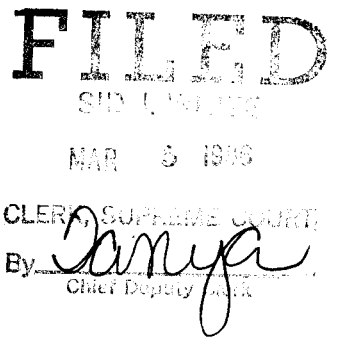
IN THE SUPREME COURT OF FLORIDA

CASE NO. 67, 334



JAMES A. MORGAN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF
THE NINETEENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR MARTIN COUNTY.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

AUTHORITIES CITED

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit in and for Martin County, Florida. In this brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will designate the appropriate portions of the record:

"R"	Record on Appeal
"T"	Transcript of Trial Proceedings

STATEMENT OF THE CASE

An Indictment charging Appellant, a sixteen year old brain damaged boy, with First Degree Murder was filed on September 23, 1977. This is the third time Appellant has been before this Court for this crime. Following Appellant's first trial, this Court reversed his conviction of sentence of death because the procedure set out in Section 918.017 (1), Florida Statutes (1977), requiring bifurcation of trials when insanity was asserted, had been declared unconstitutional while Morgan's Appeal was pending. Morgan v. State, 392 So.2d 1315 (Fla. 1981). This court remanded Appellant's case for a new trial. The Appellant's second trial was held in December, 1981, and the Appellant was again convicted of the crime and sentenced to death. Appellant duly filed his Appeal from that conviction and the sentence of death. This Honorable Court, in concluding that the trial Court erred in precluding Appellant from raising the insanity defense, reversed the conviction and remanded the case for a new trial on July 12, 1984. (R 228). The Mandate was issued by this Court on August 17, 1984. (R 227)

On August 27, 1984, the trial Court appointed the Office of the Public Defender for the Nineteenth Judicial Circuit to represent the Defendant. (R 239) On September 5, 1984, the Office of the Public Defender filed a Motion to Withdraw as Counsel (R 245). The Motion to Withdraw was granted and an Order of Appointment of Private Counsel was entered on September 10, 1984, at which time Robert R. Makemson, Esq., was appointed to represent the Defendant in this cause (R 249). The Appellant filed a Notice of Intent to Rely on the Defense of Insanity on December 13, 1984 (R 256). The Appellant also filed a Motion for

a Change of Venue on December 13, 1984 (R 257). Appellant additionally filed three Motions entitled Motion to Preclude Death Qualification of Jurors, Motion to Postpone Challenges for Cause of Death-Scruple Jurors Until the Penalty Phase, and a Motion to Preclude Challenges for Cause of Death-Scruple Jurors. (R 266-271) These three Motions were denied by the trial Court by appropriate Orders entered on February 12, 1985 (R 277-281). The Appellant's Motion for a Change of Venue was also denied by an Order of the trial Court entered on February 12, 1985 (R 283). The Appellant filed an Amended Notice of Intent to Rely on the Defense of Insanity on May 1, 1985 (R 292). Thereafter, the Appellant filed a Second Amended Notice of Intent to Rely on the Defense of Insanity (R 205). Appellant filed a Second Motion for a Change of Venue on May 17, 1985 (R 309-311). The Appellant filed an Amended Second Motion for a Change of Venue on May 20, 1985 (R 322-328). The trial Court entered its Order denying the Appellant's Motion for a Change of Venue on May 28, 1985 (R 345).

On May 28, 1985, both the Appellant and the Appellee announced ready for trial and the selection of the jury commenced (T-3). During the Voir Dire on May 28, 1985, juror Franklin was questioned by both the Appellant and the Appellee as to her ability to render an advisory recommendation as to the imposition of the death penalty or life imprisonment should the Appellant be found guilty of the crime with which he was charged (T 249-258). The Appellee moved to excuse juror Franklin for cause (T 257). The Appellant objected to the said Motion (T 258). The trial Court granted the Motion for Cause and juror Franklin was excused (T 258). During the process of selecting the jury, juror Blanks, while sitting in open Court, in response to a question

from the Court as to whether he or another juror knew anyone involved in this case, answered "Yes. At the time he was convicted, I was in Court at the time". Juror Blanks, in response to another question by the Court as to whether or not he knew James Morgan, answered "Not personally, but at the time he was convicted, I was in Court". Subsequently, again in response to a question by the Court as to whether he knew anything about the case other than what he was told in the courtroom, answered "Only the time I was in the Court at the time". (T 545-548). At that time, counsel for the Appellant informed the Court that he had a motion to make. He further asked the Court and informed the Court that the record would reflect the statements of Mr. Blanks in front of the jury. Appellant then made a Motion for Mistrial based upon the statements of juror Blanks in front of the jury. The trial Court denied the Motion for a Mistrial (T 551).

The twelve jurors were selected and sworn on May 28, 1985 (T 686). Two alternate jurors were selected and sworn in (T 774).

The trial Judge gave his preliminary instructions to the jury (T 800). The Appellee and Appellant gave their respective opening arguments (T 802-814).

The Appellee presented all of its evidence to the jury and the Appellee rested (T 1158). The Appellant filed a Motion for Judgment of Acquittal (T 1161). The trial Court denied the Appellant's Motion for Judgment of Acquittal (T 1162). Before the Appellant commenced presentation of his side of the case, the Appellee entered a Motion to preclude the Appellant's two expert psychiatric witnesses from testifying as to the contents of any statements the Appellant had made to them while under hypnosis and to further preclude the Appellant from offering into evidence the testimony of its two expert psychiatric witnesses as to their opinions or conclusions as to the defendant's insanity if their opinions or

conclusions were based on any statement made by the Appellant to the two psychiatric expert witnesses while under hypnosis. The trial Court entered its Order sustaining the Appellee's objection, thereby granting the Appellee's Motion and precluding the Appellant from offering into evidence any statements made by the Appellant which were procured during hypnosis. The trial Court further entered its Order precluding the Appellant from offering into evidence the testimony of its two psychiatric experts as to their opinions or conclusions if they were based upon the Appellant's statements to them while under hypnosis. The Appellant objected to the Court's ruling for the record and counsel for the Appellant stated on the record that, based upon the Court's rulings, he was precluded from calling either of his two psychiatric experts as witnesses on behalf of the Appellant (T 1206). The Appellant was allowed to proffer into evidence the testimony of his two expert psychiatric witnesses in the absense of the jury (T 1210-1348). Counsel for the Appellant further stated for the record that, based upon the Court's prior ruling, the Appellant would offer no further testimony or evidence on its behalf and that the Appellant would rest its case (T 1349-1355).

The Court then entered its Order denying the Appellant's Motion for a Judgement of Acquittal at the end of the entire case (T 1386). The Appellant and the Appellee gave their closing arguments (T 1397-1405). The jury instructions were presented to the jury (T 1422). The jury rendered its verdict of guilty as to the crime charged (T 1445-1446). The Appellee admitted and took the position that the Appellant was entitled to present evidence to the jury during the penalty phase as to that testimony which was previously precluded from being offered into evidence by the trial Court's prior ruling (T 1476).

The Appellant announced that it would rely on the evidence presented during the guilt or innocence phase of the trial as to the aggravating and mitigating factors which were to be considered by the jury in the penalty phase (T 1497). The Appellant presented its evidence as to the mitigating factors to be considered by the jury by calling its two expert psychiatric witnesses (T 1498-1648). The Appellant's mother, Alice Morgan, testified on behalf of the Appellant (T 1685). The Appellant testified on his own behalf (T 1689). The defense rested its case as to the mitigating factors to be considered by the jury (T 1697). The Appellee presented evidence in rebuttal (T 1698). The Appellee concluded its presentation of the evidence in rebuttal on the penalty phase of the trial (T 1748). The Appellant and the Appellee gave their closing arguments to the jury as to the penalty phase (T 1758-1773). The Court instructed the jury as to the law on the three aggravating factors proposed by the Appellee and the four mitigating factors proposed by the Appellant for its consideration as to the advisory opinion on the sentence which it would recommend to the Court (T 1793-1795). The jury deliberated as to its advisory opinion and recommendation (T 1799). The jury returned with its verdict and in a vote of 7 to 5 advised and recommended to the Court that it impose a sentence of death upon the Appellant (T 1802). The trial Court, finding three aggravating factors and two mitigating factors, imposed the sentence of death upon the Appellant (T 1809). The trial Court entered its Findings of Fact by the Court on June 7, 1985 (R 391-394).

STATEMENT OF THE FACTS

The instant case involves the death of Gertrude Trbovich on June 6, 1977. The trial was divided into two phases. Phase one involved the guilt or innocence of Appellant. Phase two involved the advisory sentencing proceedings. The selection of the jury commenced on May 28, 1985. During the process of selecting the jury, prospective juror Blanks, in response to a question by the Court as to whether or not he knew anyone involved in the case or was he related to anyone involved in the case, stated "At the time he was convicted, I was in Court at that time". Then again, in response to a question by the Court as to if he knew James Morgan, he stated "Not personally, but at the time he was convicted, I was in Court". Thereafter, again, in response to a question by the Court as to whether he knew anything about this case other than what he was told in Court, juror Blanks responded "Only the time I was in the Court at the time". (T 545-548) Counsel for the Appellant made a Motion for a Mistrial based upon the statements of prospective juror Blanks which were made in open Court before the other prospective jurors (T 549-550). The trial Court denied the Motion for a Mistrial (T 551). Subsequently, during the continued process of selecting the jury, prospective juror Franklin was questioned by counsel for both the Appellant and the Appellee as to her death qualifications. (T 249-256) The State moved for cause to excuse prospective juror Franklin (T 257). Counsel for the Appellant objected (T 258). The Court granted the Motion to excuse prospective juror Franklin for cause (T 258).

After the twelve jurors and two alternate jurors were selected and sworn in, the trial commenced on May 28, 1985. The State rested its case after the presentation of its witnesses (T 1158). The Appellant moved for a

Judgment of Acquittal which was denied by the trial Court (T 1161-1162). Prior to the presentation of evidence and witnesses by the Appellant, the State filed a Motion to preclude the Appellant from offering into evidence the testimony of its two expert psychiatric witnesses, Dr. Caddy and Dr. Kosen. The Appellee asked the Court to enter an Order precluding either of these two expert psychiatric witnesses from testifying as to any statements which the Appellant, James Morgan, made to them during hypnosis and for a further Order precluding the Appellant from offering into evidence the testimony of these two expert psychiatric witnesses if their opinions and conclusions as to the sanity or insanity of the Defendant were based upon the statements made by the Appellant to these two said experts while under hypnosis (T 1163). The trial Court sustained the Appellee's objections and entered an Order precluding the Appellant from offering into evidence the testimony of its two psychiatric expert witnesses as to any statements made by the Appellant to these two said witnesses while under hypnosis and further precluding the Appellant from offering into evidence the testimony of its two psychiatric expert witnesses as to their opinions or conclusions as to the insanity of the Defendant because they were based upon the information which they obtained while the Appellant was under hypnosis (T 1189) Counsel for the Appellant stated for the record that he could not call either of its two psychiatric expert witnesses based upon the Court's ruling (T 1206). The trial Court allowed the Appellant to proffer into evidence, in the absence of the jury, testimony of its two psychiatric expert witnesses.

Dr. Caddy testified as to his qualifications of an expert. Dr. Caddy was proffered as an expert witness and the Court entered its ruling qualifying Dr. Caddy as an expert witness in clinical psychology and in the use of hypnosis (T 1218). Dr. Caddy testified that he met with the Appellant on three occasions

on April 6, 1985, April 19, 1985, and April 28, 1985 (T 1221). Dr. Caddy testified that during the first session on April 6, 1985, the Appellant indicated to him that he did not know what had caused the death of Mrs. Trbovich. He further testified that the Appellant told him that he was not involved in Mrs. Trbovich's death and basically otherwise denied any involvement (T 1226). Dr. Caddy testified that based upon information which he had obtained from the police reports or a summary of the police procedures that had been filed in the investigation of the case, he determined that the Appellant was not being truthful with him (T 1227). Dr. Caddy testified that he left the Appellant alone and that he returned after 10 minutes (T 1230). Dr. Caddy then testified that he again questioned the Appellant as to his involvement in the death of Mrs. Trbovich and asked the Appellant if he was ready to reveal to this witness the facts as they had occurred. Dr. Caddy testified that the Appellant informed him that he had been dishonest with him because he was scared and also because on multiple occasions defense attorneys had told him not to reveal material. Dr. Caddy then went on to testify that the Appellant informed him that he was present in Mrs. Trbovich's house on June 6, 1977, and that he remembered striking Mrs. Trbovich with a wrench. He informed Dr. Caddy that he did so because he believed that Mrs. Trbovich could probably smell the odor of an alcoholic beverage or of gasoline on his breath and that he believed Mrs. Trbovich was writing a letter to his mother to tell her about his drinking. The Appellant informed Dr. Caddy that he became angry and that he decided that he had to stop Mrs. Trbovich from writing to his mother. He then approached the victim from the rear and he hit her with the wrench several times (T 1236). Dr. Caddy then testified that the Appellant was very vague about the whole process, but that he remembers

going back over to see the victim to determine whether or not she was breathing and that he was afraid that he might have killed her (T 1237). Dr. Caddy then testified that the Appellant informed him that he then cleaned himself up and then left the house in fear (T 1237). Dr. Caddy testified that the Appellant was not able to report any of the other details involved (T 1238). Dr. Caddy then testified that during the second session he performed various tests upon the Appellant and that he determined the Defendant to have a verbal scale I.Q. test result of 75 and a performance scale test result of 92. Dr. Caddy testified that although the test results in themselves do not prove brain damage at that point, that he then performed various other tests, including the Rorschach Ink Blot Test and the Thematic Appreciation Test. Dr. Caddy testified that as a result of these tests, he determined the Appellant to be brain damaged or brain impaired (T 1242). Dr. Caddy testified that at the end of the first session he did not choose to attempt, nor did he reach a conclusion as to whether or not the Appellant was sane or insane at the time of the killing of Mrs. Trbovich (T 1243). Dr. Caddy then testified that after the second session, he was able to say that, in general, on June 6, 1977, that the Appellant was sane. He further testified, however, that he was not willing at that point to commit himself to a definitive position on the Appellant's insanity. Dr. Caddy further testified that he determined that it was appropriate at that point to evaluate the Appellant under conditions of clinical hypnosis in order to determine whether or not the Appellant was sane or insane at the time that he killed Mrs. Trbovich (T 1245). Dr. Caddy testified that during the third visit with the Appellant which occurred at the Martin County Detention Center on April 28, 1985, that he was present along with Dr. Kosen. Dr. Caddy testified as to the process involved

in placing the Appellant under hypnosis and that in a relatively non-threatening way, he questioned the Appellant as to his life, starting at the age of four (T 1247). Dr. Caddy then testified that the Appellant explained to him the truth as to what occurred in Mrs. Trbovich's house on June 6, 1977. Dr. Caddy testified that the Appellant informed him that he had been drinking beer prior to entering Mrs. Trbovich's house. The Appellant told Dr. Caddy that he went into Mrs. Trbovich's house in order to call his father and that when he couldn't reach his father, he became exceedingly frustrated and angry. Dr. Caddy testified that the Appellant informed him that he became angry at Mrs. Trbovich because he thought that she was going to write a letter to inform his mother that he had been drinking. Dr. Caddy testified that the Appellant walked toward Mrs. Trbovich and beat her with a crescent wrench across the back of the head. The Appellant picked up a vase and slammed it across the back of Mrs. Trbovich's head. He then picked up a knife and stabbed her, but he was unable to say how many times he had stabbed her. The Appellant ripped the blouse off of Mrs. Trbovich up over her breast and pulled down her clothing to reveal the lower part of her body. The Appellant then bit Mrs. Trbovich on the breast. The Appellant placed his finger in or around her vaginal area. The Appellant then proceeded to clean up the mess and took Mrs. Trbovich's purse and left the house (T 1251-1256). Dr. Caddy testified that the hypnotic session lasted four hours and at the end of the session, the Defendant was soaking wet from sweat (T 1255-1266). Dr. Caddy then testified that in his expert opinion, that at the time and date of the killing of Mrs. Trbovich, that the Appellant did have a mental infirmity, defect or disease. He further testified that the mental infirmity or disease or defect caused the Appellant

to lose his ability to understand or reason accurately. He further stated that, based upon the Appellant's loss of ability to understand or reason accurately, that the Appellant did not know the nature or consequences of his acts. Dr. Caddy testified that he believed the Defendant did not intend to kill Mrs. Trbovich. He testified that the Appellant failed to have the capacity to appreciate that the nature of his actions would inevitably lead to Mrs. Trbovich's death. Dr. Caddy testified that in his expert opinion, the Appellant did not have a conscious pre-meditated intent to kill (T 1263-1264). Dr. Caddy concluded his testimony.

The Appellant asked the Court to reconsider its position and the Court denied the Motion to Reconsider and restated its Order (T 1283).

Counsel for the Appellant informed the Court that he intended to call Dr. Kosen to proffer his testimony out of the presence of the jury, but that it was his intention to rest his case based upon the Court's prior ruling (T 1284). The Appellant then called Dr. Dennis F. Kosen as a witness (T 1294). Dr. Kosen testified as to his qualifications as an expert. The trial Court ruled that Dr. Kosen was an expert in forensic psychiatry and hypnosis (T 1304). Dr. Kosen testified that he was not capable of forming a conclusion or opinion as to the Defendant's insanity or his premeditated intent to kill Mrs. Trbovich without making reference to the third hypnotic session (T 1305). Dr. Kosen testified that he was involved with two sesssion with the Defendant, the first session occurring on April 19, 1985 (T 1306). Dr. Kosen testified that the Appellant informed him as to his use of alcohol and that he was prone to sniffing gasoline from an early age (T 1307-1309). Dr. Kosen testified that the Appellant made a statement to him as to the events which occurred on June 6, 1977. Dr. Kosen testified that the Appellant informed him that he had

arrived at the Trbovich residence in connection with his job to mow her lawn. Dr. Kosen further testified that the Appellant told him that he went to Mrs. Trbovich's door in order to ask permission to make a phone call to his father. The Appellant informed this witness that he became very angry when he was not able to reach his father by phone. The Appellant further informed him that after coming out of the bathroom, that he struck Mrs. Trbovich several times with a crescent wrench. The Appellant had informed this witness that he had struck Mrs. Trbovich because he was concerned and afraid that Mrs. Trbovich was writing a letter to his mother to inform his mother as to his use of alcohol. The Appellant informed this witness that he struck Mrs. Trbovich several times with the crescent wrench and that he recalled stabbing her. He further remembered standing up over her body in the kitchen and attempting to wipe up the blood with a wash rag (T 1312-1315). Dr. Kosen then testified that after the first examination of the Appellant, he was unable to form an opinion as to the Appellant's sanity on June 6, 1977 (T 1315). Dr. Kosen did testify that he had reached the opinion or conclusion that the Appellant was brain impaired or brain damaged (T 1317). Dr. Kosen then testified that it was determined at that point that it was necessary to place Mr. Morgan under hypnosis in order to provide him with the ability to recall the events of June 6, 1977. Dr. Kosen testified that he was present in the Martin County Detention Center on April 28, 1985, when Dr. Caddy performed the hypnotic interview with the Appellant (T 1317). Dr. Kosen testified that he did not take part in the questioning of the Appellant but that he was present and provided Dr. Caddy with certain written questions which he might pose to the Appellant (T 1317). Dr. Kosen testified that the Appellant gave to him and Dr. Caddy a more detailed and specific version of the events which occurred on June 6, 1977 (T 1319). Dr. Kosen testified that the Appellant was able to fill

in the gaps in his memory. The Appellant stated that he had struck Mrs. Trbovich with a wrench, that he struck her over the head with the vase and that he stabbed her numerous times. The Appellant was able to discuss his feelings and his thoughts at the time while he was striking and stabbing Mrs. Trbovich. The Appellant informed the two doctors of his licking of the genitalia and the putting of his hand in the vagina of Mrs. Trbovich (T 1319-1320). Dr. Kosen then testified that it was his expert opinion that on June 6, 1977, during the killing of Gertrude Trbovich, that the Appellant did have a mental infirmity, defect or disease. He further testified that the mental infirmity, defect or desease did cause the Appellant to lose his ability to understand or reason accurately. He testified that because of the loss of the ability to reason or understand accurately, the Appellant did not know what he was doing. He further testified that the Appellant did not know that his acts were wrong. He testified that the Appellant did not understand the nature of his act and its consequences. He further testified that the Appellant did not know at that time that his act was wrong. Dr. Kosen further testified that in his opinion, the Appellant was insane at the time of the killing of Mrs. Trbovich on June 6, 1977. Dr. Kosen testified that prior to the hypnotic session with the Appellant, he was not able to draw a conclusion or opinion one way or the other as to whether or not the Appellant was sane or insane at the time of the killing of Mrs. Trbovich (T 1321-1342). Dr. Kosen concluded his testimony.

Counsel for the Appellant then informed the Court that based upon the Court's rulings and based upon the fact that the two expert witnesses had informed him that they were not able to state an opinion as to Mr. Morgan's sanity without reference to anything related to their hypnotic session, that

"I have no insanity defense and I am not going to call them for any purpose". The Appellant rested his case without offering any evidence (T 1355).

The Court entered its Order denying a Motion for Judgment of Acquittal at the end of the entire case (T 1386). The Appellant and Appellee gave their closing arguments (T 1397-1413). The Court read the jury instructions (T 1422). The jury returned its verdict of guilty of Murder in the First Degree (T 1445-1446).

The second phase of the trial began. The Appellee admitted on the record and took the position that the Appellant was entitled to put on evidence that the Appellant was placed under hypnosis, the testimony of the Appellant's two expert witnesses as to the statements made by the Appellant while under hypnosis and the opinions or conclusions of the two expert psychiatric witnesses as to the Defendant's insanity even though they were based upon the statements made to them by the Appellant while under hypnosis (T 1476). The Appellee announced to the Court and to the jury that it would rely on the evidence presented in the guilt and innocence phase to establish three aggravating factors for the jury's consideration as to it advisory sentence (T 1497). The Appellant commenced its presentation of its evidence in mitigation. The Appellant called Dr. Caddy, the clinical psychologist, to testify on behalf of the Appellant (T 1498). Dr. Caddy testified as to his expertise, and the Court found Dr. Caddy to be an expert in clinical psychology and in the field of hypnosis (T 1502-1516). Dr. Caddy testified that he interviewed the Appellant on three occasions. Dr. Caddy testified that the first interview on April 6, 1985, lasted seven hours. Dr. Caddy testified that he determined during the first session that the Appellant could not read or write. He also determined from the Appellant that there was a long history

of substance abuse including the use of alcohol and the inhalation of gas fumes. Dr. Caddy then testified as to the inconsistent statements made to him by the Appellant during the first session, as stated hereinabove. Dr. Caddy then testified that he determined that the Appellant was not being truthful with him based upon information which he had obtained from the police reports, as stated hereinabove. Dr. Caddy then testified that the Appellant provided him with a second version of the events as previously stated (T 1518-1535). Dr. Caddy testified that he determined that the Appellant was brain damaged in that there is a "left hemisphere of brain impairment likely limited to the temporal lobe that is really quite pronounced and profound in this man's case". (T 1536). Dr. Caddy testified that after the first session with the Appellant on April 6, 1985, he was not able to form an opinion as to the Appellant's sanity or insanity on June 6, 1977 (T 1538). Dr. Caddy then testified that a second session with the Appellant took place on April 19, 1985, and that the second session lasted for four and one-half hours. He testified as to the statements made by the Appellant to him during that second session, as stated hereinabove. Dr. Caddy testified that as a result of the second session with the Appellant, and based upon the vagueness with which the Appellant had reported the information as to the events of June 6, 1977, he was again not capable of concluding or drawing an opinion as to whether or not the Defendant was sane or insane at that time. Dr. Caddy testified that at that point it was determined that in order to clear up some of the vagueness and to fill in the gaps, it was determined that a procedure known as Age Regression Hypnotic Induction should be used. He testified that on the third visit he placed Mr. Morgan under hypnosis (T 1539). Dr. Caddy testified that the third and the hypnotic session occurred on April 28, 1985,

at the Martin County Detention Center. He testified that he and Dr. Kosen were present during the four and one-half hour session. He testified that he placed the Defendant in a hypnotic state. He testified that the Defendant was able to give him a more complete and detailed description of the events of June 6, 1977. The Appellant told him and Dr. Caddy that he had been sniffing gasoline the night prior to the killing of Mrs. Trbovich and, again around 9:30 to 10:00 in the morning on that day. The Appellant told them that he had sniffed some more gasoline around noon-time to approximately 1:00 o'clock. The Appellant reported to them that he also drank several beers on that day. The Appellant told them that when he approached Mrs. Trbovich's door, he determined that she knew that he had been drinking. The Appellant entered the victim's house to use the telephone and he became very frustrated when he could not get in touch with his father, as he needed his father's permission to go home. He requested of Mrs. Trbovich that he be allowed to use the bathroom. The Appellant informed them that after using the bathroom, he opened the door and he sees Mrs. Trbovich writing something. The Appellant became absolutely assured that Mrs. Trbovich was writing to his mother in order to inform her that she had smelled alcohol on the Appellant's breath and that he decided that he had to stop her. The Appellant informed them that he struck her with the crescent wrench and that he hit her across the head with the vase. The Appellant told them that he picked up a knife and stabbed Mrs. Trbovich, but he did not know how many times. The Appellant ripped Mrs. Trbovich's blouse and pulled it up over her waist and towards the top of her torso, revealing her breasts. The Appellant pulled down her clothing and then her undergarments below her groin. The Appellant bit her on the breast and then placed his hands inside her vagina, although

he had no intention of hurting her, but rather that he was intrigued about this whole process. The Appellant then stood up, became scared, and went over to see if Mrs. Trbovich was breathing. The Appellant then determined that there was nothing he could do to help her, he takes her purse, he cleans himself up and he proceeds to leave (T 1543-1548). Dr. Caddy then testified that, in his expert opinion, the Appellant did have a mental infirmity, defect or disease at the time of the killing of Mrs. Trbovich. He testified that as a result of the mental infirmity, defect or disease, the Appellant lost his ability to understand or reason accurately. He testified that because the Appellant had lost the ability to understand or reason accurately, it was his opinion that at the time of the attack upon Mrs. Trbovich with the wrench or with the knife, that the Appellant's capacity became so diminished as to render him incapable of appreciating the consequences of his acts (T 1548-1549). Dr. Caddy further testified that, in his expert opinion, the crime for which the Defendant was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. He further testified that during the attack on Mrs. Trbovich, he was incapable of conforming himself to the requirements of law or to appreciate the criminality of his conduct (T 1552-1553).

The Appellant then called Dr. Kosen, the psychiatrist, to testify on behalf of the Appellant (T 1614). Dr. Kosen testified as to his expert qualifications and the Court determined Dr. Kosen to be an expert in forensic psychiatry (T 1615-1627). Dr. Kosen testified that he examined the Defendant on two occasions. He testified that the first session on April 19, 1985, occurred at the Martin County Jail and that it lasted three hours. He testified as to the statements made to him by the Appellant at that time. (See Statement of the Case as appears hereinabove) He testified that generally the Appellant

remembered striking Mrs. Trbovich with a wrench and attempted to clean up the blood (T 1632). Dr. Kosen testified that he could not draw a conclusion or make a determination as to the Defendant's sanity of insanity at the end of the first session (T 1635). Dr. Kosen testified that it was then determined that a hypnotic session was necessary (T 1636). He testified that he was present during the hypnotic session which occurred on April 6, 1985, at the Martin County Jail and that he took notes and presented written questions to Dr. Caddy (T 1636). He testified that the Appellant gave a full account and was able to fill in some of the gaps and did give a more detailed version of the events of June 6, 1977, during the four hour session while under hypnosis (T 1638). Dr. Kosen further testified that the Appellant was able to relate to them a little more on his feelings or motives when he walked into Mrs. Trbovich's house and when he came from the bathroom (T 1638). (See the Statement of the Facts hereinabove). Dr. Kosen testified that the Appellant stated that he asked Mr. Trbovich if he could use her bathroom. The Appellant told them that he became afraid for the punishment that might follow and that he became angry at Mrs. Trbovich. He stated that he came out of the bathroom and that he began to think that he was not only angry, but he wanted to hurt her. He told them that he took out the wrench and impulsively struck her on the head. He stated that he struck her a number of times. He stated that he became angrier and that she had a look on her face that was similar to the look his mother would give him when she was angry. He stated that the look on Mrs. Trbovich's face was similar to that which his mother gave his father when she was fed up with his drinking or he came home late, or had done something wrong. He said that he began to panic and became afraid. At that point he virtually exploded and he threw a vase filled with flowers at her. He then stabbed her a number of times,

senselessly without realizing what he was doing. He raised her blouse and lowered her pants. He bit her on the right breast, and he put his hand into her vagina. He bit or licked her genitalia and that he stood up and realized what was going on around him. The Appellant became horrified and concerned as to whether or not Mrs. Trbovich was dead or alive. The Appellant set about trying to clean up the blood and to clean his clothes (T 1639-1641). Dr. Kosen then testified that, in his expert opinion, the Appellant had a mental infirmity, defect or disease on June 6, 1977, during the killing of Mrs. Trbovich. He testified that as a result of the mental infirmity, defect or disease, the Appellant lost his ability to understand or reason accurately. He testified that as a result of the loss of ability to understand or reason accurately, the Appellant did not know what he was doing. He testified that as a result of the loss of the ability to reason or understand, the Appellant did not know what would result from his actions and that he did not understand the consequences of his acts (T 1643-1644). He testified that the Defendant was insane at the time of the killing of Mrs. Trbovich (T 1646-1647). He testified that the crime for which the Appellant was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance and that the Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct with the requirements of law was substantially impaired (T 1647-1648).

The Appellant's mother, Alice Morgan, testified on behalf of the Appellant (T 1685-1688). The Appellant testified on his own behalf (T 1689-1696). The Appellant rested and presented no further evidence (T 1697).

The State presented its evidence as to the penalty phase of the trial. Dr. McKinley Cheshire,a psychiatrist, testified that he examined the Appellant in 1977. He testified that in his expert opinion, the Defendant was sane on June 6, 1977, based upon two clinical examinations. Dr. Cheshire testified that the Appellant was a "sexual psychopath" and had an "inadequate personality". Dr. Cheshire testified that the Appellant knew what he was doing at the time he murdered Mrs. Trbovich and that he knew what he was doing was wrong. He testified that the Appellant knew what would result from his actions at the time he killed Mrs. Trbovich and that in his expert opinion, the Appellant was not under the influence of extreme mental emotional disturbance at the time of the killing of Mrs. Trbovich. He further testified that the Appellant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was not substantially impaired. (T 1700-1707) The Appellee concluded its presentation of the evidence to be submitted to the jury on the penalty phase of the trial (T 1748). The Appellee and the Appellant gave their closing arguments to the jury as to the penalty phase of the trial (T 1758-1773). The Court gave its oral jury instructions as to to three aggravating factors and four mitigating factors which it was to consider (T 1793-1795). The jury commenced its deliberation as to its advisory sentence (T 1799). The jury returned and rendered an advisory opinion that the Court should impose the death penalty upon the Defendant, by a vote of 7 to 5 (T 1801-1802). The Court imposed the sentence of death citing three aggravating factors and two mitigating factors (T 1809). The Court entered its written Findings of Fact by the Court on June 7, 1985 (R 391-394). The Court found that three aggravating factors existed as enumerated in Section 921.141 (5) of the Florida Statutes, to wit:The capital felony was committed while the Defendant was engaged in the commission of or an attempt to commit sexual battery; the capital felony

was especially heinous, atrocious and cruel; and, the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The Court found two mitigating factors to exist as enumerated in Section 921.141 (6) to wit: The age of the Defendant at the time of the crime (i.e. 16 years of age); and, any other aspect of the Defendant's character or record, and any other circumstance of the offense (i.e. the Defendant's father was an alcoholic and the Defendant observed his father drunk on many occasions while the Defendant was a child). The Court specifically found, that the capital felony was not committed while the Defendant was under the influence of extreme mental or emotional disturbance. The Court also found that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not materially, substantially impaired. The Court specifically determined that there existed sufficient aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravating factors (R 391-394).

POINTS ON APPEAL

POINT I

DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION FOR CHANGE OF VENUE, SECOND MOTION FOR CHANGE OF VENUE, AND AMENDED SECOND MOTION FOR CHANGE OF VENUE?

POINT II

DID THE TRIAL COURT ERR IN SUSTAINING THE APPELLEE'S OBJECTION TO THE TESTIMONY OF THE APPELLANT'S TWO EXPERT PSYCHIATRIC WITNESSES DURING THE GUILT AND INNOCENCE PHASE OF THE TRIAL AND IN FURTHER PRECLUDING THE APPELLANT'S TWO EXPERT PSYCHIATRIC WITNESSES FROM TESTIFYING AS TO THE STATEMENTS MADE BY THE APPELLANT TO THESE TWO WITNESSES AND IN FURTHER PRECLUDING THESE TWO EXPERT PSYCHIATRIC WITNESSES FROM TESTIFYING AS TO THEIR EXPERT OPINION ON THE ISSUE OF THE APPELLANT'S SANITY AND STATE OF MIND?

POINT III

DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BASED UPON THE INSUFFICIENCY OF THE EVIDENCE TO PROVE PREMEDITATION WHERE THE EVIDENCE DID NOT NEGATE ALL REASONABLE HYPOTHESES OF NON-PREMEDITATED HOMICIDE?

POINT IV

DID THE TRIAL COURT ERR IN GRANTING THE APPELLEE'S CHALLENGE TO PROSPECTIVE JUROR FRANKLIN FOR CAUSE?

POINT V

DID THE TRIAL COURT ERR IN FAILING TO GRANT THE APPELLANT'S MOTION FOR A MISTRIAL BASED UPON THE STATEMENT MADE BY JUROR BLANKS DURING VOIR DIRE?

POINT VI

DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION TO PRECLUDE DEATH QUALIFICATION OF JURORS, MOTION TO PRECLUDE CHALLENGES FOR CAUSE OF DEATH-SCRUPLE-JURORS AND MOTION TO POSTPONE CHALLENGES FOR CAUSE OF DEATH-SCRUPLE-JURORS UNTIL THE PENALTY PHASE?

POINT VII

WOULD THE IMPOSITION OF THE DEATH PENALTY UPON A BRAIN DAMAGED SIXTEEN YEAR OLD CHILD BE GROSSLY DISPROPORTIONATE AND OFFEND THE CONTEMPORARY STANDARDS OF DECENCY EMBODIED IN THE CONSTITUTION PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT?

POINT I

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR CHANGE OF VENUE, SECOND MOTION FOR CHANGE OF VENUE, AND AMENDED SECOND MOTION FOR CHANGE OF VENUE.

Prior to trial, the Appellant filed a Motion for Change of Venue, a Second Motion for Change of Venue and an Amended Second Motion for Change of Venue. (R 257-258, 309-311, 323-328). The trial Court denied each of the three Motions. (R 75-78, 200-213).

On January 29, 1985, the Court heard various Motions. At that point and time, the Appellant brought up before the Court the Appellant's Motion for Change of Venue. The Court inquired as to whether or not the said Motion was grounded upon the general concept of pre-trial publicity, or whether it was based upon a confession which had been published in the media as in Oliver v. State, 250 So. 2d 888 (Fla. 1971). Counsel for the Appellant informed the Court that he would simply be relying on pre-trial publicity in general (R 76). The Court denied the Motion providing the Appellant with leave to file or further move for a change of venue at a later time (R 78).

On May 24, 1985, at a hearing before the Court, the Appellant brought on to be heard before the Court the Appellant's Second Motion for Change of Venue and Amended Second Motion for Change of Venue (R 200). At that time, counsel for the Appellant informed the Court that the basis for the Motion was the publication in the local newspapers of three articles which featured therein the alleged confession of the Appellant. The three articles were attached as exhibits to the two Motions. (R 312, 326-328).

In Oliver v. State, (supra), the Appellant filed a Motion for Change of Venue because the June 27, 1968 edition of the "Tallahassee Democrat", the sole daily newspaper published in the general Tallahassee area, featured a

transcript of an alleged confession made by Oliver. The transcript was presented in summarized form followed by selected portions. In the alleged confession, Oliver implicated himself and others and he stated a motive for the crime and gave a description of it. This Court held that the Motion for a Change of Venue should have been granted. This Court held that to do otherwise would constitute a "trial by newspaper". This Court, in its opinion, resolved the apparent conflict with Singer v. State, 109 So. 2d 7 (Fla. 1959) by pointing out that no confession had been presented as part of the publicity in that case. This Court attempted to resolve the supposed conflict by announcing the general rule that when a "confession" is featured in news media coverage of a prosecution, as in the instant case, a change of venue motion should be granted whenever requested. This Court went on to hold that the "voir dire process cannot cure the effect of a confession which has been given news media coverage". In Singer v. State, (supra) this Court held that the general rule is that an application for a change of venue is addressed to the sound discretion of the trial Court and that a ruling refusing to grant a change of venue will not be disturbed except upon a showing that there has been a palpable use of discretion. This Court went on to say that in ruling upon a Motion for a Change of Venue, the Court must liberally resolve in favor of the Defendant, any doubt as to the ability of the State to furnish him a trial by a fair and impartial jury, and that if any reasonable basis is shown for a change of venue, a properly made Motion should therefore be granted. This Court held, however, that the trial Court did not commit a palpable abuse of its discretion in denying the Motion for a Change of Venue simply because of wide publicity received concerning the efforts of the County Sheriff to apprehend the Defendant and publicity given to the Defendant's alleged dangerous character

and further publicity of a reward for the arrest and conviction of the slayer.

The Appellant would submit that the Court erred for two reasons. First, the Appellant would submit that the trial Court's denial of the Motion for a Change of Venue was in error in that the Appellant had established sufficient evidence of general pre-trial publicity. It must be remembered that this case had been previously tried on two occasions. Consequently, both of those convictions and death sentences were reversed and remanded back to the trial Court for subsequent trial. Prior to the first trial in December, 1977, the Appellant filed a Motion for a Change of Venue which was denied. The second trial produced an additional amount of publicity because of the fact that the conviction and sentence had been reversed and that the case was being remanded back to Martin County for a second trial. No Motion for a Change of Venue, however, was made prior to the second trial. This Appellant would submit that a sufficient showing of general pre-trial publicity was established by the following facts: The same case had been tried and the Defendant was convicted on two prior occasions on the charge of First Degree Murder; the Defendant had previously been sentenced on two prior occasions; the two prior convictions for First Degree Murder and the two prior sentences of death were reversed and remanded back to the trial Court; the general pre-trial publicity prior to the third and instant trial emphasized that the Appellant had previously been tried, convicted and sentenced twice for the very same crime for which he was then scheduled to stand trial in Martin County.

In McCaskill v. State, 344 So. 2d 1276 (Fla. 1977), this Court adopted the test set forth in Murphy v. Florida , 421 U.S. 794, 95 S.C.t 2031, 44 L. Ed. 2d 589 (1975) and in Kelly v. State, 212 So. 2d 27 (Fla. 2d DCA 1968) for

determining whether or not to grant a change of venue. According to that test, determination must be made as to whether the general state of mind of the inhabitants of the community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors cannot possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom. In Manning v. State, 378 So. 2d 378 (Fla. 1979), this Court held that a trial Judge is bound to grant a Motion for a Change of Venue when the evidence presented reflects that the community is so perversely exposed to the circumstances of the incident that prejudice, bias and preconceived notions are the natural result. This Court went on to say that the trial Court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process or may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause. This Court held that the evidence sufficiently established that the community was so perversely exposed to the circumstances of the incident that the Defendant could not secure a fair and impartial trial in Columbia County. As such, this Court held that the Motion for a Change of Venue should have been granted. Obviously, each case must be determined on its own facts. Similar claims of prejudice for failure to grant a change of venue were rejected in McCaskill v. State, 344 So. 2d 1276 (Fla. 1977); Dobbert v. State, 328 So. 2d 433 (Fla. 1976); Murphy v. Florida, (supra); and Thomas v. State, 374 So. 2d 508 (Fla. 1979). The Appellant would submit, however, that the facts which were known to the Court at the time of the Motion for a Change of Venue were sufficient to require the granting of the said Motion upon the grounds of general pre-trial publicity.

The Appellant would submit, however, that even if this Court should rule that there was not a sufficient showing of general pre-trial publicity, that the decision of this Court in Oliver v. State, (supra) requires and mandates that this Honorable Court find that the trial Court erred in denying the Motion for a Change of Venue. This Court stated therein that the voir dire process cannot cure the effect of a confession which has been given news media coverage. As such, the only determination left for this Court to make is whether or not there has been a sufficient showing at the trial level of a "confession" which has been "featured" in the local news media. A review of the exhibits which were attached to the various Motions shows that the newspaper articles specifically refer to a "hypnosis session in which James Morgan detailed the 1977 stabbing of an elderly Stuart woman". During the session, "Morgan described how he hit Mrs. Trbovich several times with a crescent wrench. Then, while she still fought with him, he dragged her into the kitchen and stabbed her dozens of times with a bread knife. He then sexually molested her, according to the recording". The article then went on to state that "Morgan, who mowed the lawn at Mrs. Trbovich's home, said under hypnosis that he thought Mrs. Trbovich was writing a letter to his mother to tell her that she had seen him drink a beer, he was afraid his mother would be angry and take away his motorcycle". (R 326). The second newspaper article which was attached to the Motion again referred to "a video tape in which murder suspect James Morgan, under hypnosis, detailed the 1977 stabbing death of an elderly Stuart woman". The Appellant would submit that the three newpaper articles clearly refer to a "confession" and that the confession was "featured" in the newpaper articles thereby mandating and requiring the granting of the Motion for a Change of Venue.

In conclusion, it is clear that the trial Court erred in denying the Motion for a Change of Venue in the first instance in that there was a sufficient showing of general pre-trial publicity and in the second instance because of the featuring of a confession by the Appellant in the local news media. Therefore, this Court should vacate the Judgment and Sentence and remand for a new trial.

POINT II

THE TRIAL COURT ERRED IN SUSTAINING THE APPELLEE'S OBJECTION TO THE TESTIMONY OF DR. CADDY AND DR. KOSEN AND IN FURTHER PRECLUDING THE APPELLANT'S TWO PSYCHIATRIC WITNESSES FROM TESTIFYING AS TO THE STATEMENTS MADE BY THE APPELLANT WHILE UNDER HYPNOSIS AND IN FURTHER PRECLUDING THESE TWO EXPERT PSYCHIATRIC WITNESSES FROM TESTIFYING AS TO THEIR OPINION AS TO THE APPELLANT'S INSANITY AT THE TIME OF THE KILLING.

Simply stated, the trial Court erred in its reading, interpretation and application of Rodrigues v. State, 327 So. 2d 903 (Fla. 3d DCA 1976). Alternatively, the trial Court erred in misreading, misinterpreting or misapplying Bundy v. State, 455 So. 2d 330 (Fla. 1984) and Bundy v. State, 471 So. 2d 9 (Fla. 1985).

At the close of the presentation of the evidence by the Appellee, and after the Court's denial of the Appellant's Motion for a Judgment of Acquittal, and prior to the commencement of the presentation of the evidence on behalf of the Appellant, the Appellee, by way of a Motion, objected to the testimony of Dr. Caddy and Dr. Kosen, the Appellant's two expert psychiatric witnesses, from testifying. The Appellee objected to these two expert psychiatric witnesses testifying as to any of the statements made by the Appellant while under the influence of hypnosis during the session which occurred on April 28, 1985. (T 1163) The Appellee further objected to these two expert psychiatric witnesses testifying as to any conclusion or any opinion that either expert had if the conclusion or opinion was based upon what was said by the Appellant during the hypnotic session of April 28, 1985 (T 1163). The Appellant would note for the Court's consideration that this Motion was made by the Appellee notwithstanding the prior Order of the Court that any and all Motions were to be filed on or before January 25, 1985. (R 44) Counsel for the Appellant, by way of a Motion for a Mistrial, noted to the Court that the Motion violated the prior Order of this Court that all Motions were to be heard prior to trial and to be filed

prior to January 25, 1985. (T 1193-1195) The Appellant does not hereby argue that the denial of the Motion for a Mistrial constitutes one of the grounds for Appeal on its own, but does submit this issue, and the alleged prosecutorial misconduct, for this Court's consideration in conjunction with the issue raised on Appeal herein.

The Appellee based its Motion or objection on the case of Rodrigues v. State, 327 So. 2d 903 (Fla. 3d DCA 1976). (T 1163). The Appellee made a second objection based upon the fact that it believed that the expert witnesses would be testifying that the Appellant was insane under a theory of irresistible impulse which it alleged was not recognized by the State of Florida (T 1165). As a third grounds for the Motion or objection, the Appellee cited Bundy I (supra) and Bundy II (supra). (T 1167-1169) Later, however, the Appellee submitted that it was withdrawing its Motion or objection as to the second ground as stated hereinabove, but that it was relying on Rodrigues v. State, (supra) and Bundy I (supra) and Bundy II (supra) (T 1170-1178). Counsel for the Appellant objected to the Motion or objection. (T 1170-1176). Counsel for the Appellant noted for the record that if the Court were to grant the State's Motion or objection that this would effectively preclude him from offering either of the two psychiatric expert witnesses to testify on behalf of the Appellant for any reason. Counsel for the Appellant noted for the record that these two psychiatric expert witnesses were unable to reach their conclusion or opinion as to the sanity or insanity of the Appellant until after the completion of the third, hypnotically induced, session of April 28, 1985 (T 1183-1184). The trial Court sustained the State's objection to the admission into evidence of any of the Appellant's statements made or procured during hypnosis (T 1189). Likewise, the Court sustained the Appellee's

Motion or objection to the testimony of the two expert psychiatric witnesses as to the insanity of the Appellant (T 1190). Counsel for the Appellant then noted for the record that the two expert psychiatric witnesses were not able to testify and to give an opinion of insanity, under the Court's ruling, because they did not reach that opinion until after the hypnotic session and based upon the statements made by the Appellant to them, they could not even testify (T 1191). The Court did allow the Appellant, however, an opportunity to make a proffer as to the testimony of the two psychiatric expert witnesses for Appellate purposes (T 1207).

The Appellant would submit that the ruling of the Court was in error. The Court's ruling, in sustaining the Appellee's objection, states as follows:

> "Dealing first with the State's objection to the Defendant's statements procurred during hypnosis, the objection is sustained. Basically, the Court can't determine from arguments in the record at this point and the reliability of statements procurred under hypnosis, particularly in this situation.
>
> Hypnosis essentially is, under the law of the State, a scientific test or procedure and there must be a preliminary showing that the statements so procurred are reliable, and there is not a sufficient showing.
>
> Concerning the giving of opinion based upon the Defendant's statements during hypnosis, likewise that objection is sustained for the same reason".

The Appellant would submit that the Court, in its ruling, extended Rodrigues v. State, (supra) beyond that which the Court intended in that opinion. The sole point raised in that case was whether the trial Court committed reversible error in wholly excluding all evidence of statements made by the Defendant to Dr. Mutter, the Defendant's expert psychiatric witness, while the Defendant was under hypnosis and further whether the trial Court erred in barring Dr. Mutter from testifying

as a fact that he placed the Defendant under hypnosis. The only material issue involved in that case was the Defendant's insanity. The Defendant was attempting to use Dr. Mutter's testimony to show the state of mind of the Defendant at the time he did the shooting and that it formed, in part, the basis of the doctor's opinion that the Defendant was suffering from paranoid schizophrenia which prevented him from knowing and understanding the nature and consequences of his acts. The trial Judge sustained and the Appellate Court affirmed the State's objection to the statements made by the Defendant while under hypnosis and any reference by the doctor to the use of that procedure. Nowhere in that case, however, did the issue arise as to the admissibility of the expert's testimony as to insanity (or state of mind of the Defendant). The sole issue in Rodrigues (supra) was the admissibility of the Defendant's statements made while under hypnosis and the admissibility of the experts' testifying to the fact that he had used the hypnotic procedure. Nowhere in Rodrigues (supra) did the Court reach the issue as to the admissibility of the expert's testimony as to sanity or insanity. In fact, however, it would appear that the expert witness, Dr. Mutter, was able to testify, in substance, that the Defendant was suffering from a major medical disorder which was sufficient in nature to prevent him from knowing the nature and consequences of his acts. As such, the case sub judice can be distinguished from Rodrigues (supra).

Additionally, the Appellant would submit that the decisions of this Court in Bundy I (supra) and Bundy II (supra) do not support the trial Court's decision in the case at bar. As in Key v. State, 430 So. 2d 901 (Fla. App. 1 Dist. 1983), the Appellate Court had to deal with the issue of the admissibility of hypnotically "refreshed" testimony. In the case at bar we are not dealing with hypnotically "refreshed" testimony. In Key v. State,(supra) the Court held that an identification made after a witness's memory was refreshed through hypnosis, was

admissible and that the credibility of the testimony was a question for the jury, citing Clark v. State, 379 So. 2d 371 (Fla. 1st DCA 1980). The Appellate Court in Key v. State,(supra) held that the trial Court did not abuse its discretion in admitting testimony of a victim, which testimony had been refreshed through hypnosis. Although, the Court went on to recommend the use of the precedural safeguards set out in State v. Heard, 86 NJ 525, 432 A. 2d 86, 96, 97 (1981), a decision by the Supreme Court of the State of New Jersey, the Court specifically held that "we do not adopt them as pre-requisites to the admissibility of such testimony. Implementation of these workable safeguards by the trial Courts will protect the accused from unreliable evidence while preventing the blanket exclusion of testimony refreshed with the use of hypnosis, a valuable resource when dealing with traumatized victims of crime". The Appellant would suggest that the use of hypnosis would also constitute a valuable resource to the alleged perpetrators in attempting to defend against charges which they face. In Key v. State, (supra) the Court specifically stated "we find no basis for applying Frye's rule to disallow the victims'hypnotically refreshed testimony in this case or to preclude as incompetent the testimony of the witness whose recollection has been refreshed by hypnosis. We hold that the admissibility of such evidence is within the discretion of the trial Court and that a ruling regarding admissibility will not be disturbed absent a showing of an abuse of discretion". The court then went on to suggest the guidelines of Heard (supra).

Likewise, in Bundy I, (supra) and Bundy II, (supra) the Court was dealing with the issue of the admissibility of hypnotically "refreshed" testimony. In Bundy I (supra), this Court held that the testimony of an eye witness who

identified the Defendant was not subject to being excluded on grounds that the witness was hypnotized prior to trial for the purpose of improving the quality in detail of her recollection where it was clear from evidence that, although the hypnotic's session made the witness's memory seem clear at the time, it did not ultimately add to or change the way she recalled the events. In Bundy II, (supra) again, this Court dealt with the issue of the admissibility of hypnotically "refreshed" testimony. Clearly, both Bundy I (supra), and Bundy II, (supra) can be distinguished from the case at bar. In the case at hand we are not dealing with hypnotically refreshed testimony. The case at hand deals with the use of information or evidence which was obtained through the use of hypnosis. In the case at hand, by using hypnosis, the psychiatric expert witnesses were able to obtain information through which they could testify as to the sanity or insanity of the Appellant. In Bundy II, (supra) the Court specifically said that "we do not undertake to foreclose the continued use of hypnosis by the police for purely investigative purposes. Any corroborating evidence obtained is admissible in a criminal trial subject to other evidentiary objections". The Appellant would suggest that the basis for this statement should no less serve for and to the benefit of the accused. In the case at hand, the accused used hypnosis for purely investigative purposes. It used hypnosis in order to obtain other corroborating evidence of the Appellant's insanity which should not be rendered inadmissible merely because it was obtained through the use of hypnosis but would only be rendered inadmissible based upon "other evidentiary objections".

As previously stated, this Court held in Bundy I, (supra) that the fact that the hypnosis took place was a matter relating only to the weight of the testimony and not as to its admissibility. This Court in Bundy II, (supra) stated that

the issue confronting it was the witness whose memory has been "refreshed" or "enhanced" through State-sponsored hypnosis. This Court cited People v. Gonzales, 415 Mich. 615 320 N.W. 2d 743 (1982) and quoted therein that Court's opinion as follows:

> "Hypnosis has not received sufficient general acceptance in the scientific community to give reasonable assurance that the results produced under even the best of circumstances will be sufficiently reliable to outweigh the risks of abuse and prejudice".

For these reasons, this Court held,

> "We likewise hold that hypnotically refreshed testimony is per se inadmissible in a criminal trial in this State, but hypnosis does not render a witness incompetent to testify to those facts demonstrably recalled prior to hypnosis".

This Court was specifically dealing with the admissibility of hypnotically "refreshed" testimony. This is not the issue facing the Court in this case.

Assuming arguendo, however, that this Court holds that the issue in the case at hand is the same as the issue that it was faced with in Bundy II (supra), the Appellant would submit that this Court's own ruling in that case would not apply because the hypnotic session took place in the case sub judice after Bundy II, (supra) became final. In the case at hand, the third hypnotic session occurred on April 28, 1985. The decision of this Court in Bundy II, (supra) was issued on May 9, 1985, re-hearing denied July 11, 1985. Clearly, the hypnotic session took place before Bundy II,(supra) became final.

In conclusion, the Appellant would submit that the trial Court erred in precluding the Appellant from offering into testimony the testimony of the two psychiatric expert witnesses as to the statements made by the Appellant to these two said witnesses and in further precluding the opinions of the two psychiatric expert witnesses that the Appellant was insane at the time of the commission of the crime for which he was convicted. Based thereon, the Judgement of Conviction and Sentence should be vacated and the case remanded to the Lower Tribulal for a new trial.

POINT III

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BASED UPON THE INSUFFICIENCY OF THE EVIDENCE TO PROVE PREMEDITATION WHERE THE EVIDENCE DID NOT NEGATE ALL REASONABLE HYPOTHESES OF NON-PREMEDITATED HOMICIDE.

First degree murder is the unlawful killing of a human being while committing or attempting to commit one of the felonies enumerated in #782.04(1), Fla. Stat. (1977) or when done from a premeditated design. #782.04(1)(a) Fla. Stat. (1977). Proof of the underlying felony or proof of premeditation is essential to sustain a verdict of first degree murder. Either the underlying felony or premeditated design to kill must be proven beyond a reasonable doubt. Here, no premeditated deisgn to kill was proven beyond every reasonable doubt. Appellant made two motions for judgments of acquittal on this basis which were erroneously denied. (T 1162-1386). The verdict in this case is contrary to the strong evidence that this was a killing caused by Appellant's extreme mental problems.

The importance of proving premeditation beyond a reasonable doubt has often been emphasized by this Court. As was stated in Snipes v. State, 154 Fla. 262, 17 So. 2d 93 (1944):

> "An essential element of murder in the first degree is premeditated design and in order to constitute murder in the first degree it must be established beyond every reasonable doubt, not only that the accused committed an act which resulted in the death of another human being, but it must be proven that before the commission of the act which results in death, that the accused had formed in his

> mind a distinct and definite purpose to take the life of another human being and deliberated or meditated upon such purpose for a sufficient length of time to be conscious of a well-defined purpose and intention to kill another human being". (Emphasis Supplied). 17 So. 2d at 97.

Thus the prosecution must prove beyond a reasonable doubt that the accused had formed a distinct and definite purpose to kill and that he had deliberated on that purpose. Purkhiser v. State, 210 So. 2d 448, 449 (Fla. 1968); Douglas v. State, 152 Fla. 63, 10 So. 2d 731 (1942); Hines v. State, 227 So. 2d 334 (Fla. IDCA 1969).

Proof of premeditation may be circumstantial. Hill v. State, 133 So. 2d 68 (Fla. 1961). However, for circumstantial evidence to prove premeditation it must exclude all reasonable hypotheses other than premeditation. Thompson v. State, 276 So. 2d 218 (Fla. 4DCA 1973). In Driggers v. State, 164 So. 2d 200 (Fla. 1964), this Court reversed a conviction for first degree murder because the circumstances which the state relied on to prove premeditation were not "inconsistent with any reasonable hypothesis of (the defendant's) innocence". Id at 203. This Court went on to state that:

> "The State's case against the Appellant is based upon circumstantial evidence. We have repeatedly held that in order for a conviction to be sustained on such evidence it must not only be consistent with defendant's guilt, but it must also be inconsistent with any reasonable hypothesis of his innocence". Id at 203

Thus, if the state relied upon circumstantial evidence to prove premeditation the circumstances must exclude every reasonable hypothesis of nonpremeditated homicide.

The evidence showing premeditation must show some point in time from which the specific intent to kill is formulated and entertained. In Weaver v. State, 220 So. 2d 53 (Fla. 2DCA 1969) the Court reversed the conviction for first degree murder and found the evidence insufficient to support a finding of the element of premeditation. The Court in Weaver stated:

> "Premeditation has been defined as a fully formed conscious purpose to kill existing in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which the act of killing ensues. While it is true that no particular length of time is necessary in order to make the specific intent premeditated, nevertheless some time must have passed, however, brief, during which the specific intent is reflected upon or entertained. It necessarily follows that there must be some point from which reasonable minds can compute such a period of time. It is rudimentary, of course, that intent may be inferred from circumstantial evidence. But the point of time at which the specific intent to kill is inferentially formed cannot be left to guesswork and speculation". (Emphasis Supplied). Id at 59

Thus, the evidence must establish some distinct point in time at which the specific intent to kill was formulated.

The evidence of premeditation in the present case was circumstantial and failed to exclude several reasonable hypotheses of non-premeditated homicide. The State's evidence consisted entirely of putting together physical evidence, photographs of the deceased and the homicide scene, and an analysis of this evidence by the various experts. There was no direct evidence whatsoever.

Appellant would submit that to the contrary, the evidence points strongly to an impulsive killing caused by a sixteen year old boy whose

history of severe mental problems caused a killing without any premeditated design or deliberation. It is the bizarre nature of this strange array of evidence which evinces the "depraved mind" contemplated by non-premeditated homicide. (T 859, 944, 933, 1066, 1072, 1076, 1099, 1100, 1133, 1138, 1146). The bite marks on the breast and the multiple stab wounds are equally consistent with an impulsive and non-reflective killing. (T 1099).

The evidence of Appellant's extreme mental disorders was abundant. Although excluded, he had a viable insanity defense. Further, it had been determined that due to his mental retardation he functioned at a level below the eighth grade of school (T 1222). Both Drs. Kosen and Caddy testified, out of the presence of the jury, that Appellant was brain damaged and that due to this fact, he was unable to make good judgments or otherwise premeditate (T 1259-1322). For this reason, the State used the physical evidence to create the facade that the homicide was premeditated. Appellant's mental history clearly indicates it was not.

Violence and multiple stab wounds are equally consistent with a second degree murder. In Austin v. United States, 382 F. 2d 129 (D.C. Cir. 1967) the court reversed a conviction for first degree murder where the victim was killed by multiple stabbings. The court stated:

> "The evidence and multiple wounds . . . cannot, standing along, support an inference of a calmly calculated plan to kill requisite for premeditation. . . as contrasted with an impulsive and senseless albeit sustained frenzy". Id at 139.

In People v. Hoffmeister, 229 N.W. 2d 305 (1975) the court reversed a conviction for first degree murder with the following rationale:

> "The brutality of a killing does not itself justify an inference of premeditation . . . The mere fact that the killing was attended by much violence or that a great many wounds were inflicted is not relevant . . . as such a killing is just as likely (or perhaps more likely) to have been on impulse". Id at 307

Multiple stab wounds are equally consistent, if not more consistent, with a frenzied attack characteristic of a depraved mind regardless of human life than with a premeditated homicide.

This court has recognized the principle that multiple stabbings can indicate a frenzied attack rather than a coldly calculated premeditated homicide. Jones v. State, 332 So. 2d 615, 616 (Fla. 1976)[1] Sub judice the nature of the killing tells us little or nothing about premeditation.

This is a bizarre case in many respects. There are many facts Appellee leaves unexplained with his theory of premeditation. The physical evidence cannot camouflage lack of any specific intent to kill. The circumstances are clearly insufficient to exclude every reasonable hypothesis of non-premeditated homicide. Appellee has merely surmised that this was a first degree murder. The facts are equally consistent with an impulsive, frenzied killing by a person with extreme mental problems.

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[1]Jones involved a homocide during a rape, so the question of the degree of murder was not directly raised.

POINT IV

THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S CHALLENGE TO PROSPECTIVE JUROR FRANKLIN FOR CAUSE.

During the process of voir dire, prospective juror Miss Franklin was questioned by counsel for the Appellant and counsel for the Appellee (T 251-257). After prospective juror Franklin was questioned by both sides, the Appellee made its Motion for Cause to excuse prospective juror Franklin (T 257). Counsel for the Appellant objected (T 258). The trial Court granted the Motion for Cause and prospective juror Franklin was excused (T 258).

The basis for the Appellant's objection to the excusal of prospective juror Franklin was Wainwright v. Witt, (infra). In this case, the accused was tried by a jury in this State and convicted of First Degree Murder. In accordance with the jury's recommendation, he was sentenced to death. On Appeal, Witt claimed that several prospective jurors had been improperly excluded for cause because of their opposition to capital punishment, in violation of Witherspoon v. Illinois, 391 U.S. 510. After unsuccessfully seeking postconviction review in the State Courts, Witt filed a petition for a writ of habeas corpus in Federal District Court under 28 U.S.C. Section 2254. That Court denied the petition. The Court of Appeals reversed and granted the writ, holding that, on the basis of the voir dire questioning by the prosecutor, one of the prospective jurors was improperly excluded for cause under Witherspoon (supra). The Court drew the standard for determining when a juror may properly be excluded under Witherspoon (supra at page 522, n. 21) which states that jurors may be excluded for cause if they make it "unmistakeably clear" that they would "automatically" vote against capital punishment without regard to the evidence or that their attitude toward the death penalty would prevent them from making an impartial decision as to the

Defendant's "guilt". The Supreme Court of the United States held that the proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath". Adams v. Texas, 448 U.S. 38, 45. In addition to dispensing with Witherspoon's reference to "automatic" decision making, the court held that this standard does not require that a juror's bias be proved with "unmistakeable clarity". The Court held that given this standard, the Court of Appeals erred in focusing unduly on the lack of clarity of the questioning of the prospective juror, and in focusing on whether her answers indicated that she would "automatically" vote against the death penalty. The Supreme Court held that under the facts of the case before it, the prospective juror in question was properly excused for cause. Wainwright v. Witt, 105 Supreme Court 844, 83 L. E. d 2d 841 (1985).

In the case sub judice, the Appellant argued that prospective juror Franklin had made it clear that she could consider the circumstances and that if she felt the circumstances were appropriate, she could recommend life versus recommending the death penalty. In other words, she had therefore stated that she could fulfill her obligation as a juror. Appellant further argued that prospective juror Franklin survived the test of Wainwright v. Witt, (supra) because nothing that she said showed that she was substantially impaired from performing her duties as a juror. The duties as a juror are to weigh the circumstances and to come to an advisory recommendation. Although she said that she could not recommend death, the Appellant argued that it was not her duty to recommend death. Her duty as a juror was to weigh the circumstances and to render an advisory opinion. Neither

Witherspoon (supra) or Witt (supra) entitle the State to have a juror absolutely committed to death. The Appellant would submit that notwithstanding the fact that prospective juror Franklin answered "yes" in response to the question "Is that substantially impaired to recommend death?", the trial Court erred in granting the Motion to excuse her for cause. The issue is not whether or not the prospective juror would use the words "substantially impair", but whether or not a review of the entire colloquy in its totality would show that the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath". The Appellant would submit that the trial Court erred in granting the Motion to excuse prospective juror Franklin for cause and that this Court should vacate the Judgment of Conviction and Sentence and remand the case to the trial Court for a new trial.

POINT V

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A MISTRIAL BASED UPON THE STATEMENT MADE BY JUROR BLANKS DURING VOIR DIRE.

The Appellant would submit that the entire proceedings at the trial level was infected with reversible error when prospective juror Blanks commented in open Court, before the entire jury panel, that the Appellant had been previously convicted. During the process of voir dire, while in open Court, the Court questioned two of the prospective jurors as to whether or not either of them knew anyone involved in the case or whether they were related to anyone involved in the case. One of the jurors answered "Yes". The other prospective juror, Mr. Blanks, stated "At the time he was convicted, I was in Court at that time". (T 545) The Court then asked of Mr. Blanks if "You know James Morgan?" Prospective juror Blanks responded, "Not personally, but at the time he was convicted, I was in Court". (T 545-546) Subsequently, again, the following colloquy took place between the Court and prospective juror Blanks:

> Q. Do you remember something about the case from the time you were actually in the courtroom when Mr. Morgan was here?
>
> A. Yes.
>
> Q. We will talk with you about that out of the presence of the other jurors.

Subsequently, counsel for the Appellant informed the Court that he was making a Motion for a Mistrial based upon the comments of prospective juror Blanks in open Court. (T 549). The Court denied the Motion for a Mistrial (T 551).

Although the Appellant has no case law to submit which falls within the four corners of the issue raised herein, it is submitted that no safeguards which the Court could have taken could rehabilitate the defective status of the proceedings once prospective juror Blanks made his comments in open Court. On at

least two occasions, prospective juror Blanks used the word "convicted" in reference to his prior appearance in Court and in connection with the Appellant. The Appellant would submit that the trial Court erred in denying the Motion for a Mistrial and that this Honorable Court should reverse the Judgment of Conviction and Sentence and remand the matter to the trial Court for a new trial.

POINT VI

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO PRECLUDE DEATH QUALIFICATION OF JURORS, MOTION TO PRECLUDE CHALLENGES FOR CAUSE OF DEATH-SCRUPLE-JURORS AND MOTION TO POSPONE CHALLENGES FOR CAUSE OF DEATH-SCRUPLE-JURORS UNTIL THE PENALTY PHASE.

Prior to the trial, the Appellant filed three Motions which were all argued before the Court at one time. The three Motions included a Motion to Preclude Death Qualification of Jurors, a Motion to Pospone Challenges for Cause of Death-Scruple-Jurors Until the Penalty Phase, and a Motion to Preclude Challenges for Cause of Death-Scruple-Jurors. The trial Court denied all three Motions (R 71-73, 261-271). Although the three Motions were brought on, argued and ruled on separately, the Appellant would submit that this Court should consider the three Motions as though they were made in conjunction with one another. The basis for the Motion to Preclude Death Qualification of Jurors alleged that studies have shown that the process of death qualification of jurors results in a jury which is "prosecution-prone". It further alleged that by seating and accepting "prosecution-prone" jurors, the Appellant would be denied his rights to a fair and impartial trial by jury representing a cross section of the community as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 22, of the Florida Constitution. The Appellant also argued that this would constitute a violation of his right to Equal Protection of the Law and Due Process of Law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 9, of the Florida Constitution. In effect, by death qualifying jurors in capital cases and not requiring the death qualification of jurors in non-capital cases, there is a violation of the Equal Protection Clauses of the Constitution of the United States and of the State of Florida. The basis for the Motion to Postpone

Challenges for Cause of Death-Scruple-Jurors Until the Penalty Phase was essentially the same as the basis for the prior Motion. In support of the Motion to Preclude Challenges for Cause of Death-Scruple-Jurors, the Appellant argued that death-scruple persons are an identifiable class of citizens. The exclusion of death-scruple jurors creates a "prosecution-prone" jury. Such a jury is more likely to convict a person charged with First Degree Murder. The exclusion of death-scruple-jurors denies the accused the right to Due Process Equal Protection of the Law and a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 22 of the Florida Constitution. Counsel for the Appellant also cited Witherspoon v. Illinois, 391 U.S. 510 at 518 (1968) and Davis v. Georgia, 97 S. Ct. 399 (1976). Additionally, Appellant argued that the exclusion of death-scruple-jurors deprives the Defendant of the right to be tried by a jury selected from a representative cross-section of the community as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 22, of the Florida Constitution. Taylor v. Louisiana, 419 U.S. 522 (1975). The Appellant would submit that a person with a fixed opinion against capital punishment may still be able to follow the instructions of the trial Judge. Boulden v. Halman, 394 U.S. 478 at 483. There is no compelling justification for excluding death-scruple-jurors since under Section 921.141 of the Florida Statutes, the jury does not finally impose sentence, the advisory sentence of the jury occurs at the second stage of a bifurcated trial and the verdict is rendered by a majority vote of the said jurors.

Additionally, the Appellant would submit that the exclusion of death-scruple-jurors subjects the accused to cruel and unusual punishment as prohibited by the United States Constitution and by Article I, Section 17, of the Florida Constitution

because the jurors who will be selected for the trial will be incapable of performing the function demanded by Woodson v. North Carolina, 428 U.S. 280 (1976), "maintaining a link between contemporary community values and the penal system". Gregg v. Georgia, 428 U.S. 152 (1976).

Wherefore, the trial Court erred in denying the three Motions filed by the Appellant and this Court should reverse the Judgment of Conviction and Sentence and remand the case to the trial Court for a new trial.

POINT VII

WOULD THE IMPOSITION OF THE DEATH PENALTY UPON A BRAIN DAMAGED SIXTEEN YEAR OLD CHILD BE GROSSLY DISPROPORTIONATE AND OFFEND THE CONTEMPORARY STANDARDS OF DECENCY EMBODIED IN THE CONSTITUTION PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

The Eighth Amendment draws its meaning "from the evolving standards of decency that mark the progress of a maturing society". Trop v. Dulles, 356 U.S. 86, 110 (1958). In Gregg v. Georgia, 428 U.S. 153 (1976) the Supreme Court of the United States held that excessive punishments are unconstitutional where such punishment "(1) makes no reasonable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground". Coker v. Georgia, 433 U.S. 584, 592 (1977).

The question as to whether imposing the death penalty upon a sixteen year old child constitutes cruel and unusual punishment was to have been answered in Eddings v. Oklahoma, _____U.S. _____ 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). Unfortunately, the United States Supreme Court conveniently sidestepped the issue while reversing on other grounds. The Court in doing this stated:

> "Because we decide this case on the basis of Lockett v. Ohio, 438 U.S. 586 (1978), we do not reach the question of whether - in light of contemporary standards the Eighth Amendment forbids the execution of a Defendant who was 16 at the time of the offense".

This sidestep appeared to have bothered certain members of the Court, as noted by the dissent of Chief Justice Burger, (with whom Justices White, Blackmun and Rehnquist joined) in pointing out:

> "It is important at the outset to remember - as the Court does not - the narrow question on which we granted certiorari. We took care to limit our consideration to whether the Eighth and Fourteenth Amendments prohibit the imposition of a death sentence

> on an offender because he was 16 years old in 1977 at the time he committed the offense; review of all other questions raised in the petition for certiorari was denied. 450 U.S. 1040 (1981). Yet the Court today toes beyond the issue on which review was sought - and granted - to decide the case on a point raised for the first time in petitioner's brief to this Court. . ." 102 S. Ct. 879.

Thus, the issue is thrust back to this Honorable Court. Simply put, should the death penalty be imposed for an offense committed by a 16 year old brain damaged (retarded) child?

United States Supreme Court decisions have looked at objective indicators to appraise the evolving standards of decency in our society which go to the question of excessiveness of the death penalty in particular situations.[1] See: Gregg v. Georgia, 428 U.S. 153 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976), and Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977). Youth is one such indicator which must be carefully scrutinized before imposing a sentence of death.

In Eddings, supra (although not reaching the issue), the Supreme Court noted:

> ". . . Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to the influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formulative years of childhood and adolescence, perspective and judgment" expected of adults." Bellotti v. Baird, 443 U.S. 622, 635, 99 S. Ct. 3035, 3044, 61 L. Ed. 2d 797 (1979).

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[1]Appellant has relied in part upon the initial point contained in the brief to the United States Supreme Court in Eddings v. Oklahoma.

In some jurisdictions juvenile offenders under eighteen are expressly exempted from capital punishment[2] while in most other states youth of an offender is a statutorily enumerated mitigating circumstance[3].

Internationally, the consensus against executing juvenile offenders also prevails. The International Covenant on Civil and Political Rights[4] contains a provision, stating that a "(s)entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women"[5]. Similarly, the American Convention on Human Rights states that "(c)apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age . . ."[6] The International Covenant has been ratified by at least 60 countries[7] and the American Convention by at least 14.[8]

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[2]CAL. PENAL CODE #190.5 (West Supp. 1980) (under 18); COLO. REV. STAT. #16-11-103 (5) (a) (1978) (under 18); CONN. GEN STAT. ANN. #53a-46a (f) (1) (West. Supp. 1980) (under 18); ILL. REV. STAT. ch. 38, #9-1 (b) (Smith Hurd. Supp. 1978) (under 18); LEV. REV. STAT. #176.025 (1973 # Supp. 1977) (under 16); TEXAS PENAL CODE ANN., tit. 2, #807 (d) (Vernon Supp. 1980-1981) (under 17).

[3]See for instance: FLA. STAT. ANN. #921.141 (6) (g) (West. Supp. 1981); KY. REV. STAT #532.025 (b) (8) (Supp. 1980); LA. CODE CRIM. PRO. ANN. art. 905.5 (f) (Supp. 1981); MD. CRIM. LAW CODE ANN. #413 (g) (5) (Suppl. 1980); MISS. CODE ANN. #99-19-101 (6) (g) (Supp. 1979); MO. REV. STAT. # 565.012 (3) (7) (Supp. 1981); MONT. REV. CODES ANN. #46-18-304 (7) (1979); NEB. REV. STAT. #29-2523 (2) (d) (1979); NEV. REV. STAT.# 200.035 (6) (1979); N.H. REV. STAT. ANN. #630:5 II (b) (5) (Supp. 1979); N. M. STAT. ANN. #31-20A-6-1 (Supp.1980).

[4]International Covenant on Civil and Political Rights, entered into force March 23, 1976, G.A. Res. 2200A, 21 U.N. GAOR, supp. (No. 16) 49, 52, U.N. Doc. A/6316 (1967).

[5]Id. art. 6(5).

[6]American Convention on Human Rights, entered into force July 18, 1978, O.A.S. Doc. OEA/SER. K/XVI/1.1 Doc. 65 (1970), reprinted in (1969) YEARBOOK ON HUMAN RIGHTS 390 (United Nations).

Former President Carter affixed his signature to the American Convention in June of 1977 [9] and to the International Covenant in October, 1977[10].

By way of example, English law had also reflected a decline in use of capital punishment for juvenile offenders. The Royal Commission report on capital punishment described the legislative changes in England against the death penalty:

> "The Children Act, 1908, provided that a person under 16 years of age at the time of conviction should not be sentenced to death but should instead be sentenced to be detained during His Majesty's pleasure. This provision, which applied both to England and Wales and to Scotland, was extended by the Children and Young Person Act, 1933 . . . to persons under 18 at the time of conviction; and was further extended by section 16 of the Criminal Justice Act, 1948 . . . to persons under 18 at the time when the offence was committed. No person under 18 years of age had in fact been executed since 1887".[11]

Finally, a review of the inventory contained in Bowers, Executions in America 200-402 (1974) indicates that in the last 25 years only three out of over 350 persons executed were under the age of 18.[12] By comparison, there have been 72 executions for rape in this century since 1955.[13] Thus, it is

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[7]International Human Rights Treaties: Hearings before the Senate Comm. on Foreign Relations, 96th Cong., 1st Sess. 520 (1979) (hereinafter (Senate Treaties Hearings")

[8]Id. at 506.

[9]Id.

[10]Id. at 520

[11]ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949. 1953. REPORT (H.M.S.O. 1953) (Cmd. 8932) 64-65.

[12]The three, all age 17, one year older than Appellant on the date of the offense herein, are J. Johnson (1961, Alabama); Leonard Schockey (1959, Maryland); and Norman Roye (1956, New York). In Florida, of the 38 persons executed during this period, none were under the age of 18.

[13]United States Department of Justice, Law Enforcement Assistance Administration, National Prisoner Statistics Bulletin No. SD-NPS-CP-3, Capital Punishment 1974 (November 1974) 16-17.

apparent that executions of children have been much less prevalent in this country than the practice declared unconstitutional in Coker v. Georgia supra. Looking as the Court did in Coker to "guidance in history and from the objective evidence of the country's present judgment," 433 U.S. at 593, one finds that the death penalty imposed upon children is today virtually extinct.

All indicators of contemporary standards of decency- history, precedent and legislation would reject the death penalty as an acceptable sentence for juvenile murder. Due to the special nature of childhood and problems encountered during adolescent development, imposition of the final punishment would not only be violative of the constitutional prohibition against cruel and unusual punishment, but would be patently inhuman and outrageous.

The only answer to the question of whether the execution of a sixteen year old brain damaged youth "comports with the basic concept of human dignity at the core of the (Eighth) Amendment" would be NO! Gregg v. Georgia, supra 428 U.S. at 182. Based on the authorities cited herein, it is submitted that America is terribly reluctant to execute its children and that death to James Aaron Morgan under all the facts and circumstances of this case is both disporportionate and constitutionally impermissible.

Accordingly, Appellant would respectfully request this Honorable Court vacate the imposition of the death penalty.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Honorable Court to Vacate the Judgment and Sentence of the Trial Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, by mail on the 4th day of March, 1986.

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