments made by the State in closing during the sentencing phase prejudiced appellant's right to a fair trial and requires this Court to reverse the sentence of death and remand for a new sentencing hearing. Counsel for appellant promptly objected at each instance of prosecutorial misconduct.

Appellee alleges that the first two objections were not specifically addressed to improper argument, therefore, the want of specific objection would preclude appellate review. However, the objection did specifically relate to the error of the prosecution at the time the objection was made. The objections were to specific errors, which in the general sense, were improper argument. Appellant's objection may not have specifically mentioned improper argument, but they certainly were specific enough to bring it to the attention of the courts. Assuming, arguendo, that the objections were not specific, appellate review is not necessarily precluded where the error alleged is improper prosecutorial argument. Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985).

Appellant's third objection arose from the State's appeal to sympathy for the victim's family. Appellee claims that, but for appellant's objection, the argument of the State would not have been improper because the prosecutor had yet to fully explain the argument. Appellee's position fails because the prosecutor, upon recommencement of the argument, did not clear up the problem, but

instead created further error by misstating the applicable law. This brings us to appellant's fourth objection: the prosecutor errantly stated that mercy plays no part in the jury's decision.

Appellee alleges that appellant misstated the law regarding non-limitation of statutory mitigating circumstances. Appellee cites to Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983), to urge its position that mercy does have any bearing independent of the mitigating factors built into the sentencing statute. However, a closer reading of Stanley will lead this court to the opposite conclusion. The Stanley court, after examining Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), concluded:

> ...a death penalty scheme must allow the sentencing authority to consider and give weight to mitigating factors in addition to those listed in the death penalty statute. The cases thus create an asymmetry weighed on the side of mercy...

Id. at 960. Therefore, appellant did not incorrectly state the law when objecting to the improper argument of the prosecutor.

Finally, the "opinion" statement of the prosecutor was virtually identical to the statement found improper in Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985).

This Court has recently held that for prosecutorial conduct to warrant vacating a sentence, the misconduct must be egregious. Bertolotti v. State, 476 So.2d 130 (Fla. 1985). The Court in Bertolotti found that the misconduct did not warrant vacating the sentence. Similarly, in Valle v. State, 474 So.2d 796 (Fla. 1985), the Court determined that prosecutorial misconduct in that case did not warrant vacating the sentence. However, the

misconduct in Valle and Bertolotti do not equal that of the instant case, in quantity or severity. In Valle, the prosecutor discussed the defendant's chances for parole and appealed for sympathy for victim's family. In Bertolotti, the prosecutor invited the jury to imagine the pain and suffering of victim, to consider the message they could send to community, and commented on defendant's silence (but after he was already convicted).

In the instant case, the prosecutor first invited the jury to imagine pain and suffering of the victim. Next, the prosecutor drifted into a story on the horrors of felony murder instead of merely arguing the aggravating circumstances. The prosecutor also appealed for sympathy for the victim's family, and expressed a personal opinion as to the appropriateness of a death penalty. Finally, the prosecutor misstated the law to the jury when trying to correct an improper argument. Another crucial factor which calls for vacating the sentence is that there were substantial factual disputes in the instant case: regarding who actually committed the Butler murder. In Hill v. State, 477 So.2d 553 (Fla. 1985), the Florida Supreme Court, subsequent to its holdings in Valle and Bertolotti, held that inexcusable prosecutorial overkill, in a case involving substantial factual disputes, would result in harmful error requiring reversal. Id. at 556, 557.

Accordingly, the sentence in the instant case should be vacated and the case remanded for a new sentencing hearing.

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 analysis of mitigating circumstances, the Court discussed, but rejected, the following facts: (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. The Court erred in determining that, based on the facts presented, Mr. Kight's mental retardation did not exist in the form of a mitigating circumstance. The court's rejection was particularly objectionable because there was absolutely no rebuttal evidence, at any phase of the trial, to establish that Mr. Kight's mental condition did not exist. Indeed, Mr. Kight's retardation was documented well before the occurrence of this crime in his elementary and secondary school records [See, Defendant's Penalty Phase, Exhibit 1].

In Stano v. State, 460 So.2d 890 (Fla. 1984), this Court, in discussing the standard to be employed in determining whether certain mitigating circumstances have been established, stated that the trial judge's determination should be final "if it is supported by competent substantial evidence." Id. at 894 (emphasis added). Under this reasoning, a finding, like that of the instant case, not supported by substantial, competent

evidence constitutes an abuse of discretion.

In Pope v. State, 441 So.2d 1073 (Fla. 1983), this Court 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. Since the only evidence to be considered was that offered by the appellant to show the mitigating circumstance did exist, the trial court's decision that it did not exist was a palpable abuse of discretion. Furthermore, since the record is silent as to the basis for the trial judge's determination that the mitigating circumstance did not exist, this Court is hampered in its ability to make its determination.

In the absence of "competent substantial evidence" that Mr. Kight did not suffer from a mental deficiency, the refusal of the trial court to find this fact in mitigation was error. The silence of the record precludes this court from determining any basis upon which this discretionary decision was made. Therefore, the sentence of Mr. Kight should be reversed.

XV.

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

Appellant relies on the arguments in the initial brief, with the addition of the following.

The instant case is factually similar to Toole v. State, _So.2d_, 10 F.L.W. 617 (1985). The Supreme Court vacated a death sentence in Toole due to the failure of the trial court to instruct the jury on the statutory mitigating factors. Id. at 617. The factual similarities are great in that Toole, like Mr. Kight, was a borderline retarded person, along with possessing several other socio-emotional disorders. Ibid. Another similarity is that the trial court in the instant case, by determining that there were no mitigating circumstances, effectively prejudiced appellant by keeping from the jury evidence which might have led to a different recommendation. This is the same effect as that of the failure to instruct in Toole. Id. at 618.

Therefore, based on the arguments presented above and previously in the initial brief, the death sentence should be vacated.

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.

The State clearly violated the dictates of Brady v. Maryland, 373 U.S. 83 (1963), by not disclosing evidence of concessions made to its witnesses, which evidence was favorable to defense. Contrary to the State's assertions, the existence of these concessions is not mere speculation. Moreover, the instant case does not involve evidence that is so ambiguous that the logical inferences to be drawn are too tenuous to support harmful error, as was the case in Sullivan v. State, 303 So.2d 632 (Fla. 1974).

A decision based on circumstantial evidence is a far cry from a decision based on mere speculation. Circumstantial evidence is often as strong as, and sometimes stronger than, positive evidence. A well connected chain of circumstances is as conclusive of the existence of a fact as is the greatest array of positive evidence. 23 Fla. Jur.2d, Evidence and Witnesses, §363 (1980). Appellant has alleged facts which constitute a prima facie case of a failure by the State to disclose material evidence upon specific requests by the defendant, and a failure to correct false testimony at trial regarding state-witness agreements. Such facts, if established, are grounds for a new trial under Brady, United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972), Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1934).

Appellant's position was reaffirmed in United States v. Bagley, 473 U.S._, 87 L.Ed.2d 481 (1985). In Bagley the Court, relying upon the reasoning set forth in the Giglio decision, held that impeachment evidence falls within the Brady rule. The Court also emphasized that reversal is mandated where the evidence withheld is material. Id. at 491. The major significance of Bagley is the new standard created to determine materiality:

> "...The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Id. at 494.

The testimony of the four former convicts was the backbone of the State's prosecution of Mr. Kight. Had the defense been allowed to show the "self-interested" aspect of their testimony and thereby effectively impeach their character for truthfulness, the jury would not have convicted Mr. Kight. Disclosure of this evidence, relating to the prosecutions key witnesses, certainly creates a reasonable probability that the outcome of the trial would have been different.

XVII.

THE CUMULATIVE EFFECT TO 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 reversed a conviction due to the cumulation of multiple evidentiary rulings. As in Chambers, certain critical evidentiary rulings by the court below have denied Mr. Kight his right to a fundamentally fair trial. Specifically, the errors were: 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 a result of ineffective assistance of counsel; and the allowance of inflammatory and prejudicial statements by the State during its closing argument at sentencing. Contrary to the position of appellee, appellant does not consider these arguments "devoid of legal or factual merit;" the cumulative effect of these errors deprived appellant of a fundamentally fair trial. His conviction and sentence, therefore, must be reversed.

CONCLUSION

Based upon the facts and legal principles cited herein, Mr. Kight's conviction for first degree murder and the sentence of death imposed herein should be suppressed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mark C. Menser, Esquire, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301, by mail this 17th day of June, 1986.

ATTORNEY