IN THE SUPREME COURT OF FLORIDA

CHARLIE THOMPSON

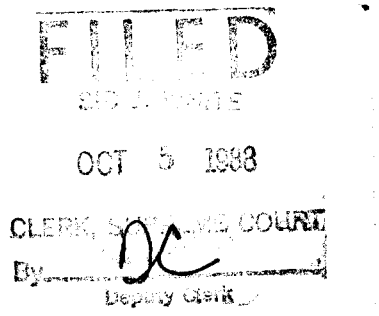
Appellant,

VS.

STATE OF FLORIDA

Appellee.

Case No. 70,401



DIRECT APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
FLORIDA BAR NUMBER 0143265
TENTH JUDICIAL CIRCUIT

STEPHEN KROSSCHELL
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STATEMENT OF THE CASE

On September 17, 1986, a grand jury in Hillsborough County indicted Charlie Thompson for two counts of kidnapping and two counts of first degree murder, in violation of sections 782.04 and 787.01(1)(a)(3), Florida Statutes (1985). (R1303-05) On March 13, 1987, a jury found Thompson guilty as charged. (R899) At the penalty hearing on March 16, the jury recommended death by a vote of nine to three for both murder counts. (R1063-64) On April 6, the court imposed two death sentences. (R1262-63) Consecutive to these sentences, the court also imposed two consecutive life sentences and a consecutive fifteen year term for the kidnappings and for a sexual battery for which Thompson had been on probation. (R1265-66) He now appeals. (R1521)

STATEMENT OF THE FACTS

Thompson worked as a groundskeeper for the Myrtle Hill Cemetery in Tampa. (R629, 644) In May, 1986, he pulled a muscle while digging a grave. (R793) He filed for workmen's compensation and received some money but, according to Thompson, never received a final check for $156 which the claims office in Jacksonville told him had been sent to Myrtle Hill. (R793-94) Myrtle Hill officials told him he had received all his money, but he did not believe them. (R645, 649, 795)

On August 26, 1986, he called William Swack, treasurer and chief bookkeeper at Myrtle Hill, because Thompson was still concerned about the missing check. (R630, 796) Swack told him to come to the cemetery the next day. (R796)

Thompson testified that, on August 27, he went to Myrtle Hill about 10 a.m. and entered the offices through the back. (R796-98) He walked into Swack's office and talked to Swack and his assistant, Nancy Walker. (R797) Thompson asked about his workmen's compensation check. (R797) Swack wrote out a check and gave it to Thompson, who put it in his pocket without looking at it. (R797) Not until later did he realize it was made out for $1500 rather than $150. (R798)

This trial testimony was consistent with an initial statement Thompson made to detective Rick Childers on August 29, 1986, but inconsistent with a taped statement made later the same day. (R758) In the taped statement, Thompson said that Walker slapped him while they were talking in the office. (R1207) After Swack finished writing the check, he told Thompson to leave the office. (R1207) Thompson then showed them his gun and had them walk to Swack's car. (R1207, 1210) Swack drove them to Williams Park, a nearby recreation area. (R596, 1210)

At the park, according to his taped statement, Thompson had Swack and Walker leave the car and walk into some woods. (R1211) The time sequence of events then became unclear. At one point, Swack hit Thompson with a tree branch, and, in return, Thompson slapped Swack on the neck. (R1207, 1212) At another point, Thompson made them take their clothes off because he wanted to take their clothes with him. (R1207, 1211) Walker later put her clothes on again and lay on the ground. (R1213) Thompson ultimately shot Swack and then Walker. (R1214) He did not realize until later that he had a $1500 check. (R1211)

Thompson said in the taped statement that he had not intended to kill and that he had only acted in self-defense. (R1207, 1220, 1224) He knew nothing about Swack's ring or watch, and neither he nor Swack had a knife. (R1212-14)

On the afternoon of August 27, Vincent Olds found the bodies of Swack and Walker in the woods at Williams Park, about fifty feet from a nature trail. (R596-97) Detective Stoney Burke arrived between 12:30 and 1:00 p.m. (R610) Burke found signs of a struggle in the area around Swack's body but found no such signs in the area around Walker's body. (R611-12, 621) The bodies lay about twenty feet apart in a muddy area of the woods. (R610-11)

Swack's body was clothed only in underwear, shoes, and socks. (R612) A pair of trousers lay next to the body, and a shirt covered its face and chest. (R611) The entire body was smeared with mud, except for a clean area on the left wrist, where something had apparently been removed. (R612, 616) Burke found a reddened area on Swack's neck, which might have been caused by a tightening of the gold chain that Swack was still wearing. (R615)

Walker's body lay face down with her face resting on her hands. (R616) She was fully clothed. (R616) After removing her clothes, Detective Burke saw mud and vegetation on her back and under her underwear, but the underwear itself and the outside of her clothes were clean. (R618, 620)

The medical examiner, Dr. Charles Diggs found that a bullet had entered the corner of Swack's left eye, continued through the brain, and lodged near the joint on the right side of the head. (R662-63) The bullet had been fired at close range. (R655) The

blood hemorrhaging around the bullet track suggested that Swack's heart had still been pumping at the time of the gunshot. (R663) Diggs said the shot would have caused immediate unconsciousness and death. (R670)

Diggs found on Swack's body nine stab wounds that could have been inflicted by a knife or other sharp instrument during a struggle. (R657, 661-62) Two of the wounds were in the chest, three in the abdomen, three in the neck, and one behind the right ear. (R657-61) One of the chest wounds entered the left lung and was fatal; two of the abdominal wounds would eventually have been fatal absent medical attention. (R659-60, 665) Swack's heart was still pumping at the time these wounds were inflicted. (R658) Dr. Diggs could not determine whether the immediate cause of death was the gunshot or the stab wounds and could not determine which occurred first. (R665, 670)

In Walker's case, Dr. Diggs found that a bullet entered the back part of her skull, lodged in the frontal lobe of her brain, and caused immediate death. (R666-67) Diggs could not determine whether this bullet was fired from close range. (R666)

James McKeehan, the superintendent at Myrtle Hill, entered Swack's office about 4 p.m. and saw Walker's electric typewriter still running, her glasses on top of her work, and her purse under her desk. (R633) Swack's calculator was also running, and Swack had left his lighter and cigarettes on his desk, which he normally never did. (R633) In the safe, McKeehan found a check register cash disbursement log, which had an entry of $1500 to Charlie Thompson. (R634, 1557) McKeehan also found a carbon copy

of a $1500 check, made payable to Charlie Thompson. (R634, 1559)

Thompson testified that, on August 28, he bought a watch and ring for $45 from a man and a woman in front of the Jackson store. (R808) He later sold the ring to Kenneth Bell and the watch to Huetra Carnegie. (R809) Carnegie and Bell later gave the watch and ring to the police. (R679, 690, 773-74) The defense stipulated that these items belonged to Swack. (R694) Thompson testified that he was not aware when he bought them that they were Swack's. (R810-11)

Between August 27 and August 29, 1986, Charlie Thompson tried to cash the $1500 check at various businesses without success. (R800-01, 1217-19) The police eventually arrested him at a used car lot in Tampa on August 29. (R707-10)

After the police finished their interrogation of Thompson, they put him in a holding cell at the Hillsborough County Jail. (R714-15, 807) According to Marvin Lacy, a fellow inmate, Thompson said he had stabbed a man and shot a woman in Williams Park. (R723-24) He had sold or gotten rid of some items he had taken from the bodies. (R723) He had forced the man and woman to write a check for him. (R724) At trial, however, Thompson denied making these statements to Lacy. (R807)

Lacy testified that this conversation occurred on the morning of August 31, 1986, the date he was arrested for possession of cocaine. (R727) Thompson, however, was booked the morning of August 30. (R727) In deposition, Lacy initially asserted that Thompson had stabbed the woman and shot the man. (R733) After the state attorney corrected him, Lacy changed his story and said that Thompson had stabbed the man and shot the woman. (R733-34)

Lacy testified he had seen news stories on television about the case before he was booked on August 31. (R729)

SUMMARY OF THE ARGUMENT

I. Chief Judge Spicola improperly circumvented Florida's constitution by repeatedly assigning County Judge Bonanno to do circuit court work. Contrary to this supreme court's admonition that these temporary appointments should last only sixty days, Judge Bonanno did only circuit court work for over six months. He was a criminal circuit judge, in charge of his own division with his own independent caseload, just as the other criminal judges were in charge of their divisions. Capital cases are precisely the cases that a county judge should never hear.

11. Judge Bonanno poisoned the relationship between Thompson and his lawyer by telling him that his lawyer was a prima donna who was not representing him "speedily and adequately." Bonanno even briefly dangled in front of him the prospect that Bonanno would appoint private counsel for him, because his public defender was too slow and not representing him properly. After these comments by the judge, Thompson never again trusted and cooperated with his lawyer. He made numerous requests for other counsel, all of which the court ignored or denied.

By destroying the relationship between Thompson and his lawyer and yet refusing to appoint another lawyer for Thompson, Judge Bonanno improperly interfered with Thompson's right to counsel. This state interference with Thompson's sixth amendment right is cognizable on direct appeal. Depending on the standard of review

this court adopts, it should therefore either dismiss the charges against Thompson or remand for a new trial.

III. The judge should have held a hearing on the defense objections to the presence of a television camera during voir dire, *so* that the judge's conclusions could be predicated on valid evidence. Although this court has held that this objection must be made before trial, this holding is unconstitutional and irrational. The federal constitution requires a hearing whenever one is necessary. Moreover, requiring defense counsel to object to something he does not even know about is irrational.

IV. The prosecutor failed to give satisfactory reasons for his exclusion of four black jurors. He failed to give any reasons at all for excluding one black juror. He excluded several black jurors for reasons which applied equally well to white jurors he did not exclude. Finally, his exclusion of a fourth black juror because she was weak on the death penalty helped to create an hanging jury unconstitutionally organized to kill.

V. The judge erred by not excluding for cause three jurors whose answers during voir dire gave reasonable grounds for believing they would not be strictly impartial. One juror had business connections with the victims which she said might affect her during jury deliberations and which she would have a hard time putting aside. A second juror would automatically lean toward recommending death for anyone convicted of premeditated murder. A third juror admitted that he might be unduly influenced by gory photographs.

VI. The defendant stated through his lawyer that he wished to represent himself. The court failed to make the constitutionally

mandated inquiry into the defendant's mental condition, age, education, experience, and the nature and complexity of the case. This failure was per se reversible error.

VII. Thompson repeatedly told Judge Graybill that he was dissatisfied with his lawyer. The judge never inquired into the reasons for this dissatisfaction. Instead, the judge repeatedly told Thompson that the judge would not appoint new counsel and then asked him whether he had anything else to say. Not too surprisingly, he said nothing. The judge's tactics here did not constitute the legally required full inquiry into the reasons for Thompson's dissatisfaction with his lawyer.

VIII. The judge erred by ruling at the competency hearing that Thompson was competent to stand trial. The testimony by the state doctors in support of this finding was inadequate. Moreover, Thompson gave numerous signs during trial that, as the pressures of a capital trial increased, he may have been become incompetent. The trial judge should have been alert to these signs suggesting a change and granted defense counsel's motion for a second competency hearing.

IX. When Thompson made his incriminating statements to the police, he said he wanted a lawyer but could not afford one. The doctors agreed that this statement showed that Thompson did not understand his constitutional rights to have a free lawyer appointed for him and to have this lawyer present during questioning. The doctors said that Thompson, who was mentally retarded, could not have understood the rights he had abandoned unless the detective had carefully explained the rights in simple language.

The detective made no such simplifying explanation.

Moreover, Thompson's statements were not voluntary because they were coerced by the psychological ploy of the police. The police turned down the lights, put goggles on everyone, and shone a laser on Thompson's arm. If the arm glowed, then supposedly Thompson had fired a gun recently. When the arm did glow, Thompson quickly incriminated himself. Since this ploy was psychologically timed to exert a coercive effect on a mentally weak defendant, the resulting statements were not voluntary.

Finally, Thompson's statement that he had asked for a lawyer but could not afford one was at least an equivocal expression of his desire for a lawyer. Accordingly, the detective could not continue the questioning without first clarifying this desire and making sure that Thompson understood his rights. Since the detective failed to make these required inquiries, Thompson's statements should have been suppressed.

X. Thompson's taped statement that he had asked for a lawyer but could not afford one was played to the jury. This statement was fairly susceptible to the conclusion that, since Thompson had wanted a lawyer, he must have had something to hide. Accordingly, this tape constituted an improper comment on Thompson's exercise of his constitutional rights.

XI. Although Thompson did not want to be present for his lawyer's closing argument, Thompson never waived his right to be present for the jury's verdict. At the time the verdict was announced, the trial judge twice ignored Thompson's requests to return to the courtroom. Thompson had a fundamental right to be present for the verdict, so that he could exercise his right to

confront the jurors as they were polled.

XII. During the penalty phase, the judge would not let a defense doctor explain the psychological reasons for Thompson's many courtroom outbursts during the trial. This refusal was error, because the court should have allowed Thompson to rebut the adverse inferences that the court and jury might have drawn from these outbursts. In addition, the doctor's explanation would have constituted legitimate mitigation, which the courts must always allow a capital defendant to present.

XIII. Florida's jury instructions improperly minimize the jury's role by suggesting that the jury serves only an advisory function and that the judge can easily ignore its advice.

XIV. The killings were not committed in a cold, calculated, and premeditated manner without pretense of legal or moral justification. The doctors testified that Thompson did not originally intend to kill. He killed instead in a psychotic rage, because he believed he was being unfairly cheated out of money. Moreover, he had a pretense of legal justification, because he said he killed in self-defense after Swack struck him with a branch.

XV. Florida's "heinous, atrocious, or cruel'' aggravating circumstance is unconstitutionally vague because it does not genuinely narrow the class of people eligible for the death penalty. As the United States Supreme Court has recently said, a juror could honestly believe that every first degree murder is heinous, atrocious, or cruel. Furthermore, this court's limiting language does not limit this aggravating circumstance, because the limiting language is just as vague as the statute itself. This limit-

ing language was never read to the jury. A better interpretation of this aggravating circumstance recognizes that the relevant factors are the amount of physical pain, the degree of mental torture, and the length of time the pain or torture lasts. Judged by this standard, the killings in this case were not heinous, atrocious, or cruel, because they did not last long, and the pain was probably not great.

XVI. The scoresheet contains numerous errors. In addition, a judge should not be able to use unscored convictions as the sole reason to impose a sentence which is greater than the sentence would be if the convictions were scored.

XVII. Executing the retarded is cruel and unusual punishment. Polls show that Florida residents are overwhelmingly opposed to such executions. Georgia forbids executing the retarded. The Florida legislature has said that noxious stimuli should not be used on the retarded to eliminate bizarre or unusual behavior. Society's need for deterrence cannot justify executing the retarded because mentally retarded persons do not have the knowledge and reasoning power to be deterred by the possible prospect of capital punishment. Society's desire for retribution likewise cannot justify these executions, because the retarded by definition do not have the highly culpable mental state necessary for imposing the death penalty.

XVIII. Executing Charlie Thompson would be proportionately incorrect. This court almost never affirms a death sentence after the trial court finds both statutory mental mitigators. Furthermore, not only was Thompson mentally ill, but also he suffered from mental retardation, a low emotional age, brain

damage, and an impoverished upbringing. The killings probably also occurred upon reflection of but a short duration. Consequently, executing Thompson would be disproportionate to the mercy shown to other, similar defendants.

ISSUE I

DESPITE HIS REPEATED "TEMPORARY" APPOINTMENTS TO THE CIRCUIT BENCH, COUNTY JUDGE BONANNO LACKED JURISDICTION TO PRESIDE OVER THIS CAPITAL CASE.

According to Florida Rule of Judicial Administration 2.050(b)(4), the chief judge of a circuit "may assign any judge to temporary service for which the judge is qualified in any court in the same circuit." A chief judge may therefore temporarily assign a county judge to do circuit court work. Crusoe v. Rowls, 472 So.2d 1163 (Fla. 1985); State ex rel. Treadwell v. Hall, 274 So.2d 537 (Fla. 1973). A chief judge, however, may not contravene Florida's constitutionally established two-tier court system by repeating these temporary assignments to the point that a county judge becomes a de facto permanent circuit judge. Pavret v. Adams, 500 So.2d 136 (Fla. 1986). In accordance with these principles, this court prohibited the supposedly temporary appointment in Pavret but permitted the temporary appointments in Treadwell and Rowls.

In the present case, Chief Judge Spicola repeatedly assigned County Judge Bonanno to do circuit court criminal work. (R1344-45, 1349, 1352, 1356, 1437) These assignments first took effect on July 14, 1986 and continued at least until the beginning of trial, March 10, 1987. (R6, 1345) For several reasons, these

supposedly temporary assignments resulted in an illegal permanent appointment of Bonanno to the circuit bench.

First, Judge Bonanno did only circuit court work for over six months. (R1341) According to Rowls, a county judge should not serve full-time on the circuit bench for more than sixty days. 472 So.2d at 1165 n.2. Although, in response to Pavret and to Thompson's motion to disqualify him, Bonanno evidently reassumed some county court duties in February, 1987, (R1436) these county court duties could not have been very great because he was still prepared to preside over a full-scale capital trial on March 10, 1987. (R6-7) A county judge may not evade the constitution simply by belatedly reassuming a few minor county court duties.

Second, as in Pavret, Bonanno's duties were as extensive as those of the other circuit judges in Hillsborough County. Bonanno headed Division C, just as the other criminal circuit judges headed their divisions. (R1341, 1352-53) By contrast, the county judges in Rowls heard only a limited class of circuit court child support cases. Chief Judge Spicola claimed that Judge Bonanno would hear only a limited class of circuit criminal justice matters. (R1438) Evidently, Spicola meant only that Bonanno would not preside over any civil cases, because Bonanno heard the full gamut of criminal cases. (R1341-42, 1360-79) Since no judge in Hillsborough County heard both civil and criminal cases, (R1351-54) this attempted restriction of Bonanno's duties was artificial and had no practical effect.

Third, as in Pavret, Bonanno acted independently of the other circuit judges. By contrast, in Rowls, the county judges merely

helped to enforce child support orders that circuit judges had previously entered. Chief Judge Spicola claimed that Bonanno helped the other circuit judges because, by taking some of their cases, he reduced their backlog and decreased the overcrowding at the county jail. (R1436) Appointing a county judge to do circuit work, however, necessarily reduces the circuit judges' caseloads. The proper determination is whether the county judge helps the circuit judges in cases still assigned to them. In that sense, Bonanno did not help the circuit judges because he headed his own independent division with an entirely separate caseload.

Finally, unlike the county judge in Rowls, who merely enforced previously issued child support orders, Judge Bonanno's rulings contributed to the defendant's being sentenced to die. No judicial function is more significant. Capital cases are exactly the cases that a county judge should never hear. Allowing a county judge -- temporarily appointed to the circuit bench or not -- to hear a capital case should be per se reversible error.

The state may point out that Circuit Judge Graybill presided over the trial of this case. (R6, 16-17) Graybill's eleventh hour assignment to the case, however, has no significance now. If Judge Bonanno lacked jurisdiction to hear the pretrial motions, then those motion hearings were void. Because the defendant requested pretrial hearings and did not legally get them, a new trial is necessary. Moreover, Bonanno's comments during the pretrial hearings severely prejudiced the defendant. Bonanno poisoned the relationship between Thompson and his attorney by accusing the attorney of inadequately representing Thompson. (R1383-86, 1397-99) Finally, Bonanno denied defense coun-

sel's motions to withdraw, to suppress, and to determine incompetence. (R1291, 1339, 1380) The hearings on these motions were just as important as the actual trial. Judge Graybill specifically relied on Bonanno's rulings when the defense renewed these motions at trial. (R9, 12-13)

The subsequent assignment of Judge Graybill to preside over the trial did not repair the damage done by Judge Bonanno, who lacked jurisdiction to hear the pretrial motions in this case. The defense motions to disqualify Judge Bonanno (R16-17, 1340) should have been granted.

ISSUE II

THE TRIAL JUDGE POISONED THE RELATIONSHIP BETWEEN THOMPSON AND HIS PUBLIC DEFENDER AND THEN REFUSED TO APPOINT NEW COUNSEL.

A

On October 22, 1986, Judge Bonanno held a pretrial conference at which Thompson and his public defender, Craig Alldredge, were present. (R1380, 1382-83) Alldredge said that he had four other first degree murder trials pending and that he expected to depose a total of 350 witnesses in the five trials. (R1383) Alldredge requested more time to prepare for Thompson's trial and expected not to be ready until March, 1987. (R1383-84)

Judge Bonanno found this requested delay unfair to the defendant. (R1384) Thompson deserved an earlier trial date because he was in jail and did not want to be there. (R1383-84) Bonanno decided to appoint private counsel for Thompson because Bonanno could not let him sit in jail until March, 1987. (R1385) When

Bonanno asked Thompson if he wanted a street lawyer, he said he did. (R1385) Bonanno said he understood this desire. (R1385) Thompson naturally wanted someone to work on his case and get it ready. (R1385)

Alldredge said he could not ethically withdraw, because no conflict of interest existed. (R1386) Judge Bonanno replied that the requested continuance conflicted with Thompson's fundamental right to be represented "speedily and adequately." (R1386) Bonanno did not agree that Alldredge needed six more months to prepare for trial and was upset that Alldredge had "messed up" the record. (R1386-87)

Bonanno ultimately decided to schedule trial for January 20, 1987. (R1388) Thompson, however, orally repeated that he wanted another attorney. (R1389) On December 9, 1986, he filed a pro se motion requesting reappointment of counsel; the court denied this motion on December 12. (R1329)

On January 7, 1987, Alldredge filed a written motion for continuance. (R1330) At the motion hearing on January 9 before Judge Bonanno, Alldredge said that he still needed to locate several witnesses for both phases of the trial and that his psychological expert might need a magnetic imaging scan of Thompson's brain. (R1392, 1431) In addition, Alldredge needed to investigate Thompson's taped confession (which Alldredge had only learned of the previous day), some photographs at the Pinellas County Sheriff's Office, the use of a laser to show that Thompson had fired a gun shortly before he was arrested, and potential evidence that had been sent for laboratory analysis but had not yet been returned. (R1393-94) Thompson, however, orally objected

to any continuance and again requested private counsel. (R1394)

Judge Bonanno thought Alldredge should already have completed his investigation of these matters. (R1394-95) Bonanno asked what Alldredge had done during the four months he had had the case. (R1395) Alldredge replied that he had deposed thirty witnesses, talked to the defendant's family, talked to possible defense witnesses, consulted with a psychological expert, and put in many hours of investigation. (R1395) Unfortunately, many potential defense witnesses did not have phone numbers or addresses and were hard to find. (R1396)

Alldredge thought he might be ready for trial the first week of March. (R1397) The state attorney, however, said that another capital trial was scheduled for that week. (R1397) The following exchange between Alldredge and Judge Bonanno then occurred.

> MR. ALLDREDGE: There is reason to believe in that case that both attorneys will move for a continuance in that case as well.
>
> THE COURT: Well, of course, because it's a first degree murder case.
>
> MR. ALLDREDGE: That's not the reason, Your Honor.
>
> THE COURT: Yes, it is. That's all that I hear from you people up in the public defender's office in the murder division, that you're above everybody else. And I know from trying first degree murders that there are some very complicated first degree murders, as there are some very complicated other cases, and they are very important because they involve the death penalty and factually and preparation wise, but that doesn't automatically make them complicated and it doesn't automatically require extended and protracted lengths of time for preparation.
>
> That's not an automatic thing. But that seems to be the mentality of the public defender's office, that if it's a first

> degree murder case you need to come in automatically and say it's first degree murder case and --
>
> MR. ALLDREDGE: I beg to differ with you. The public defender's office does the best they can in every case to defend our client to the best of our ability.
>
> THE COURT: You don't have to raise your voice at me. I can hear you. I didn't raise my voice at you. If you raise your voice at me again, I'm going to take it as being contemptuous.

(R1398-99)

Alldredge said he resented Judge Bonanno's implication that the public defenders sought delay purposely for their own glory. (R1399) Bonanno replied that he wanted to insure the protection of Thompson's rights. (R1399) Alldredge said Bonanno had *so* poisoned the record that day and on October 22 that Alldredge did not think he could continue to represent Thompson. (R1399) Bonanno replied that Thompson wanted an attorney who was prepared to represent him and who would get him to trial as quickly as possible. (R1400) After further discussion about what should be done in the case, Bonanno ultimately granted the motion for continuance. (R1330, 1401-08)

On February 4, 1987, Alldredge filed a motion to withdraw as Thompson's counsel. (R1380-81) In the motion, Alldredge said that he and Thompson had maintained a satisfactory working relationship until October 22, 1986. (R1380) On that date and again on January 9, 1987, Judge Bonanno had improperly suggested to Thompson that Alldredge was not diligently representing him. (R1380-81) This suggestion had irreparably damaged the attorney-client relationship between Alldredge and Thompson. (R1380-81)

On February 16, 1987, Thompson filed a pro se motion requesting the appointment of private counsel. (R1427) He also sent a letter to Judge Luckey, the elected public defender in Hillsborough County. (R1429) Thompson wanted Luckey to appoint a different lawyer because Alldredge was not representing Thompson properly. (R1429) Thompson did not compose the letter and motion -- he could not recite the alphabet -- but rather copied them from papers someone had given him. (R961, 1237-38)

At the motion hearing on February 20, 1987, Alldredge said that Thompson had interpreted Judge Bonanno's statements in October and January to mean that Thompson would have been released from jail had a private lawyer been appointed for him. (R1085) By intruding into the legal process, Bonanno had reinforced Thompson's perception that public defenders were inept and overburdened. (R1089) The court's comments had made Thompson distrustful of his lawyer and unable to assist his lawyer in preparation for trial. (R1093) Bonanno replied that he would not close his eyes when he saw that a defendant was not being represented adequately and was being denied his right to a speedy trial. (R1089-90) Bonanno said he had offered to appoint a private attorney for Thompson only because Alldredge was apparently too busy to handle Thompson's case properly. (R1091)

Dr. Robert Berland, a forensic psychologist, testified at the motion hearing that Thompson was a paranoid psychotic who appeared to be incapable of working with his present attorney. (R1096, 1098) Berland could not say whether this incapacity resulted from Judge Bonanno's comments or from Thompson's mental illness. (R1098) Berland thought that, in time, Thompson's sick-

ness might cause him to have problems with any attorney appointed for him. (R1098)

Thompson again asked the court to appoint a private lawyer for him. (R1103) Judge Bonanno told Thompson that Alldredge was an excellent lawyer. (R1104) Thompson said he still wanted another lawyer. (1105) Bonanno denied Thompson's request and denied Alldredge's motion to withdraw. (R1105)

During the trial, Thompson repeatedly requested new counsel, and the court repeatedly denied these requests. (R12, 585, 827, 916) At one point, Thompson even left the courtroom because he did not want to listen to his public defender's closing argument. (R835) The public defender said that, as a result of Judge Bonanno's statements, Thompson had been unable to assist in the preparation of his defense. (R11)

B

Judge Bonanno's accusations here were grossly improper. Bonanno effectively told Thompson that his lawyer was letting him rot in jail. According to Bonanno, Alldredge was not representing Thompson speedily and adequately. (R1386) Bonanno claimed that Alldredge did not need as much time as he said he did to prepare for trial and had not done enough work on the case. (R1386, 1394) Bonanno suggested that Alldredge wanted a continuance because he and the other public defenders in the capital division were prima donnas who thought they were above everybody else. (R1397-98) When Alldredge objected to this characterization of his colleagues, Bonanno told him he was close to being in contempt. (R1398)

Bonanno even went so far as to dangle in front of Thompson the prospect that Bonanno would appoint private counsel for him, because, if Alldredge remained on the case, Thompson would stay in jail until March, 1987. (R1385) Having to wait for trial that long would be unfair to Thompson and a violation of his rights. (R1384) Needless to say, when trial was continued until March, Thompson's disposition toward his lawyer did not improve.

If a police officer or prosecutor had made these disparaging remarks, they would have constituted error. The comments of the police officer in Commonwealth v. Manning, 373 Mass. 438, 367 N.E.2d 635 (1977) were strikingly similar to the comments of Judge Bonanno. The officer, who wanted the defendant to become an informer for the police, "'made several disparaging remarks about [defense] counsel and the manner in which he was conducting the defense of the ... case' and 'indicated that the tactics of defense counsel would not insure the defendant being kept out of jail.'" Id. at 636. The Manning court decided that these disparaging remarks were *so* outrageous that they mandated not only reversal of the convictions but also dismissal of the indictment. Accord People v. Moore, 57 Cal. App. 3d 437, 129 Cal. Rptr. 279 (1976) (charges dismissed because prosecutor persuaded defendant not to contact his attorney and falsely told him that his attorney was inadequate and had been disbarred).

The present case is different from Manning in two respects. On the one hand, improper remarks from a judge are worse than improper remarks from a police officer or prosecutor, because the defendant is more likely to consider such remarks from a judge, who is supposed to be "fair, temperate, and impartial." Wilkerson

v. State, 510 So.2d 1253, 1255 (Fla. 1st DCA 1987). On the other hand, a judge has an affirmative duty to protect the rights of the defendant and to protect the efficiency of the court's trial procedures. A judge may therefore have legitimate reasons to criticize defense counsel, reasons which police officers or prosecutors could never have. Thus, a judge has greater license to censure counsel but, at the same time, greater responsibility to avoid doing *so* unless the censure is warranted.

The issue then is whether Bonanno's censure of Alldredge was warranted. It clearly was not. On October 22, Alldredge had five first degree murder cases set for trial within the next two and a half months. (R1383) He had 350 witnesses to depose for the five trials. (R1383) This caseload was on its face overwhelming. No other public defender was available to handle these cases. (R1384) By January 9, 1987, Alldredge had done a substantial amount of work on the case but still had a long way to go. (R1392-96) Alldredge had an extra obligation to handle Thompson's case carefully because, not only would Alldredge's performance be subjected to exacting scrutiny if Thompson was convicted, (R1399) but also -- and more importantly -- Thompson might die if Alldredge made a mistake. Insisting, as Bonanno did, that Alldredge was not working diligently on the case (R1394) and implying that Alldredge was seeking delay purposely for his own glory (R1397-98) was grossly unreasonable.

Doubtless, in an ideal world, Charlie Thompson would not have remained in the Hillsborough County Jail for over six months awaiting trial. Doubtless, in an ideal world, his attorney would

not have had five murder trials scheduled to occur within two and a half months. If Bonanno were really concerned about Thompson's welfare, he should have appointed private counsel and allowed Alldredge to withdraw. Instead, Bonanno told Thompson that his lawyer was not diligently investigating his case and was letting him rot in jail. Bonanno nevertheless refused to appoint a different lawyer. Not surprisingly, Thompson did not thereafter assist his lawyer because he did not trust him. (R11, 915, 1093) By destroying the attorney-client relationship between Alldredge and Thompson, yet denying Thompson's request for a different attorney, Bonanno committed egregious error.

C

If Judge Bonanno's actions constituted improper state interference with Thompson's sixth amendment right to counsel, then the next issues are the standard of appellate review this court should employ and the relief this court should provide. Case law reveals numerous approaches to these issues.

Appellant initially urges this court to adopt the approach of Manning and Moore, When an officer of the state unreasonably tells a defendant that his lawyer is inadequate and that he ought to have a different lawyer, the proper remedy for this outrageous accusation is dismissal of the charges against the defendant. This approach is consistent with State v. Glosson, 462 So.2d 1082 (1985) (charges should be dismissed when state pays informant to testify). It tells the state that some misconduct cannot be tolerated in our system of justice. Because Judge Bonanno's comments were almost identical to the police officer's comments in Manning and because the Manning court dismissed the charges,

this court should likewise dismiss the charges in this case. In fact, the circumstances in the present case were worse than those in Manning, because, unlike the present case, the record in Manning did not show that the relationship between counsel and client was seriously affected.

Alternatively, this court should remand for a new trial in accordance with the per se reversal rules of Walbera v. Israel, 766 F.2d 1071 (7th Cir. 1985) or Crutchfield v. Wainwright, 803 F.2d 1103 (11th Cir. 1986). In Walberq, the trial judge during pretrial hearings became angry with defense counsel for several reasons, including counsel's filing of too many motions. Eventually, counsel asked the judge to recuse himself because the judge had told counsel, "I am going to fix you on the trial of this case." The trial judge in response accused counsel of personal ingratitude -- the judge had appointed counsel to the case -- and said he would never again waste the taxpayers' money by appointing that lawyer to represent other indigent defendants.

The Walberq court found that these comments by the judge constituted per se reversible error.

> When the state, here in the person of the trial judge, "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense," Strickland v. Washington, [466 U.S. 686 (1984)], we are in a different ballpark. If the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice is lifted. It is not right that the state should be able to say, "sure we impeded your defense -- now prove it made a difference."

766 F.2d at 1076. The Walberq court refused to require the defendant to show how his lawyer "would have defended him differ-

ently but for [the judge's] threats." Id. The judge's interference with the defendant's constitutional right to the assistance of counsel by itself mandated automatic reversal for a new trial, even though the defendant was clearly guilty and had not shown any prejudice. Id. at 1078.

The present case is similar to Walberg. As in Walberg, it shows "state interference with counsel's assistance." Strickland, 466 U.S. at 692. Judge Bonanno, by inducing the defendant not to cooperate with his lawyer, interfered with "the ability of counsel to make independent decisions about how to conduct the defense." Id. at 686. As in Walberg, Bonanno sharply and unreasonably rebuked defense counsel and suggested that the defendant ought to have a better lawyer. Unlike Walberg, Judge Bonanno's criticisms caused severe prejudice, because Thompson was unable thereafter to cooperate with his lawyer. If the judge's comments in Walberg constituted per se reversible error, then Judge Bonanno's prejudicial comments certainly require reversal for a new trial.

The Crutchfield court employed a different per se rule. In Crutchfield, the trial court did not allow the defendant to consult with his lawyer during a trial recess that lasted, for purposes of the Crutchfield holding, only five minutes. The Crutchfield court found that, if the defendant had shown he wanted to talk with his lawyer during this recess, this interference by the trial court with the defendant's right to receive advice from his counsel would have been per se reversible error because it amounted to a denial of his sixth amendment rights. "[A]ny

deprivation of assistance of counsel constitutes reversible error and necessitates a new trial. Our rule does not include a harmless error analysis.... '[W]here actual or constructive denial of assistance of counsel occurs a per se rule of prejudice applies.'" Id. at 1108 (quoting Chadwick v. Green, 740 F.2d 897, 900 n.3 (11th Cir. 1984)).

Judge Bonanno constructively denied Thompson his right to receive the advice of counsel, because, as a result of Bonanno's aspersions on the public defender's diligence, Thompson distrusted his lawyer and was not able to assist in his defense. Under the theory of Crutchfield, this constructive denial of a critical part of the sixth amendment guarantee -- the consultation between lawyer and client -- was presumptively improper and requires a per se reversal for a new trial.

If this court chooses not to adopt a per se rule of reversal in this case, then Thompson urges alternatively that it apply the harmless error rule of State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), in the same manner that it did in Thompson v. State, 507 So.2d 1074 (Fla. 1987). In Thompson, the trial judge interfered with the defendant's right to the advice of counsel by forbidding the defendant to consult with his lawyer during a thirty minute recess. This court first determined that the trial judge's interference with the right to counsel was error and then found that this error did not satisfy the DiGuilio test of harmlessness. The state in Thompson could not sustain its burden of showing "beyond a reasonable doubt that the error did not affect the verdict." DiGuilio, 491 So.2d at 1139.

In the present case, the state also cannot sustain this burden

of showing that Judge Bonanno's improper comments did not affect the verdict. The state cannot possibly know whether, if Thompson had been able to assist his lawyer, the trial would have been the same. Had Thompson's lawyer had the full cooperation of his client, he might have adopted a different strategy and put on other witnesses.

If this court chooses not to put the burden on the state to show harmless error and instead puts the burden on the appellant to show prejudice, then this court should agree with the ninth circuit that a showing of "government influence which destroys the defendant's confidence in his attorney" is sufficient proof of prejudice. United States v. Irwin, 612 F.2d 1182, 1187 (9th Cir. 1980). In the present case, Judge Bonanno's accusations destroyed the defendant's confidence in his attorney. Accordingly, reversible error occurred.

This court should not put the burden on the defendant to show "a reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. This test is only appropriate when the state has done nothing wrong. Id. at 693. If the state only stands idly by while the defendant's attorney represents the defendant ineptly, Strickland, or if, through no fault of the state, the defendant must suffer through a last minute replacement of his lawyer, United States v. Cronic, 466 U.S. 648 (1984), the burden is appropriately on the defendant to show that his defense was ineffective. The state is not responsible for the errors or difficulties of counsel in these situations and there-

fore need not retry the defendant unless the errors are of sufficient magnitude that they "undermine confidence in the outcome." Strickland, 466 U.S. at 694.

In the present case, the state did not stand idly by but rather, through Judge Bonanno, actually interfered with the relationship between counsel and client. Because the court destroyed Thompson's relationship with his attorney, the state should not then receive the windfall of forcing him to prove that the judge's error made a difference at trial. As the District of Columbia circuit explained in a similar situation (during a trial recess, the court ordered the defendant not to discuss his testimony with his lawyer),

> [t]he only way that a defendant could show prejudice would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense. Presumably the government would then be free to question defendant and counsel about the discussion that did take place, to see if defendant nevertheless received adequate assistance.
>
> We cannot accept a rule whereby private discussions between counsel and client could be exposed in order to let the government show that the accused's sixth amendment rights were not violated.

Mudd v. United States, 798 F.2d 1509, 1513 (D.C. Cir. 1986) (emphasis in original).

Appellant emphasizes that he is not arguing ineffective assistance of counsel but rather state interference with his right to counsel. This state interference is cognizable on direct appeal and, if not reversible per se, at least puts the burden on the state to show that Judge Bonanno's improper interference could not possibly have affected the verdict. The state cannot sustain

this burden, and therefore a new trial is necessary.

ISSUE III

THE TRIAL COURT ERRED BY NOT HOLDING AN EVIDENTIARY HEARING ON WHETHER THE TELEVISION CAMERA IN THE COURTROOM WOULD INHIBIT THE CANDOR OF PROSPECTIVE JURORS ABOUT THEIR RACIAL BIAS AND ON WHETHER THE CAMERA WOULD INCREASE THE CHANCE OF A GUILTY VERDICT.

A

Defense counsel first learned that the trial would be on television when he entered the courtroom for voir dire and saw the camera already in place. (R7) He immediately objected, pointing out that Hillsborough County had experienced substantial racial unrest during the previous weeks. (R5) The camera would make prospective white jurors less likely to admit to being racially biased, because their statements might later be broadcast to Tampa's racially tense black community. (R5) They might also feel pressure from their white friends to convict the defendant, a black man who had allegedly killed two whites. (R6) As the voir dire questions demonstrated, obtaining a racially unbiased jury was important to the defense. (R230)

Judge Graybill summarily denied the motion to exclude the camera. (R6) Graybill disagreed that the camera would prejudice anyone's rights and found, in any event, that the motion was untimely. (R6) The cameras remained in the courtroom throughout the trial. (R583, 820)

B

If a defendant can show "a reasonable and substantial likelihood that an identifiable prejudice to the right to fair trial

will result from the presence of electronic media," the trial judge must hold a hearing to determine whether he should permit electronic coverage of the trial. State v. Green, 395 So.2d 532, 536 (Fla. 1981). This hearing requirement was specifically mentioned in Chandler v. Florida, 449 U.S. 560 (1981), a case which upheld Florida's decision to allow cameras in the courtroom. Absent a hearing, "the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave no evidence of how the conduct or the trial's fairness was affected." Id. at 577.

The request for this evidentiary hearing must allege specific facts; general allegations of prejudice are insufficient. Green, 395 So.2d at 538. "In all instances, a showing must be made that the prejudice or the special injury resulted solely from the presence of electronic media in the courtroom in a manner which is qualitatively different from that caused by traditional media coverage." Id.

In the present case, defense counsel made the necessary specific showing of possible prejudice qualitatively different from prejudice caused by traditional media. White veniremen with racist tendencies would be less candid about their racism if they were constantly reminded by a television camera that pictures of them as they made racist statements might be broadcast to Tampa's black community. Newspaper coverage would not have the same effect because the jurors would not necessarily be aware of the presence of newspaper reporters. Moreover, the newspaper stories would include at most the juror's name and not his picture.

Widespread publicity by the electronic media would also increase the pressure white jurors would feel from their friends to return a guilty verdict. Since Tampa had recently experienced severe racial unrest, these concerns expressed by defense counsel were reasonable and substantial. The court's failure to hold a hearing was therefore reversible error. Green.

C

Relying on Maxwell v. State, 443 So.2d 967 (Fla. 1983), appellee will doubtless argue that the defense objection was too late. Maxwell requires counsel to file a pretrial motion. Id. at 970. This requirement, however, is unconstitutional, irrational, and impractical. It is unconstitutional because Chandler mandates an evidentiary hearing whenever one is necessary to preserve a defendant's right to a fair trial. The requirement is irrational because, as in the present case, defense counsel cannot possibly object to something that has not yet happened and which counsel has no reason to believe will happen. In no other instance does Florida law require counsel to object to something he does not know about. Even motions to suppress evidence -- which are normally heard before trial -- are properly heard at trial "if the defendant was not aware of the grounds for the motion." Fla. R. Crim. P. 3.190(h)(4), 3.190(i)(2).

Maxwell suggests that defense counsel are "presumably ... free to attempt to find out in advance" whether the electronic media will broadcast a courtroom proceeding. 443 So.2d at 970. This suggestion is, for several reasons, irrational and impractical.

First, the last thing an intelligent defense counsel wants to do is to remind the local media that a trial will soon occur in

his case. Yet, this reminder is precisely what Maxwell requires. Maxwell forces counsel into the unenviable Hobson's choice of either reminding the local media of the case, thereby increasing the chance that the media will cover it, or not reminding the media, in which case he waives his objections to the coverage.

Second, large urban areas like Tampa have numerous television stations and even more numerous radio stations. Maxwell evidently requires defense counsel to contact all these stations. Even then, an out-of-town station might cover the trial, in which case counsel would be out of luck.

Third, even if, for example, counsel contacts all the local stations three weeks before trial and manages to find and talk to the right persons, these persons will probably not know at that point what they will do three weeks later. By the time these persons do know -- often only a few days before trial or later -- scheduling a pretrial hearing will be impossible. By the simple expedient of waiting until the last minute to decide whether to cover a trial, the media can easily prevent defense counsel from ever filing a Maxwell motion. For these reasons, the hearing that Maxwell contemplates and that Chandler mandates will, as a practical matter, almost never happen.

The electronic media do not have a constitutional first or sixth amendment right to cover a courtroom proceeding. In re Petition of Post-Newsweek Stations, Florida, 370 So.2d 764, 774 (Fla. 1979). Indeed, respected legal authority suggests that the constitution does not allow electronic media in the courtroom at all. Estes v. Texas, 381 U.S. 532, 552 (1965) (Warren, J., con-

curring). Consequently, Florida may constitutionally insist that, if the media wishes to be heard before they are excluded from a trial, then they must give advance notice that they will cover the trial.

Requiring the media to give advance notice is much more logical and practical than requiring defense counsel to file a pretrial motion. The media knows what they will do; defense counsel does not. Upon receiving the notice, counsel can object if necessary, and all parties can come to trial represented by counsel. If the media do not provide notice, then they have no right to be heard. Of course, if media representatives are absent at the hearing, the judge and the state attorney will still be present to protect the media's interests.

This procedure accommodates both the defendant's desire to receive a fair trial and the media's desire to have a hearing before being excluded from the trial. Under the Maxwell rule, by contrast, the media's interests are satisfied at the expense of the defendant's interests. The Maxwell rule is therefore wrong, and this court should recede from it.

Defense counsel in his motion did allege specific and qualitatively different grounds for excluding the television camera from the courtroom. The trial judge should therefore have held an evidentiary hearing on the motion. By summarily denying it, the trial judge did not determine whether the camera would affect the fairness of the trial. Absent this determination, this court has no evidentiary basis for concluding that the trial was fair. Chandler, 449 U.S. at 557. Accordingly, this court should now reverse for a new trial.

ISSUE IV

THE PROSECUTOR DID NOT PROPERLY EXPLAIN WHY HE PEREMPTORILY CHALLENGED FOUR BLACK JURORS, BECAUSE (1) HE GAVE NO REASONS AT ALL FOR EXCLUDING ONE BLACK JUROR, (2) THE REASONS HE GAVE FOR CHALLENGING SOME BLACK JURORS ALSO APPLIED TO WHITE JURORS WHOM HE DID NOT CHALLENGE, AND (3) "WEAKNESS" ON THE DEATH PENALTY IS AN ILLEGAL REASON FOR EXCLUSION.

A

According to federal and Florida law, a prosecutor may not peremptorily exclude prospective black jurors simply because they are black. Batson v. Kentucky, 476 U.S. 79 (1986); State v. Neil, 457 So.2d 481 (Fla. 1984). Consequently, if the defendant can establish a prima facie case that the prosecutor is excluding jurors because they are black, the burden shifts to the prosecutor to provide clear, legitimate, reasonably specific, and racially neutral reasons for the challenges. State v. Slappy, 522 So.2d 18, 22 (Fla. 1988); Batson, 476 U.S. at 97-98 & n.20. Because the peremptory challenge is "uniquely suited" to mask discriminatory motives, doubts about the prima facie case are resolved in the defendant's favor. Slappy, 522 So.2d at 20-22.

As part of his prima facie case, the defendant does not necessarily have to show a pattern of discrimination, because a "'single invidiously discriminatory act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" Batson, 476 U.S. at 95 (citation omitted); accord Pearson v. State, 514 So.2d 374 (Fla. 2d DCA 1987). For this reason, a prosecutor's willingness to leave a token black or two on the jury does not give him carte blanche to exclude all other

black jurors. Slappy. Under the equal protection rationale of Batson, a prosecutor may not discriminate against any black juror; if he does, reversible error occurs.

When evaluating the prosecutor's reasons, the trial judge may not simply accept them at face value. Slappy. The judge must instead determine whether they are neutral and reasonable and not mere pretexts. Id. If they are not satisfactory, "then the court should dismiss the jury pool and start voir dire over with a new pool." Neil, 457 So.2d at 487. By following this procedure, the court will preserve the defendant's right to receive equal protection of the laws, Batson, and to select his jury from a fair cross-section of the community. Neil.

B

In the present case, the defendant was black, and the deceased were white. (R6) Over repeated defense objections, the prosecutor excluded the first eight blacks from serving on the jury, including four jurors for cause because they were opposed to the death penalty. (R317, 322, 329, 332, 342, 536, 547, 553) Anxious to insure that at least one token black would be on the jury, the prosecutor did not challenge the ninth black juror. (R561-62) The defense left this token black on the panel with some reluctance, because this juror had previously been the victim of an attempted rape and kidnapping, and the case at hand also involved a kidnapping with sexual overtones. (R562-67) The defense excluded the tenth black juror, because, as the prosecutor conceded, she was familiar with the case and had already formed an opinion about the defendant's guilt. (R568-70)

These circumstances presented a prima facie case of the

likelihood of discrimination. The prosecutor excluded all eight blacks among the first sixty-nine jurors. Except possibly for those jurors against the death penalty, the record did not show that these excluded blacks would be unfair or partial. Blackshear v. State, **521 So.2d 1083, 1084** (Fla. **1988)** The Batson court specifically noted that a "'pattern' of strikes against the black jurors included in the particular venire might give rise to an inference of discrimination." **476** U.S. at **97.** Any doubt on this point should be resolved in the defendant's favor. Slappy. Because the defendant made a prima facie showing of discrimination in this case, the burden shifted to the prosecutor to provide clear, legitimate, reasonably specific, and racially neutral reasons for his challenges. Id. The prosecutor failed to provide such reasons for four black jurors he excluded.

C

The trial court did not require the prosecutor to give reasons for peremptorily challenging black juror Anthony Brooks. (R318) The court reasoned that, because Brooks was the first black juror excluded, the defense had not shown any systematic striking of blacks from the venire. (R318) Moreover, the court recalled that Brooks had been arrested (but not charged) a few months earlier. **(R61, 318)** The court did not later ask the prosecutor to give reasons for challenging Brooks, despite persistent defense objections that the prosecutor was systematically excluding blacks. **(R323, 329, 332, 342, 537, 548, 553)**

The court should have required the prosecutor to give these reasons, because the erroneous exclusion of even one black juror

violates the equal protection clause. Batson; Slappy; Pearson. The court should at least have returned to Brooks when the pattern of exclusion became clear. If defense counsel had followed the common procedure of waiting until the end of voir dire to make his Batson and Neil objection, the prosecutor would certainly have had to give reasons for every black juror he excluded, including Brooks.

Because he never gave a reason for excluding Brooks, he never rebutted the defense's prima facie case of discrimination. Accordingly, reversible error occurred. Tillman v. State, 522 So.2d 14 (Fla. 1988). Of course, the court's willingness to suggest reasons for the exclusion was irrelevant. The purpose of Batson and Neil is to discover the prosecutor's reasons for exclusion, not the trial judge's speculation on what those reasons might be. Tillman.

Even if the prosecutor had said he excluded Brooks because Brooks had been arrested, this reason would have been invalid because it also applied to white jurors whom the prosecutor did not exclude. White juror John Manning had been arrested and charged for assault a year earlier, but the prosecutor did not exclude him. (R51-52, 317) According to Slappy, a challenge is improper if it is based on reasons also applicable to others jurors not challenged. 522 So.2d at 22.

A similar conclusion applies to the prosecutor's reasons for excluding black jurors Aaron Tyler and Darrell Bell. He excluded Bell in part because Bell's uncle had killed Bell's aunt ten years earlier. (R60, 238-39, 338-39) He excluded Tyler because he had been in jail in the 1950's. (R537-38) Yet, when juror

Hilda Williams said her uncle had been convicted thirty years ago of a stabbing, the prosecutor responded that, "of course," this event would not affect her ability to be a fair juror. **(R58)** White juror Eleanor King eventually served on the jury, even though her brother-in-law had recently been convicted of drug smuggling. **(R452-53, 576)** The prosecutor thus kept a white juror whose sister's husband had recently been convicted of a serious crime but excluded a black juror whose mother's brother had been convicted of a serious crime ten years earlier. He also left on the jury, Arthur Ichter (the foreman), who had been convicted in **1972** of drunk driving. **(R57, 576, 899)** Because the prosecutor's reasons for exclusion could have applied equally to white jurors he did not exclude, these reasons were invalid and did not rebut the defense prima facie case of discrimination. Slappy.

D

The prosecutor gave several other unconvincing reasons for excluding black jurors. He excluded juror Tyler because, in the 1950's when Tyler was in jail for assault, "they were hanging black people back then for spitting on the sidewalk." **(R537-38)** This reason was patently not the racially neutral reason required by Slappy. The prosecutor also complained that Tyler had not mentioned the assault conviction during the first day of voir dire. **(R538)** Tyler, however, had mentioned this thirty-year-old conviction on his jury questionnaire, *so* he was not hiding anything. **(R538)**

The prosecutor said that juror Bell was the brother of a state witness. **(R338)** This reason for exclusion was odd because prose-

cutors are normally happy to have jurors who are related to the state's witnesses. Jurors are more likely to believe their own relatives. The prosecutor also said three times that he was not "comfortable" with Bell as a juror. (R338-39) This reason was unclear and unspecific and therefore improper. Slappy.

The prosecutor challenged juror Juanita Jackson in part because she did not talk loud enough and was supposedly too "timid." (R548) Even if these reasons were true, they were unrelated to her ability to be a fair juror. By claiming that Jackson was too young, the prosecutor jumped from the frying pan into the fire because age, like race, is a constitutionally protected classification. People V. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 759, 148 Cal. Rptr. 890 (1978). Although she was late for voir dire, (R548) the prosecutor did not ask her any questions about her tardiness when the judge gave him a chance to do so; he also did not show how this tardiness would make her less likely to accept his arguments. (R451-52) The perfunctory examination and the irrelevance of the reason to the issues in the case made it invalid under Slappy. 522 So.2d at 22.

E

The prosecutor challenged black juror Juanita Jackson primarily because he thought she was too hesitant and vacillated too much on the death penalty. (R547-48) The prosecutor here had in mind the following exchange during voir dire between himself and Jackson.

> MR. BENITO: Do you think you could ever recommend that a man be sentenced to death?
>
> MS. JACKSON: I'm not sure.

MR. BENITO: You're not sure?

MS. JACKSON: I guess it would depend on the evidence. I guess.

MR. BENITO: It would depend on the evidence?

MS. JACKSON: (Indicating affirmatively)

MR. BENITO: There are certain cases you think you could recommend the death penalty?

MS. JACKSON: Yeah.

MR. BENITO: So you're not against the death penalty?

MS. JACKSON: Not really.. ..

MR. BENITO: You're not really against the death penalty then?

MS. JACKSON: No.

MR. BENITO: So under some circumstances, you could vote to recommend the death penalty?

MS. JACKSON: (Indicating affirmatively)

(R465-66) By peremptorily excluding Jackson because she expressed this hesitance about the death penalty, the state attorney confirmed what defense attorneys have long suspected, that prosecutors are consistently violating the principles of Witherspoon v. Illinois, 391 U.S. 510 (1968).

According to Adams v. Texas, 448 U.S. 38 (1980), a juror may be challenged for cause if his views on the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Id. at 45. On the other hand, jurors are not excludable for cause if they merely have general objections to the death penalty, or have religious or conscientious scruples against it, or think it is unjust. Witherspoon, 391 U.S. at 522; Lockhart V. McCree, 476

U.S. **162, 176 (1986).**

In conformity with these principles, the prosecutor in the present case successfully challenged for cause twelve of the seventy-five members of the venire, because these twelve were opposed to the death penalty. **(R295, 297, 322, 329, 331, 340, 342, 344, 345, 551, 553, 556)** The prosecutor, however, did not challenge for cause five jurors (including Jackson) who merely expressed hesitance or uncertainty about the death penalty. **(R83, 88, 90, 465, 469)** Instead, he chose the simpler and safer expedient of challenging these five jurors peremptorily. **(R315, 320, 325, 547, 559)** In this way, he achieved his goal of having on the jury, only those jurors who had no reservations about the death penalty. **(R548)**

These five peremptory challenges violated Witherspoon and Adams because the reasoning of these cases applies regardless of whether the jurors in question are challenged for cause or peremptorily. Challenges of both sorts unconstitutionally produce a jury that is unrepresentative of the community and organized to return a verdict of death.

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it ... A jury composed exclusively of [people who believe in the death penalty] cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment -- of all who would be reluctant to pronounce the extreme penalty -- such a jury can speak only for a distinct and dwindling minority....
>
> [W]hen it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who

> opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die ... [A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death ... No defendant can constitutionally be put to death at the hands of a tribunal *so* selected.
>
> Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State ... has stacked the deck against the petitioner. To execute this death sentence would deprive him of life without due process of law.

Witherspoon, **391** U.S. at **519-23.**

Adams applied Witherspoon to a Texas law which required jurors to swear that their views on the death penalty would not affect their deliberations on any issue of fact. Like the reasoning in Witherspoon, the reasoning in Adams applied equally to both peremptory challenges and challenges for cause. After quoting extensively from Witherspoon, Adams concluded that

> to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their view about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law .... [T]hese individuals were [not] *so* irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme. Accordingly, the Constitution disentitles the State to execute a sentence of death imposed by a jury from which such prospective jurors have been excluded.

448 U.S. at **50-51.**

Witherspoon and Adams do not teach that, to preserve the defendant's right to an impartial jury, the court should force the state attorney to use peremptories if he wishes to exclude

jurors who have reservations about the death penalty but can still follow the law. Neither case even mentions peremptory challenges. Instead, these cases teach that the state should not exclude such jurors at all. Whether these jurors are challenged peremptorily or for cause is irrelevant. Regardless of how they are excluded, the end result is the same. The jury eventually sworn is a hanging jury organized to return a verdict of death. Such hanging juries are stacked against defendants and deprive them of their lives without due process of law. Witherspoon, 391 U.S. at 523.

This issue was left unresolved in Gray V. Mississippi, 107 S. Ct. 2045 (1987). Gray's four justice plurality implied in dictum that a prosecutor could not constitutionally use peremptory challenges to exclude potential jurors with reservations about capital punishment. Id. at 2056. The plurality observed that, under Batson, a prosecutor's use of peremptory challenges is sometimes subject to judicial review. Id. at 2056 n.18. In the instant case, of course, this issue arose precisely because of Batson. The four dissenters and one concurring justice in Gray disagreed with the plurality's dictum. Id. at 2058 (Powell, J., concurring); id. at 2062 (Scalia, J., dissenting). Because Justice Powell is no longer on the Court, the result is an even split on this issue with Justice Kennedy yet to be heard from.

In their opinions, Justice Powell and the four dissenters argued that defense peremptory challenges counterbalance prosecution peremptory challenges; the result is a fair jury. This argument is plainly wrong, as the facts of the present case show. Thompson would gladly trade the one juror he excluded

because the juror was too much in favor of the death penalty, (R283, 312) for the seventeen jurors that the prosecutor excluded because these jurors disliked the death penalty. See Adams, 448 U.S. at 49 ("[I]t is undeniable, and the State does not seriously dispute, that such jurors will be few indeed as compared with those excluded because of scruples against capital punishment.") Furthermore, this argument, by equating the State's rights with the defendant's rights, compares apples and oranges. In criminal cases, the defendant always has more rights than the State, because it is better that many guilty persons go free than that one innocent person be found guilty. This maxim, of course, has special relevance in capital cases.

Thus, the prosecutor's reason for excluding juror Jackson was unconstitutional and illegal because it justified a hanging jury organized to send Charlie Thompson to the electric chair. Since this reason was illegal, it did not satisfy the Slappy requirement that the reason be legitimate. 522 So.2d at 22. The prosecutor also did not properly explain why he excluded jurors Brooks, Bell, and Tyler. Reversible error therefore occurred, and a new trial is now necessary.

ISSUE V

THE COURT SHOULD HAVE EXCUSED THREE JURORS FOR CAUSE RATHER THAN FORCE THE DEFENSE TO USE PEREMPTORY CHALLENGES; ONE PROSPECTIVE JUROR HAD BUSINESS CONNECTIONS WITH THE VICTIMS WHICH WOULD HAVE INFLUENCED HER JUDGMENT, A SECOND JUROR WOULD AUTOMATICALLY HAVE BEEN IN FAVOR OF DEATH FOR ALL PERSONS CONVICTED OF PREMEDITATED MURDER, AND A THIRD JUROR WOULD HAVE BEEN IMPROPERLY INFLUENCED BY GORY PHOTOGRAPHS.

A

If the statements of prospective jurors during voir dire suggest that they may be improperly biased or will tend not to view the evidence objectively, then the trial judge should excuse those jurors for cause.

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial[,] he should be excused on motion of a party, or by [the] court on its own motion.

Hill v. State, 477 So.2d 553, 555 (Fla. 1985) (quoting Singer v. State, 109 So.2d 7, 24 (Fla. 1959)); Moore v. State, 525 So.2d 870, 872 (1988).

Although these jurors may claim they can follow the law and consider the evidence impartially, such claims are properly viewed with suspicion when their other statements show otherwise. Hill, 477 So.2d at 555-56; Club West v. Tropigas of Florida, 514 So.2d 426, 428 (Fla. 3d DCA 1987). The court must insure that the jury's verdict is fair and untainted by bias or unwillingness to follow the law. "'[J]urors should if possible be not only impartial, but beyond even the suspicion of partiality'...'If there is a doubt as to the juror's sense of fairness or his mental integrity, he should be excused.'" Hill, 477 So.2d at 556 (citations omitted).

In the present case, three jurors made statements during voir dire which provided a basis for a reasonable suspicion that they might not be completely impartial. Nevertheless, in each instance, the court denied defense challenges for cause, thereby

forcing the defense to use peremptory challenges. (R299-301, 304, 311-12, 546-47) By the end of voir dire, the defense had used all its peremptories and asked for more. (R571). The court denied this request. (R571) Defense counsel then named two jurors that he would have challenged had the court given him the extra challenges. (R571) The court's erroneous rulings were therefore not harmless. Singer; Hill; Moore.

B

The first juror whom the court should have excused for cause was Estelle Constantino. She and her husband owned a monument company that did business with Myrtle Hill cemetery. (R474) She dealt with Myrtle Hill only by phone, but her husband regularly went to the cemetery offices and personally knew Nancy Walker, one of the persons who died. (R386, 475) Initially, Constantino thought she could set aside her knowledge of the case and give the defendant a fair trial. (R387, 475) Later, however, she had second thoughts. She volunteered that she would feel pressure from her business friends. (R510-11) She explained that, after the trial, her business relations with Myrtle Hill might be awkward. (R511) Although she initially claimed that this potential awkwardness would not affect her decision, (R511) her statements immediately after this claim revealed her true feelings.

> MR. ALLDREDGE: This is going to be on your mind?
>
> MS. CONSTANTINO: Right.
>
> MR. ALLDREDGE: Throughout the trial? In an abundance of caution, do you feel that that's going -- that may bother you, may affect you to sit as a juror in this cause?
>
> MS. CONSTANTINO: It might.

MR. ALLDREDGE: If the judge asked you to put that aside, could you do it?

MS. CONSTANTINO: I suppose *so.*

MR. ALLDREDGE: But it's going to be hard, isn't it?

MS: CONSTANTINO: Uh-huh.

(R512)

Thus, in dazzlingly quick succession, Constantino first volunteered she would feel pressure from her business friends to reach a decision, then stated this pressure would not affect her decision, then said it would be on her mind and might bother her, and finally said she would have difficulty following the court's instructions to set this pressure aside. By their very nature, equivocal, ambivalent, contradictory statements of this sort provide a reasonable doubt about a juror's impartiality, and numerous courts have *so* held.

For example, in Club West, a case very similar to the present one, a juror's husband owned stock in the defendant company. The juror initially said her husband's happy experiences with the defendant might influence her decision; she later claimed she could weigh the evidence impartially. The Club West court held that "[allthough she later indicated that she could be impartial, because of her equivocal answers, serious doubt remained concerning her ability to be impartial. Consequently, the trial court should have excused her for cause." 514 So.2d at 427-28.

Similarly, defense counsel in Sikes v. Seaboard Coast Line Railroad Company, 487 So.2d 1118 (Fla. 1st DCA 1986) was the best friend of a prospective juror's son. Because the juror gave

ambivalent answers about the effect this relationship would have on her ability to be impartial, the court held she should have been excused for cause, notwithstanding her statement that she would try to be fair.

In Jefferson v. State, 489 So.2d 211 (Fla. 3d DCA 1986), the juror gave equivocal answers about whether her husband's career in law enforcement would affect her deliberations. The court found that she should have been excused for cause.

In Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986), two female jurors said that, despite the nature of the crime, a sexual battery, they would try to be fair and could be objective. Their other answers during voir dire, however, were equivocal and suggested that their decision might be unduly influenced by the nature of the charge. The trial court denied defense challenges for cause. The appellate court reversed because, as the Florida Supreme Court characterized the Auriemme decision, the "juror's ability to be fair and impartial must be unequivocally asserted in the record." Moore, 525 So.2d at 873.

These cases show that when jurors are equivocal or ambivalent about some matter which might affect their impartiality, this ambivalence itself makes their impartiality suspect. The court should excuse such jurors for cause. Juror Constantino was ambivalent and equivocal about the effect her business relationship with Myrtle Hill might have on her. She thought it might affect her as she sat as a juror; she would have difficulty setting it aside. (R512) The court's refusal to excuse her (R546-47) was error.

C

The court should also have granted the defense challenge for cause of juror Lester Olson. (R304-05, 312) As the following exchange between Olson and defense counsel shows, Olson would automatically have been in favor of death if he believed that the defendant had committed premeditated murder.

> MR. O'CONNOR: Mr. Olson, what is your thinking on the propriety of the availability of capital punishment? Do you think it should be available in the system?
>
> MR. OLSON: Yes, I do.
>
> MR. O'CONNOR: Why do you feel that?
>
> MR. OLSON: I think if it's proven to me it's deliberate, premeditated and all, I think I would be in favor of it.
>
> MR. O'CONNOR: And if you found yourself convinced that someone had in fact committed premeditated murder, would you still be willing to entertain the two available options, life and death, or would you vote for death solely because it was premeditated?
>
> MR. OLSON: I would lean towards death if I honestly felt, myself, it was premeditated.

(R283)

Juror Olson stated here that, if the prosecutor could prove premeditated murder, Olson would automatically favor death as the proper punishment. When given the chance to affirm his support for both penalty options, life or death, he still said he would lean toward death. Significantly, Olson did not say he could set aside this presumption and impartially recommend the appropriate penalty in accordance with the court's instructions. Olson's comments instead suggested he would disregard mitigating circumstances if the evidence showed premeditation. The trial

judge was therefore incorrect to claim (R305) that Olson had said he believed in mitigating circumstances and could follow the court's instructions on this issue.

These circumstances make this case much like Hill and Thomas v. State, 403 So.2d 371 (Fla. 1981). In Thomas, the prospective juror was automatically against mercy for any defendant convicted of murder; here, juror Olson automatically favored death for anyone guilty of premeditated murder. Because, in Thomas, the trial court should have excluded the juror for cause, juror Olson in the present case should also have been excluded. See also, Ross v. Oklahoma, 108 S. Ct. 2273 (1988) (juror who would automatically vote for death is excludable for cause).

Similarly, a venireman in Hill said that defendants guilty of premeditated murder deserved death. Hill, 477 So.2d at 555. Although this juror added reluctantly that death should not always be imposed, he entered the courtroom with the presumption, based in part on pretrial publicity, that death was the proper penalty for the defendant. The Hill court held that the trial court should have excused this juror for cause.

> It is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in the particular case. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.

Id. at 556.

Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983) does not require a different result. According to Fitzpatrick, a "judge need not excuse ... a person [who favors the death penalty] unless he or she is irrevocably committed to voting for the death penalty if the defendant is found guilty of murder and is therefore unable to weigh the aggravating circumstances against the mitigating circumstances." Id. at 1076.

The present case differs from Fitzpatrick in two important ways. First, in Fitzpatrick, the jurors specifically said they could follow the court's instructions and weigh the aggravating and mitigating circumstances. Here, juror Olson never said he could set his predisposition aside and make an impartial recommendation. Instead, when asked about the options of life or death, he said he would always lean toward death. (R283)

Second, in Fitzpatrick, the jurors stated that the death penalty was an "appropriate" punishment for murder. Presumably, these jurors believed that life in prison was also an "appropriate" punishment for murder. Their statements implied no presumption in favor of death and suggested only a mere "tendency toward being in favor of the death penalty." Id. at 1075. By contrast, juror Olson's statements implied a presumption in favor of death, because he automatically favored death for all defendants convicted of premeditated murder. (R283) Because Olson's views amounted to a presumption and were more than a mere tendency, Fitzpatrick is distinguishable, and Hill controls. Olson should have been excluded for cause.

If this court is inclined to view the present case as more

like Fitmatrick than like Hill, then this court should recede from Fitzpatrick, because it is inconsistent with the long line of Florida cases beginning with Sinser and continuing with Hill and Moore. The basic principle of the Singer line of cases is that if any reasonable doubt exists about the ability of a juror to follow the law, the defendant should receive the benefit of that doubt, and the juror should be excluded. Sinser, 109 So.2d at 23. In this same vein, Hill states that jurors should be not only impartial but also beyond even the suspicion of partiality. Hill, 477 So.2d at 556. By contrast, dicta in Fitzpatrick seemingly suggest that the evidence must show beyond a reasonable doubt that the juror cannot follow the law before the court should excuse that juror for cause. The dicta in Fitmatrick are not easily reconciled with Hill and Sinser.

The issue in the present case, in Hill, and in Fitzpatrick involves a juror's possible prejudice in favor of the death penalty. The principle of Singer and Hill is particularly germane to this sensitive and important issue. Because procedural safeguards are especially important in capital cases, this court should now reaffirm the Singer line of cases and either overrule Fitmatrick, or restrict it to its facts.

D

The third juror whom the court should have excluded for cause was Ronald Ratka. (R299-301, 311) As the following exchange between Ratka and defense counsel shows, Ratka would have difficulty being impartial when viewing gory photographs.

> MR. ALLDREDGE: Ladies and gentlemen, you're likely to see some gory photographs.... Will all of you be able, if called upon to serve

as a juror, to look at these photographs and remain objective and reasonable? Or by seeing these photographs, do you think that it might be *so* disturbing to you that you may have difficulty making a fair and reasonable judgment? Front row?

PROSPECTIVE JURORS: (indicating negatively).

MR. ALLDREDGE: Mr. Ratka?

MR. RATKA: It would depend. I think it would influence me, depending on how gory these pictures were.

MR. ALLDREDGE: I've been doing this a long time, and I've never seen a pleasant photograph of someone who's been killed. But do you think that -- you think that just viewing the photographs might be such that it may cause you to be -- have difficulty being fair and impartial?

MR. RATKA: I think I would have to say yes.

MR. ALLDREDGE: You think that seeing the photographs might substantially impair your ability to be a juror?

MR. RATKA: That's hard to say.

(R231-32)

Juror Ratka stated directly here that gory photographs would influence his deliberations. He said these photographs would cause him to have difficulty being fair and impartial. He was unable to say, however, whether these photographs would substantially impair his ability to be a juror.

At best, these statements showed that Ratka was equivocal about his capacity to view gory photographs without being unduly influenced by them. At worst, they showed directly that he could not be fair and impartial. In either case, they raised a reasonable doubt about his fitness to be on the jury. As has already been argued at length in this brief, because of this

reasonable doubt, the court should have excluded Ratka for cause. (R299-301) A "juror's ability to be fair and impartial must be unequivocally asserted in the record." Moore, 525 So.2d at 873.

Because the court erroneously refused to exclude jurors Constantino, Olson, and Ratka for cause, remand is necessary for a new trial. Singer; Hill; Moore.

ISSUE VI

THE TRIAL COURT FAILED TO MAKE THE CONSTITUTIONALLY MANDATED INQUIRY WHEN THE DEFENDANT REQUESTED THAT HE BE ALLOWED TO REPRESENT HIMSELF OR, ALTERNATIVELY, THAT NEW COUNSEL BE APPOINTED FOR HIM.

A

Article I, section 16 of the Florida Constitution guarantees defendants in criminal prosecutions the right "to be heard in person, by counsel or both." The federal constitution gives defendants the same right. Faretta v. California, 422 U.S. 806 (1975). Violating the right to proceed pro se is inherently prejudicial. McKaskle v. Wiggins, 465 U.S. 168 (1984). "The right [to proceed pro se] is either respected or denied; its deprivation cannot be harmless." Id. at 177 n.8.

When a defendant clearly indicates his desire to represent himself, "he should be made aware of the dangers and disadvantages of self-representation, *so* that the record will establish that 'he knows what he is doing and his choice is made with his eyes open.'" Faretta, 422 U.S. at 582 (citation omitted). To determine whether the defendant is competent to represent himself, the trial court must also inquire into the defendant's "mental condition, age, education, experience, the

nature or complexity of the case, or other factors." Fla. R. Crim. P. 3.111(d)(3); Hardwick v. State, 521 So.2d 1071, 1074 (Fla. 1988); Johnston v. State, 497 So.2d 863 (Fla. 1986). Failure to make this Faretta inquiry is reversible error. Hardwick; Smith v. State, 512 So.2d 291 (Fla. 1st DCA 1987).

Sometimes, the defendant is dissatisfied with his appointed counsel and seeks -- as an alternative to self-representation -- to have his present counsel discharged and new counsel appointed. Such defendants "are presumed to be exercising their right to self-representation. They should be *so* advised, and the trial court should forthwith proceed to a Faretta inquiry." Jones v. State, 449 So.2d 253, 258 (Fla. 1984); Hardwick, 521 So.2d at 1074; Smith v. State, 444 So.2d 542, 545 (Fla. 1st DCA 1984).

B

Before opening arguments, defense counsel told the court that Thompson wanted to represent himself. (R585) The court had previously either denied or ignored Thompson's numerous requests that the court appoint new counsel for him. (R12, 1105, 1329, 1385, 1389, 1394, 1427, 1429) He apparently concluded that, since he could not get new counsel, he would take the next step and represent himself. This statement by Thompson through his lawyer constituted a clear and unequivocal request to waive the assistance of counsel.

Because Thompson tried to exercise his right to represent himself, the trial court should have made a Faretta inquiry. The court made no such inquiry. The record below (R585-88) reveals that the court did not explain to Thompson his right to represent

himself; did not make him aware of the dangers and disadvantages of self-representation; and did not inquire into his mental condition, age, education, and experience with the law. This failure to make the appropriate Faretta inquiry was per se reversible error. Hardwick; McKaskle.

The state will doubtless argue that Thompson's statements after making this request showed he did not want to represent himself and instead wanted different court-appointed counsel. Hardwick. This argument is incorrect and irrelevant. It is incorrect because, just as the state cannot use a defendant's later statements to cast doubt on the clarity of his earlier unambiguous request for the assistance of counsel, Smith v. Illinois, 469 U.S. 91 (1984), so also the state cannot use later statements to cast doubt on the clarity of Thompson's earlier unambiguous request to waive the assistance of counsel. The argument is irrelevant because, even if Thompson actually only requested different counsel, the court should have presumed this request meant he wanted to represent himself and should have made a Faretta inquiry anyway. Jones; Hardwick.

The state may also argue that Thompson abandoned his Faretta rights when, after the court asked him whether he had anything further to say, he said he did not. (R588) This argument has no merit because a major purpose of the Faretta procedure is to insure that, if a defendant abandons his earlier request for self-representation, "he knows what he is doing." Faretta, 422 U.S. at 582. Here, the court did not insure that Thompson -- who was mentally retarded and not legally sophisticated -- knew what he was doing.

The record shows instead that the court repeatedly told him that anything he said in the courtroom could be used against him. (R585-86) The court thereby suggested that he should not persist with his request for self-representation, because his statements while making the request might be self-incriminating. After he said he did not understand, he was told three times that the court would not appoint another lawyer. (R586-88)

Under these circumstances, Thompson's decision not to say anything when asked was understandable. (R588) Thompson may have thought that the court had already denied his initial request for self-representation and that further requests might only incriminate him. Consequently, his decision not to say anything did not by itself constitute the "intelligent and knowing" waiver required by Faretta. Johnston, 497 So.2d at 868. Because Thompson did not waive his right to represent himself, the trial court's failure to make a proper Faretta inquiry was per se reversible error, and a new trial is now necessary. Hardwick; McKaskle.

ISSUE VII

THE TRIAL JUDGE IMPROPERLY FAILED TO DETERMINE WHETHER THOMPSON HAD GOOD CAUSE TO BE DISSATISFIED WITH HIS LAWYER.

On several occasions during trial, Thompson told the court that he was dissatisfied with his lawyer. (R11-12, 585-88, 827-35, 914-17) Because he expressed this discontent with his appointed counsel, federal and Florida law required the trial court to inquire into the reasons for the defendant's

dissatisfaction and to determine whether the defendant had good cause to demand another lawyer. Hardwick v. State, 521 So.2d 1071 (1988); Smith v. State, 444 So.2d 542 (Fla. 1st DCA 1984); United States v. Allen, 789 F.2d 90 (1st Cir. 1986). Judge Graybill, however, never asked Thompson why he was upset with his lawyer and never determined whether he had good cause for his complaints. Instead, without inquiry, Graybill summarily rejected Thompson's requests. (R12, 586, 827, 916) Graybill said that Judge Bonanno had already decided this issue and that Graybill would not revisit it. (R12, 586-87)

Thompson's trial objections however were different from those expressed in Judge Bonanno's courtroom several weeks earlier. When Judge Bonanno asked Thompson why he wanted his lawyer to withdraw, he said that his lawyer had not given him the addresses of the state's witnesses and that he did not think a public defender should handle a capital case. (R1103-04) At trial, however, some of his objections were that his lawyer had talked against him in the courtroom and that his lawyer had told him to appeal in five or ten years. (R585, 830) Since Graybill had no reason to believe that the objections were still the same -- in fact they were not -- Graybill could not rely on Bonanno's ruling as disposing of the issue.

Of course, determining what Thompson's objections actually were is now difficult because Judge Graybill never asked Thompson about them and refused to hear them. (R12) The protests that Thompson did make were made in spite of the judge, not because the judge ever gave him a chance to speak. Thompson expressed some of his complaints by talking to the jury despite Graybill's

orders not to do *so.* (R828-31) At another time, Thompson did manage to interject that his lawyer had talked against him in the courtroom. (R586) On both occasions, however, Graybill had already expressly said he would not appoint another attorney. (R586, 827) Graybill's statements and attitude showed he had made up his mind and would not consider Thompson's protests. Moreover, Graybill never determined whether Thompson had other objections that he had not yet had a chance to express.

Rather than forthrightly ask Thompson why he wanted to discharge his attorney, Judge Graybill repeatedly told Thompson that he would not get another lawyer and then abruptly asked him whether he had anything else to say or whether his sole position was that he was entitled to another attorney. (R586-88, 916-17) Because Thompson was retarded, Thompson had a hard time saying anything when placed on the spot that abruptly, especially after the court had implied that further requests would be useless. Graybill's tactics were only too successful. They did not constitute the full inquiry required by the law. Hardwick; Allen. Remand for a new trial is therefore necessary.

ISSUE VIII

THE TRIAL COURT PREDICATED THE ORIGINAL COMPETENCY DECISION ON INVALID EVIDENCE; MOREOVER, THE COURT SHOULD HAVE HELD A SECOND COMPETENCY HEARING BECAUSE EVENTS AT TRIAL GAVE REASONABLE GROUNDS FOR BELIEVING THAT THOMPSON HAD BECOME INCOMPETENT DURING THE COURSE OF THE TRIAL.

A

The question of Thompson's competence was first raised at

hearings three weeks before trial. Dr. Michael Maher and Dr. Robert Berland testified that Thompson was not competent to stand trial. (R1146, 1159) They based this conclusion in part on his low verbal intelligence, which was well within the retarded range. (R1147-48, 1160) It severely inhibited his ability to help his lawyer prepare a defense. (R1147, 1160)

The doctors also based their conclusion on his psychotic paranoia, which Berland said was caused by physical brain damage. (R1152, 1154, 1160) Thompson's paranoia had convinced him that his lawyer was working against him. (R1153, 1159-60) He had repeatedly asked the court to appoint new counsel. (R1105, 1329, 1385, 1389, 1394, 1427, 1429) His mistrust rendered him unable to assist his attorney, and it affected his motivation to help himself in the legal process. (R1153, 1160) These two factors combined -- paranoid mistrust and retarded intelligence -- meant that Thompson did not satisfy the first prong of the competency test, which is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." Duskv v. United States, 362 U.S. 402, 402 (1960); Fla. R. Crim. P. 3.211(a).

Dr. Arturo Gonzalez and Dr. Daniel Sprehe, however, testified that Thompson was competent to stand trial. (R1129, 1272-73) They found that he understood the charges against him, understood the legal system, and could communicate with his lawyer and assist him at trial. (R1130-31, 1273, 1276) Neither Gonzalez nor Sprehe tested Thompson's intelligence, but each noted that it seemed to be low. (R1133, 1283) They each interviewed him for an hour or less and did not give him any psychological tests.

(R1131, 1140, 1272, 1282)

Unlike Gonzalez and Sprehe, Dr. Berland and Dr. Maher relied on numerous psychological tests taken by Berland, and each spent several hours with Thompson. (R1145-46, 1158-59) Berland said that, without psychological testing, short interviews like those conducted by Gonzalez and Sprehe were an insufficient and ineffective means of determining mental competence. (R1145-46) Maher said that Thompson generally tried to hide the extent of his disability. (R1161-62) Only after lengthy questioning and testing did the full extent of Thompson's problems become apparent. (R1147, 1150, 1161) Berland and Maher agreed that Thompson was not malingering. (R1152, 1162)

At the conclusion of the competency hearing, defense counsel asked the court to appoint a fifth expert to examine Thompson. (R1291) Judge Bonanno denied this request and ruled that Thompson was competent. (R1291-92)

B

The court should have appointed a fifth expert because, according to section 916.11(1)(d), Florida Statutes (1985), when the defendant's suspected condition is mental retardation, the court "shall appoint the diagnosis and evaluation team of the Department of Health and Rehabilitative Services" to determine whether the defendant is competent. These mental retardation experts are better qualified than psychiatrists to determine the competence of the retarded, because psychiatrists are typically concerned with mental illness and do not analyze the effects of retardation. Ellis & Luckasson, Mentally Retarded Criminal

Defendants, 53 Geo. Wash. L. Rev. 414, 456 n.233 (1985). Because mentally retarded defendants usually make great efforts to "prevent any discovery of their handicap," psychiatrists often fail to even notice the retardation. Id. at 457-58.

Dr. Gonzalez and Dr. Sprehe did not come from the Department of Health and Rehabilitation. They were instead psychiatrists (R1128, 1271) who knew nothing about mental retardation. They did not analyze the effects of Thompson's retardation. They did not even notice it. Gonzalez said that measuring intelligence was something "we don't do." (R1133, 1283) Their incompetence is apparent on the face of the record.

Furthermore, their testimony provided legal conclusions but little evidence. Gonzalez determined that Thompson could assist his lawyer but mentioned no specific evidence to support this conclusion, except another conclusion that Thompson could communicate with counsel. (R1130-31) Sprehe likewise provided scant evidence that Thompson could assist his lawyer. On this point, Sprehe found only that Thompson could remember what happened the date of the offense. (R1275-76)

As in State v. Bennett, 345 So.2d 1129 (La. 1977), the "vital factual considerations were supplanted by the physicians' conclusion of law that [the] defendant was able to assist counsel." Id. at 1138. During their perfunctory examination of Thompson, Sprehe and Gonzalez failed to determine whether Thompson was

> able to assist counsel in locating and examining relevant witnesses; whether he [was] able to maintain a consistent defense; whether he [was] able to listen to the testimony of witnesses and inform his lawyer

> of any distortions or misstatements; whether he [had] the ability to make simple decisions in response to well-explained alternatives; whether, if necessary to defense strategy, he [was] capable of testifying in his own defense; and to what extent, if any, his mental condition [was] apt to deteriorate under the stress of trial.

Id. The absence of these factual determinations meant that the conclusory testimony of Sprehe and Gonzalez did not legally rebut the strong testimony of Maher and Berland and was legally insufficient to support the court's competency ruling. Gibson v. State, 474 So.2d 1183 (Fla. 1982) (court's competency ruling must be predicated on valid medical evidence).

C

Even if the court correctly ruled that Thompson was competent, the hearing testimony at least showed that he was close to being incompetent. His behavior at trial suggested that the already unbalanced scales of his rationality might have tipped even further as the pressures of a capital trial increased. His lawyers twice moved for a second competency hearing. (R914-16, 1027) Judge Graybill summarily denied these motions. (R916, 1027) He should have granted them.

"Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Drope v. Missouri, 420 U.S. 162, 181 (1975). A court may not rely solely on past medical reports and its own observations. Gibson. "[I]f during trial the evidence raises a 'bona fide and reasonable doubt' as to defendant's capacity, it is incumbent upon the trial court to

conduct another competency proceeding." Holmes v. State, 494 So.2d 230, 232 (Fla. 3d DCA 1986) (citation omitted); accord Trawick v. State, 472 So.2d 1235, 1238 (Fla. 1985).

In the present case, Thompson's trial behavior, the expert testimony, and the pretrial proceedings provided numerous indicia of Thompson's incompetence. The twelve indicia of incompetence which follow constituted reasonable grounds for believing that Thompson may have become incompetent. They thus entitled him to a second hearing on his fitness to stand trial.

D

First, Thompson's lawyer stated at the beginning of the penalty phase that Thompson's mental condition had materially worsened since the first competency hearing. (R915) Thompson's mistrust of his lawyers had become obsessive, and they had been unable to communicate with him. (R914-15) Because his lawyers were the persons in the legal system who knew Thompson best, their opinion on the need for a competency hearing was entitled to great weight. "Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, an expressed doubt in that regard by one with 'the closest contact with the defendant' is unquestionably a factor which should be considered." Drope, 420 U.S. at 177 n.13 (citations omitted).

Second, two medical experts had testified at the pretrial competency hearing that Thompson was not competent. Prior medical opinion of this sort is highly "relevant in determining whether further inquiry is required." Id. at 180. Although Judge Bonanno ruled at the pretrial hearing that this expert testimony

did not support a finding of incompetence, the trial judge, Judge Graybill, refused to hear this testimony. (R957) Consequently, Graybill did not know how close Thompson was to the thin line between competence and incompetence. Graybill should have held another hearing, because he could not make an informed decision without listening to the relevant medical testimony.

Third, Judge Graybill did hear testimony from the doctors at the penalty phase that Thompson's verbal intelligence was within the retarded range. (R959-60, 992) This low intelligence was a sign of potential incompetence because a retarded person necessarily has a difficult time communicating with his lawyer.

Fourth, Dr. Maher testified that, during periods of high stress, Thompson was not always able to keep clear in his mind what he was doing. (R966) Certainly, the guilt and penalty phases of his capital trial were periods of high stress. His fear of the electric chair was an important factor in his outbursts at trial. (R832) The court should have been aware that the stress of the trial might cause his behavior to become more irrational.

Fifth, the entire history of the trial showed that Thompson was unable to work with his lawyers. Thompson repeatedly requested new counsel. (R12, 585-86, 830, 917) The doctors testified that Thompson was psychotically paranoid and thought everyone was trying to persecute or harm him. (R962, 998-99) Their testimony implied that Thompson also thought his lawyers were trying to harm him. Of course, the abilities "to disclose to attorney pertinent facts surrounding the alleged offense, ... to relate to attorney, ... [and] to assist attorney in planning

defense" are part of the essence of being competent. Fla. R. Crim. P. 3.211(a)(1)(iv)-(vi).

Sixth, just before his attorney's closing argument during the guilt phase, Thompson told the jury that his lawyer had not represented him properly and had falsely told him he would have to wait five or ten years to appeal. (R830) Thompson thus suggested to the jurors that they not listen to his attorney's closing argument, because his lawyer was a bad lawyer who lied about the law. Thompson then showed the jury by leaving the courtroom that he would not listen to these lies. (R835) He thereby encouraged the jurors to disregard his own attorney's arguments. This behavior was highly irrational, because defendants normally want juries to pay close attention to the closing arguments on their behalf. According to Drope, a defendant's irrational behavior at trial can by itself be sufficient to show the need for a competency hearing. Id. at 180.

Seventh, Thompson was absent from the courtroom for closing arguments, jury instructions, and the verdict. (R841, 902-03) This absence was a sign of incompetence because defendants usually wish to face the jury at all phases of trial. As in Drope, Thompson's

> absence bears on the analysis in two ways: first, it was due to an act which suggests a rather substantial degree of mental instability contemporaneous with the trial; second, as a result of [his] absence the trial judge and defense counsel were no longer able to observe him in the context of the trial and to gauge from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him.

Id. at 181 (emphasis added).

Eighth, Thompson said through his counsel after jury selection that he was *so* upset with his lawyer that he wanted to represent himself. (R585) Since Thompson was retarded, this desire raised yet another reasonable doubt about Thompson's competence.

Ninth, as Dr. Berland testified about Thompson's mental condition, Thompson interrupted and said that Berland was lying and that Berland had not seen him shoot anybody. (R999, 1010-11) Telling the jury that your own witness is lying as he provides important mitigating testimony on your behalf is not the way a competent person would normally act at trial.

Tenth, Thompson made numerous irrational statements during the course of the trial. He insisted that his attorney was talking against him in the courtroom. (R586) He twice accused the state attorney of committing the crimes. (R1009, 1024) When the state attorney asked Dr. Berland whether the crimes had been committed in anger, Thompson said, "Statement said it was white man and all." (R1011-12) According to Drope, irrational behavior at trial is substantial evidence of incompetence.

Eleventh, the court told Thompson that creating a scene in front of the jury could only prejudice his case. (R830) Despite this admonition, Thompson made a scene anyway when the jury returned. (R830) Thompson continued to create problems later in the trial. The "ability to manifest appropriate courtroom behavior" is a specific factor that courts must consider when determining competence. Fla. R. Crim. P. 3.211(a)(1)(viii).

Finally, Thompson told the jury he expected to appeal the case. (R830) This statement amounted to an admission of defeat at trial. A competent defendant does not usually tell the jury

he expects the jury's decision to go against him.

Appellant is not arguing that these twelve indicia showed he became incompetent during the trial. Appellant is only arguing that these twelve indicia gave the court reasonable grounds to believe that he might have become incompetent during the trial. Consequently, the court should have held a hearing on Thompson's competence. Drose; Scott v. State, 420 So.2d 595 (Fla. 1982). The court's failure to do so was reversible error. Since neither this court nor the trial court can now retroactively determine Thompson's competence at the time of trial, remand is necessary for a new trial. Pate v. Robinson, 383 U.S. 375, 386-87 (1966); Dusky, 362 U.S. at 403.

ISSUE IX

THE TRIAL COURT IMPROPERLY ADMITTED AS EVIDENCE THOMPSON'S TAPED STATEMENT TO THE POLICE, BECAUSE THE POLICE (1) DID NOT INSURE THAT THOMPSON UNDERSTOOD HIS RIGHTS AND INTELLIGENTLY WAIVED THEM, (2) COERCED HIS CONFESSION BY USING A LASER ON HIM, AND (3) DID NOT SCRUPULOUSLY HONOR HIS DESIRE FOR THE ASSISTANCE OF COUNSEL.

A

About 4 p.m. on August 29, 1986, after detective Rick Childers had arrested Thompson and taken him to the police station, Childers read him his constitutional rights from a written consent form. (R1168-70, 1568) As Childers read each right, he asked whether Thompson understood it. (R1171, 1181) When Thompson in each instance said he did, Childers put a check mark next to the right on the form. (R1181, 1568) After Childers had read all the rights, Thompson said he understood them and signed

the form. (R1172, 1568) Childers did not explain the meaning of such words on the form as "inducement," "voluntary," "terminate," "signature affixed," and "requirement." (R1181-82) Childers admitted at the suppression hearing that he did not know if Thompson had understood any of the words on the form. (R1182)

Dr. Michael Maher, a forensic psychiatrist, testified that Thompson could not have understood this consent form without detailed explanations of the words on the form and their interrelationships. (R1157, 1189-90) He may have believed he understood the form but could not have actually understood it. (R1195) According to Maher, Thompson was mentally retarded, about ten years old mentally, and about two and a half years old emotionally. (R1187-88, 1199) His overall IQ was only seventy; his verbal IQ was even lower. (R1187) Consequently, many of the words on the form, such as "inducement," "affixed," and "prosecuted," were beyond his capacity to understand. (R1191) Maher discounted Childers's testimony that Thompson had said he understood his constitutional rights. In Maher's own interview with Thompson, Thompson had said he understood his rights and had immediately showed he did not. (R1193-94)

Dr. Robert Berland, a forensic psychologist, agreed with Maher that retarded and brain damaged persons like Thompson often say they understand, simply to avoid admitting they do not. (R1094, 1230) Dr. Berland thought that, because Thompson's capacity to think abstractly was especially deficient, he would have had difficulty understanding many parts of the consent form. (R1228, 1232) Berland also thought, however, that with further

explanation in more primitive language, Thompson would have been capable of grasping the concepts involved. (R1229)

During Thompson's initial interrogation, he denied committing the offenses and gave an alibi. (R1173-74) According to officer Childers, Thompson seemed to have no difficulty understanding or answering the questions. (R1173) Several hours later, however, after the police used a laser on him, Thompson agreed to make a taped statement admitting his involvement in the shootings. (R1175-78, 1206) On the tape, Thompson first gave a brief version of the events surrounding the killings, (R1206-07) and then the following questions and answers occurred.

> DETECTIVE CHILDERS: Do you remember myself, detective Durkin, and detective Perry, and sergeant Price when you were brought down to the detective division, we advised you of your rights, correct?
>
> THE DEFENDANT: Yes, sir.
>
> DETECTIVE CHILDERS: Did you understand your rights?
>
> THE DEFENDANT: Yeah.
>
> DETECTIVE CHILDERS: Did you at any time request an attorney?
>
> THE DEFENDANT: Yeah, but I don't have the money to pay an attornev.
>
> DETECTIVE CHILDERS: You never told us that you wanted an attorney, did you?
>
> THE DEFENDANT: No.
>
> DETECTIVE CHILDERS: Okay. What you're saying right now is because Charlie Thompson wants to say it, isn't that correct?
>
> THE DEFENDANT: Yes.
>
> DETECTIVE CHILDERS: Have I promised you anything?

THE DEFENDANT: No.

DETECTIVE CHILDERS: Have we threatened you in any way?

THE DEFENDANT: No.

(R1208-09) (emphasis added)

Dr. Berland and Dr. Maher listened to this tape and concluded that Thompson did not understand his rights. **(R1192, 1229)** Specifically, Thompson did not understand he had a right to remain silent until an attorney was present and a right to have a free attorney appointed for him. **(R1192)** His statement that he wanted an attorney but could not afford one showed he did not understand these rights. **(R1229)**

Over defense objections, detective Childers first testified about the substance of Thompson's two statements and then played the tape for the jury. **(R757-63)**

B

When, as in this case, custodial interrogation produced incriminating statements, the government may not use these statements at trial unless the police informed the defendant of his rights, and the defendant voluntarily and knowingly waived them. Miranda v. Arizona, **384** U.S. **436 (1966).** The inquiry into whether the defendant properly waived his rights has two facets.

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.

Moran v. Burbine, **475** U.S. **412, 421 (1986).**

The court must evaluate the defendant's "age, experience,

education, background, and intelligence, and whether he has the capacity to understand the warnings given him." Fare v. Michael C., 442 U.S. 707, 725 (1979). A defendant's low intelligence, however, by itself does not necessarily make a confession inadmissible. Ross v. State, 386 So.2d 1191 (Fla. 1980).

In Ross, the defendant had an overall IQ of sixty-six and a verbal IQ of fifty-five. In Kight v. State, 512 So.2d 922 (Fla. 1987), the defendant's IQ was sixty-nine. In each case, despite the defendant's low intelligence, this court found the defendant's confession to be admissible, because other facts showed that the confession was knowing and voluntary. The present case, however, differs in several significant respects from Ross and Kight.

First, the opinion in Kight did not show that any experts testified about the defendant's ability to comprehend his Miranda rights; in Ross, the sole expert testified affirmatively that the defendant did have the capacity to understand these rights. In the present case, by contrast, two experts testified that Thompson did not understand his rights when the police interrogated him and did not understand the words on the printed consent form. (R1191-92, 1228-29) Moreover, the police officer admitted he did not know if Thompson had understood the words on the form. (R1182) The state presented no expert witnesses to contradict this testimony. As the court said in Hines v. State, 384 So.2d 1171 (Ala. Crim. App. 1980), "[w]hen expert testimony indicates that a defendant could have intelligently understood the waiver of his constitutional rights only if they were simply and clearly explained, the record must expressly and specifically

establish that such an explanation was given." Id. at 1181.

Second, the defendant in **Ross** waived his Miranda rights seven or eight times. In Kisht, the defendant asserted his rights once and waived them four times. Thompson, however, heard his rights only once -- at the beginning of the interrogation -- and waived them only once. (R1177)

Third, the defendant's parents were present in **Ross**. In this case, from the time Thompson was arrested (1:35 p.m.) until the time he made the taped statement (11:02 p.m.), he was alone with the police for nine and a half hours. (R748, 1206) Sims v. Georgia, 389 U.S. 404 (1967) emphasized this very point.

> The reliance by the State on subsequent warnings made to petitioner prior to his confessing is misplaced. Petitioner had been in the continuous custody of the police for over eight hours and had not been fed at all during that time. He had not been given access to family, friends, or counsel at any point. He is an illiterate, with only a third grade education, whose mental capacity is decidedly limited. Under such circumstances the fact that the police may have warned petitioner of his right not to speak is of little significance.

Id. at 407.

Fourth and most important, unlike the record in Kisht which showed that the defendant had affirmatively "evidenced a full awareness of the nature of the rights being abandoned," Kisht, 512 So.2d at 926, the record of Thompson's statements in the present case affirmatively showed he did not understand the rights he had abandoned. His statement that he had asked for a lawyer but could not afford one patently meant he did not understand he could have had one free. (R1208) When Thompson

made this statement, detective Childers should at least have explained the right more carefully, to make sure that Thompson knew what he was doing. Instead, Childers simply asked whether Thompson had ever requested a lawyer. (R1208) This inquiry was insufficient, since Thompson may not have asked for a lawyer precisely because he did not know he could get one.

Thompson's statement that he could not afford a lawyer made this case similar to Fields v. State, 402 So.2d 46 (Fla. 1st DCA 1981). In Fields, the police repeatedly informed the juvenile defendant of his Miranda rights, and he said he understood them. When the police asked, however, whether he wanted a lawyer, he responded that he could not afford to get one. Id. at 47. His interrogators did not then or later explain the right to counsel in greater detail. A psychologist testified that the defendant had a reduced mental ability, was brain damaged, and would have trouble understanding his rights.

The Fields court held that the state had not met its burden of showing that the defendant had intelligently waived his right "to have counsel even if he could not afford the cost." Id. Since the facts in Fields are virtually identical to the facts below, this court should reverse the trial judge's refusal to suppress Thompson's incriminating statements to detective Childers. See also Hall v. State, 421 So.2d 571 (Fla. 3d DCA 1982) (expert testimony showed that retarded juvenile did not knowingly waive his rights); Tennell v. State, 348 So.2d 937 (Fla. 2d DCA 1977) (same); People v. Redmon, 127 Ill. App. 3d 342, 468 N.E.2d 1310, 1314 (1984) (expert testimony showed that seventeen-year-old defendant with IQ of seventy needed more than a mere "ritualistic

recital" of his Miranda rights before he could knowingly waive them); Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972) (as in the present case, state's evidence from the police officer showed only that the sixteen-year-old defendant with IQ of less than seventy waived his rights and "appeared" to understand them; the court should have suppressed the defendant's confession, because the officer's testimony did not rebut the expert testimony that the defendant did not understand his rights).

Under the totality of the circumstances in this case, the state did not meet its burden of showing that Thompson knowingly and intelligently waived his rights. The trial court should therefore have suppressed all his statements to the police.

C

Before the state may use a defendant's statements as evidence, the defendant must under the totality of the circumstances have waived his rights, not only knowingly and intelligently, but also voluntarily. Burbine. This requirement of voluntariness means that the police may not obtain a confession by coercion and may not use "[t]echniques calculated to exert improper influence." Thomas v. State, 456 So.2d 454, 458 (Fla. 1984); Brewer v. State, 386 So.2d 232 (Fla. 1980). Today, due process forbids not only physical coercion but also "more subtle forms of psychological persuasion." Colorado v. Connelly, 107 S. Ct. 515, 520 (1987). When the police use these psychological ploys, the courts have found the mental state of the defendant to be an especially significant factor in the "voluntariness" calculus. Id.

In the present case, the police used these "subtle forms of

psychological persuasion" on Thompson. Because Thompson was retarded, he was especially likely to be taken in by these persuasive techniques. The statements he finally made after several hours of interrogation therefore were not the product of his free will but rather were induced by psychological coercion.

According to the evidence at the suppression hearing, the police first arrested Thompson at 1:30 p.m. and took him to the police station. (R748, 1168) A police station is considered to be inherently coercive. Drake v. State, 441 So.2d 1079 (Fla. 1983). Sergeant Price and detective Childers started questioning Thompson about 4 p.m. in the Tampa police department's memorial room, so-called because it was lined with the pictures of dead police officers. (R1169-70) At the suppression hearing, Childers said this room was twenty-five feet by thirty feet, but, at trial, he said it was six feet by twelve feet. (R750, 1169)

Although he was not interrogated the entire time, Thompson remained in the custody of the police for several hours. He did not begin to incriminate himself until 11 p.m. (R1206) The coup de grace occurred when, with Thompson's consent, the officers used a laser on his arm. The officers explained that the laser examination was a new technique that might show whether he had recently fired a gun. (R1174) The officers, of course, did not tell him that the test would detect the presence not only of gunpowder residue but also of semen, urine, and various other chemicals. (R776)

The police turned down the lights, and everyone wore protective goggles. (R1179) The laser technician first shone the laser on Childers's arm, to show that it was not harmful. (R1175)

The technician then shone the light on Thompson's arm. (R1176) His arm glowed in the dark. (R1176) The officers asked Thompson if he wanted to talk. (R1176) Thompson said that he did. (R1177) Within five minutes, he made incriminating statements about his involvement in the killings. (R1177)

Dr. Maher testified concerning this procedure that it was possibly very coercive. (R1194) Because of Thompson's paranoia, his perceptions of these events may have been very different from those of the other observers in the room. (R1194)

These circumstances were similar to those in Henry V. Dees, 658 F.2d 406 (5th Cir. Unit A Oct. 1981). In Henry, the police improperly took advantage of a mentally retarded defendant by telling him he had flunked a polygraph. The court found that a "fundamental concern" in such situations was the "mentally deficient accused's vulnerability to suggestion." Id. at 409. The police should have taken "extra precautions" and should have "painstakingly determined" that the defendant comprehended what was happening. Id. at 411. The defendant's waiver of his rights was therefore not voluntary.

These circumstances were also similar to those in People v. Stanis, 41 Mich. App. 565, 200 N.W.2d 473 (1972). In Stanis, as in the present case, the defendant's IQ was seventy, and he suffered from organic brain damage. After several hours of interrogating the defendant and three readings of his Miranda rights, the police obtained a taped confession about 10:30 p.m. As in the present case, the officer testified that the defendant appeared to understand the questions and that the police did not

coerce the defendant's statements in any way.

During this questioning, however, the police showed the defendant a little black box with a needle that moved back and forth. The officers told the defendant that the movements of this needle showed when the defendant was lying. The Stanis court held that the use of this black box was "psychologically timed to have a serious impact on a person of the mental capacity ascribed to the defendant by the examining psychiatrists ... We have no doubt that such impact registered and that defendant's self-incriminating statements were far from voluntary and since lacking such voluntariness they were inadmissible." Id. at 479.

The laser in the darkened room served the same function in the present case that the black box with the moving needle served in Stanis. The laser and Thompson's subsequently glowing arm were "psychologically timed" to have a serious impact on a mentally retarded defendant. That Thompson immediately thereafter made incriminating statements showed how effective this technique was. It was "calculated to exert improper influence," Thomas, 456 So.2d at 458, and was therefore illegal. "[T]he blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

Because Thompson's statements to detective Childers were the product of subtle psychological coercion rather than Thompson's free will, the trial court should have suppressed them. Repeating them to the jury was reversible error, and a new trial is now necessary.

D

According to the bright line rule established in Edwards v.

Arizona, 451 U.S. 477 (1981), "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Id. at 484. A defendant invokes this right to counsel "by statements that in any manner indicate his desire to deal with the police only through counsel, regardless of subsequent statements made by the defendant." Doyle v. State, 526 So.2d 909, 911 (Fla. 1988); Smith v. Illinois, 469 U.S. 91 (1984). If this desire for counsel is equivocal, then, in Florida, the investigating official may "continue questioning for the sole purpose of clarifying the equivocal request." Long v. State, 517 So.2d 664, 667 (Fla. 1987). The issue is not whether the defendant actually requests counsel but rather whether he desires one. Cannady v. State, 427 So.2d 723, 728 (Fla. 1983). If the defendant's statement clearly indicates a desire to have an attorney, then all questioning must cease. Id.

When detective Childers asked Thompson whether he had ever requested a lawyer, he replied, "Yeah, but I don't have the money to pay an attorney." (R1208) Although he did not clearly request an attorney here, he did clearly and unambiguously indicate a desire for one. He simply did not know he could get one free. Because this statement showed that Thompson desired a lawyer, Childers should have stopped the questioning. Cannady.

Furthermore, even if Thompson's desire was equivocal, detective Childers's next questions should have attempted to

clarify this desire. Specifically, Childers should have determined whether he wanted a lawyer and whether he understood he could have one free of charge. Instead, Childers asked merely whether he had previously asked for a lawyer and whether he was talking to Childers because he wanted to. (R1208) These questions did not clarify his desire for a lawyer but rather ignored it. That he was willing to talk to Childers and that he had not previously asked for a lawyer did not determine whether he understood that he could get a free lawyer to help him.

These facts are very similar to those in Commonwealth v. Wassoner, 540 A.2d 280 (Pa. Super. Ct. 1988). In Wassoner, the defendant, when asked whether he understood that he could have a free lawyer present during any police questioning, replied that he could not afford a lawyer. The police officer did not stop to clarify this response but, instead, simply continued to read the remaining Miranda rights. The Waasoner court pointed out that, "[c]onsidering Waggoner's response, one could easily draw the conclusion that Waggoner had failed to understand that he could have a free lawyer appointed for him. Moreover, Waggoner's statement would seem to indicate that if he could have afforded a lawyer, he would have wanted one present." Id. at 288. The court held that this response was at least ambiguous and that, therefore, the officer should have "attempted to clarify whether Waggoner had understood his right to have counsel free of charge." Id. Accordingly, the court suppressed Waggoner's statements and reversed and remanded for a new trial.

Thompson's statement was also at least ambiguous. Detective Childers should therefore have clarified whether Thompson wanted

a lawyer and understood his right to have one appointed for him free of charge. Childers's failure to do *so* meant that the trial court should have suppressed the rest of Thompson's statements.

Thompson did not knowingly and intelligently waive his Miranda rights. His statements also were not voluntary, because the police used a psychological ploy to take advantage of his mental weakness. Finally, the police did not scrupulously honor his desire for a lawyer. Accordingly, the trial court erred by not suppressing Thompson's statements to the police. A new trial is now necessary.

ISSUE X

THE STATE IMPROPERLY COMMENTED ON THOMPSON'S RIGHT TO SILENCE AND RIGHT TO COUNSEL BY INTRODUCING THOMPSON'S STATEMENT THAT HE HAD ASKED FOR A LAWYER BUT COULD NOT AFFORD ONE.

As discussed in the previous issue, when detective Childers asked Thompson on tape whether he had ever requested an attorney, Thompson said, "Yeah, but I don't have the money to pay an attorney.'' (R1208) Although Thompson did not here unambiguously ask for the assistance of counsel, he did show that he wanted a lawyer. He just did not know he could get one free.

When the state played this portion of the tape at trial, the defense argued that telling the jury that Thompson had wanted a lawyer but could not afford one constituted a comment on Thompson's constitutional rights. (R763-64) The state attorney replied that this statement meant only that Thompson distrusted public defenders and preferred a private lawyer. (R765) The state attorney argued further that Judge Bonanno had already

overruled this objection at the preliminary suppression hearing. (R765) Judge Graybill agreed with the state and likewise overruled the defense objection. (R766)

According to Doyle v. Ohio, 426 U.S. 610 (1976), a trier of fact may not draw adverse inferences from a defendant's desire to exercise his constitutional rights.

> [W]hen a person under arrest is informed ... that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, ... it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.

Id. at 619 (quoting United States v. Hale, 422 U.S. 171, 182-183 (1975) (White, J. concurring)) (emphasis added).

This reasoning applies regardless of whether the defendant actually was silent after exercising his rights and regardless of whether he desired to be silent or to be assisted by counsel. In each instance, the jury can draw an adverse inference that because the defendant indicated a desire to be silent or to be assisted by counsel, he must have had something to hide. If he had nothing to hide, he would not have needed a lawyer and would not have needed to be silent. That the defendant continued to talk and that his desire was for a lawyer rather than to be silent makes no difference, because the mere expression of a desire for an attorney or to be silent can be enough to cause the jury to draw the adverse inference that Dovle condemns.

Florida cases agree with this view of Dovle. For example, in

State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), the police officer committed error by testifying that the defendant "advised me he felt like he should speak to his attorney.'' Id. at 1131. Although this court characterized this error as a comment on the defendant's right to remain silent, the error nevertheless occurred because the defendant indicated his desire for a lawyer.

Moreover, the state may not comment on the defendant's initial invocation of his rights, even though he shortly thereafter decided to talk. Smith v. State, 492 So.2d 1063 (Fla. 1986); Roban v. State, 384 So.2d 683 (Fla. 4th DCA 1980). Because a jury can infer that the defendant had something to hide, error occurs, regardless of later statements.

During the police questioning, Thompson indicated a desire for a lawyer. The state brought this desire to the jury's attention. This desire was fairly susceptible to an interpretation by the jury that, since Thompson had wanted a lawyer, he probably had something to hide. DiGuilio, 491 So.2d at 1131 (employing "fairly susceptible" test). Since the state's comment on Thompson's desire for a lawyer was fairly susceptible to this improper interpretation, the comment was by definition error. Id.

According to the state attorney's theory, Thompson's statement meant only that he did not like public defenders and preferred private counsel. (R765) This theory was incorrect and irrelevant. The theory was incorrect because Thompson and his public defender got along fine until Judge Bonanno improperly intruded in their relationship. (R1380) Moreover, the idea is absurd that a mentally retarded defendant being interrogated for first degree murder would have the knowledge and reasoning power

to think far enough in advance that, if he asked for a lawyer, he would not get private counsel but instead would get a public defender whom he did not want.

The state attorney's theory was in any event irrelevant because the issue at trial was not whether the state attorney could think of a possible, innocent interpretation of Thompson's statement. State v. Thornton, 491 So.2d 1143 (Fla. 1986). The issue instead was whether the statement was fairly susceptible to an improper interpretation by the jury. Id. If a jury could reasonably make this improper interpretation, "[t]hat is enough to constitute error." Id. at 1144. Because the jury could have made this improper interpretation in the present case, error occurred, and remand is necessary for a new trial.

ISSUE XI

THOMPSON WANTED TO BE ABSENT FROM THE COURTROOM ONLY DURING CLOSING ARGUMENTS; HE DID NOT WAIVE HIS RIGHT TO BE PRESENT WHEN THE JURY RETURNED ITS VERDICT AND WAS POLLED.

A

Shortly before closing arguments during the guilt phase, Thompson told the jurors that he wanted to make a statement and that "they're taking all my rights." (R828) The court had the jurors go back to the jury room. (R829) The court told him that, if he continued to make a disturbance, the court would order the bailiffs to make certain he did not interrupt the trial again. (R829) When the jurors returned, Thompson told them he wanted a private attorney because his present attorney was not representing him properly. (R830) The court again ordered the

jury back to the jury room. (R830-31)

The court told Thompson he would have to continue with his present attorney. (R831) Thompson replied that he would not. (R831) The court gave Thompson a choice of either sitting quietly or going voluntarily back to the holding cell. (R832) Thompson said he would go to the holding cell. (R833) The court asked if Thompson wanted to go voluntarily to the holding cell and not listen to final arguments. (R833) Thompson replied, "Until I get me a private attorney." (R833) The court said that Thompson had voluntarily decided he did not want to hear final arguments. (R835) He replied, "Not by a public defender." (R835) At defense counsel's request, the court told the jurors that Thompson had voluntarily absented himself and that they should draw no conclusions from his absence. (R835, 840-41, 1479) He was absent during the closing arguments, jury instructions, and jury deliberations. (R841-95)

At 4:53 p.m., the jurors told the bailiff they had reached a verdict. (R896) The state attorney suggested that the court ask Thompson to return to the courtroom. (R897) The court said that Thompson had voluntarily left the courtroom. (R897) Defense counsel said, "That's fine, Your Honor." (R897) The jurors entered the courtroom at 5 p.m. (R898) They found Thompson guilty on all charges. (R899) After the clerk had polled the jurors, the court sent them home. (R900-02)

Defense counsel suggested that, rather than forcibly bring Thompson back to the courtroom, the court could have the clerk go to the holding cell and inform Thompson of the verdict. (R902-03) The state attorney pointed out that only two bailiffs were left

in the courthouse; the others had already gone home. (R903) The court asked a bailiff to find out whether Thompson wanted to return. (R903) The bailiff reported that Thompson did. (R904)

The court asked the bailiff whether having only two bailiffs present might be dangerous. (R904) The bailiff said it was possible. (R904) The judge had the clerk go to the holding cell and publish the verdict there. (R904-05) After the clerk read the verdict, Thompson again asked to return to the courtroom. (R905-06) The court ignored this request, and Thompson remained in the holding cell until the court adjourned. (R906-09)

B

A defendant has the constitutional right to be present at all critical stages of his trial. Muehleman v. State, 503 So.2d 310 (Fla. 1987); Snyder v. Massachusetts, 291 U.S. 97 (1934). Florida Rule of Criminal Procedure 3.180 defines the critical stages of the trial. Herzog v. State, 439 So.2d 1372 (Fla. 1983). Rule 3.180(a)(8) provides that the "defendant shall be present ... [a]t the rendition of the verdict."

Other jurisdictions also recognize this right of the defendant to be present for the verdict.

> Not only has the prisoner the right to have a polling of the jury but his very presence may move some of the jury to have compassion on him and when polled some may say "not guilty." ...[W]e have not found a single jurisdiction in which the absence of a defendant in a felony case from the courtroom at the time the jury renders its verdict (unless the defendant is out on bail) is not a fatal error.... In Diaz v. United States, 223 U.S. 442, 32 S. Ct. 250, 254, 56 L. Ed. 321, the United States Supreme Court quoted with approval the following: ... "It is the right of the defendant in cases of felony ...

> to be present at ... the rendition of the verdict; and if he be in ... custody and confinement, ... the reception of the verdict during such compulsory absence is *so* illegal as to necessitate the setting it aside."

Commonwealth ex. rel. Milewski v. Ashe, 363 Pa. 596, 70 A.2d 625, 627-29 (1950); accord Shaw v. State, 282 A.2d 608 (Del. 1971).

In some jurisdictions, unless the defendant waived his presence, the court must automatically acquit the defendant if he was not present for the verdict. For example, in Alabama,

> "[t]here is of course no controversy but that, unless his presence is waived, a verdict received in the absence of a defendant is void and is the equivalent to an acquittal." Almost universally recognized in our jurisprudence is the ancient and closely guarded right of the defendant in a felony case to be present when the jury renders its verdict.

Davis v. State, 416 So.2d 444, 445-46 (Ala. Crim. App. 1982) (citation omitted). This court should follow the law of jurisdictions like Alabama and hold that Thompson's absence from the courtroom when the court received the verdict made the verdict void and equivalent to an acquittal.

If this court chooses not to acquit Thompson, then this court should continue to follow the rule of Summeralls v. State, 37 Fla. 162, 20 So. 242 (1896), in which this court said that a defendant's absence during the rendition of the verdict is per se reversible error and mandates a new trial.

> [The defendant] has a right to be present in person at the rendition of the verdict, in order to exercise the right of polling the jury, and the verdict in such cases cannot legally be rendered or received during his absence; and it makes no difference whether his absence be voluntary or involuntary.

Id. at 243.

Although Henry v. State, 94 Fla. 783, 114 So. 523 (1927) held that a defendant can waive his right to be present at the rendition of the verdict, it did not otherwise overrule Summeralls. Unless the state can show a waiver, the Summeralls rule still stands. Accord Griffin v. State, 414 So.2d 1025, 1028 (Fla. 1982) (a verdict is invalid unless the court receives it in the presence of both the jury and the accused).

C

Predictably, then, the state will argue that Thompson waived his right to be present. For several reasons, the state cannot sustain its burden of proof on this point. First, the record affirmatively shows that, shortly after the court received the jury's verdict, Thompson twice asked to come back to the courtroom. (R904, 906) These requests clearly showed that, at the time of the verdict, Thompson wanted to be present in court.

Second, the defendant's presence at a capital trial is not waivable. Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). Thompson recognizes, however, that Peede v. State, 474 So.2d 808, 814 n.* (Fla. 1985) rejected Proffitt on this point.

Third, the alleged lack of security obviously did not constitute a waiver. Otherwise, the state could, by the simple expedient of not providing security, always violate a defendant's right to be present. In any event, had the court brought the defendant into the courtroom immediately when the jurors said at 4:53 p.m. that they had reached a verdict, then more bailiffs would have been available. Thompson was never physically violent during the trial or preliminary hearings. The lack of security

(if any) was not Thompson's fault but rather the state's fault for letting the bailiffs go home.

Fourth, the state cannot show that Thompson validly waived his constitutional right to be present for the verdict, because the state cannot prove that the waiver (if any) was knowing and intelligent. Amazon v. State, **487 So.2d 8** (Fla. **1986**); Johnson v. Zerbst, **304** U.S. **458 (1938).** The state can prove only that Thompson did not want to be present during his attorney's closing arguments. He never waived his right to be present after these arguments were finished.

As the prosecutor pointed out, Thompson decided to leave the courtroom because he did not want to listen to his public defender. **(R833, 835-36)** Indeed, the prosecutor believed that Thompson had waived his presence only for the closing arguments and not for the verdict, because the prosecutor suggested that Thompson be brought back for the verdict. **(R897)** Thompson's distrust of his lawyer, of course, had no bearing on his desire to be present for the verdict, since his lawyer would have little or nothing to say at that time.

This case is like Garcia v. State, **492** So.2d **360** (Fla. **1986).** In Garcia, the defendant waived his right to be present if the jury asked the judge questions. The defendant "only wanted to come back when the jury reached a verdict." Id. at **364.** This supreme court saw "no error in the court respecting his desire to be present only for a final verdict." Id. In the present case, by contrast, the trial judge did not respect Thompson's desire to be present for the final verdict. The judge accordingly erred.

Fifth, according to Illinois v. Allen, **397** U.S. **337 (1970),** a

defendant can lose his right to be present at trial if his behavior is too disruptive. Allen, however, carefully noted that "the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." Id. at 343. Relying on this language from Allen, one court held that "a trial judge who has removed a criminal defendant from the courtroom because of his disruptive behavior must offer the defendant the opportunity to reclaim the right of presence." Chavez v. Pulley, 623 F. Supp. 672, 681-82 (E.D. Cal. 1985). In the present case, Thompson's ability to disrupt the proceedings would have been almost nonexistent during the short time that the jury announced its verdict and was polled. Accordingly, the judge should have given him a chance to reclaim his right of presence.

Sixth, although defense counsel can waive the defendant's presence, the waiver is not valid unless the defendant, upon reappearance at trial, acquiesces in or ratifies the waiver. Amazon; State v. Melendez, 244 So.2d 137 (Fla. 1971). In the present case, Thompson did not acquiesce in or ratify any waiver. Thompson instead asked but was not allowed to return to the courtroom. (R904, 906) Consequently, even if defense counsel waived Thompson's right to be present, the waiver was invalid.

D

The state may argue that the error is harmless. Summeralls, however, clearly teaches that the defendant's absence during the rendition of the jury's verdict is always reversible error.

Other jurisdictions even find that this absence amounts to an automatic acquittal. Davis v. State, **416** So.2d **444** (Ala. Crim. App. **1982).** Summeralls and Davis correctly emphasize the importance of this right to be present, because the confrontation between the defendant and the jurors when the jurors announce their verdict is the fundamental focus of every jury trial. Unless the trier of fact personally informs the defendant of its decision, the trial is in a real sense not a trial at all. Coy v. Iowa, **108** S. Ct. **2798 (1988)** (confrontation clause requires eye to eye contact between the accused and the witnesses against him).

Furthermore, jurors are polled to insure that each juror agrees with the verdict and is not merely acquiescing in the will of the majority. Polling gives the jurors one last chance to review any doubts they might have and to determine whether these doubts are reasonable. Jurors are more likely to take this task seriously, more likely to change their minds about the verdict, and more likely to express disagreement with the majority if they must face the defendant in the courtroom as they individually render their verdict. Because this possibility is not quantifiable for purposes of the harmless error rule, a reviewing court is "unable to assess the extent of the prejudice, if any." Francis v. State, **413** So.2d **1175, 1179** (Fla. **1982).** The harmless error doctrine therefore does not apply. Id; accord Sowell v. State, **458** So.2d **375** (Fla. 1st DCA **1984)** (denying defendant his right to have the jury polled is not harmless error).

Republishing the jury's verdict to Thompson after the jury had

already gone home did not cure the error and in fact was a "nullity." Summeralls, 20 So. at 243; accord Henry, 114 So. at 525. The presence of Thompson's counsel as the jury was polled also did not cure the error. As the court said in Riddle v. Commonwealth, 216 Ky. 220, 287 S.W. 704 (1926),

> [t]here is no merit in the contention that appellant was not prejudiced because his attorney polled the jury, for he had the right to see and know that the entire jury was assenting to the verdict by polling the jury and requiring each juror when face to face with him to state that the verdict was his verdict. As appellant was denied his constitutional and statutory right, it follows that the judgment must be reversed.

Id. at 704 (citations omitted).

Thompson was absent for the jury's verdict, a critical stage of his trial. He did not waive his presence. In fact, the court ignored his repeated requests to be present. This error was not and cannot be harmless. This court should reverse and remand for entry of a judgment of acquittal or for a new trial.

ISSUE XII

DURING THE PENALTY PHASE, THE TRIAL COURT IMPROPERLY REFUSED TO ALLOW THOMPSON TO REBUT AND TO MITIGATE THE ADVERSE INFERENCES THAT THE JURY AND THE COURT MIGHT HAVE DRAWN FROM HIS COURTROOM CONDUCT.

As this brief has already discussed, Thompson interrupted the proceedings several times during both the guilt and penalty phases of the trial. During the penalty phase, the court did not allow Michael Maher, a forensic psychiatrist, to explain whether these interruptions were related to Thompson's mental illness and retardation. (R970) The court also would not allow Dr. Maher to

testify on whether Thompson was competent to stand trial. (R957)

The trial court should have allowed Dr. Maher to explain the psychological basis for Thompson's outbursts. According to Johnson v. State, 442 So.2d 185 (Fla. 1983), judges (and by implication juries) during the penalty phase may and do consider a defendant's courtroom behavior. Judges "may properly notice a defendant's behavior and draw inferences concerning matters such as whether the defendant is capable of appreciating the criminality of his conduct." Id. at 190.

If judges and juries may consider a defendant's courtroom behavior when they make their sentencing decisions, then the defendant must be allowed to rebut any adverse inferences that the judges and juries might draw from that behavior. Gardner v. Florida, 430 U.S. 349, 360 (1977) recognized the "importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." A court cannot sentence a defendant to death on the basis of information which he has had "no opportunity to deny or explain." Id. at 362; Pope v. Wainwright, 496 So.2d 798, 804 (Fla. 1986).

Furthermore, according to Skipper v. South Carolina, 476 U.S. 1 (1986), a defendant must be allowed to put before the jury all relevant mitigating evidence. Just as Skipper requires the admission of a defendant's good prison behavior, *so* also evidence in mitigation of a defendant's bad courtroom behavior should be admitted. See State v. Gonzales, 140 Ariz. 349, 681 P.2d 1368 (1984) (expert testimony on defendant's retardation and organic brain syndrome relevant to explain his behavior as a witness).

For similar reasons, evidence that Thompson was incompetent to

stand trial was also valid mitigating evidence about the defendant's character and valid rebuttal evidence about his courtroom behavior. Some jurors might not have recommended death, had they thought a reasonable doubt existed that he was not competent to stand trial. Since Dr. Maher's discussion of Thompson's competence to stand trial would have explained Thompson's inappropriate courtroom behavior and his distrust of his lawyer, (R1159-60) Maher's testimony would also have rebutted adverse inferences that the jurors and trial court might have drawn from this behavior and distrust.

The trial judge erred by not admitting this evidence, which was valid rebuttal under Gardner and mitigation under Skipper. Remand is therefore necessary for a new sentencing hearing.

ISSUE XIII

FLORIDA'S STANDARD JURY INSTRUCTIONS IMPROPERLY MINIMIZE THE CAPITAL SENTENCING JURY'S ROLE DURING THE PENALTY PHASE, AND, THEREFORE, THE TRIAL COURT SHOULD HAVE READ TO THE JURY A REQUESTED INSTRUCTION WHICH WOULD HAVE EMPHASIZED THE JURY'S IMPORTANT ROLE.

The trial judge denied the defense request that, during the penalty phase, he instruct the jurors that he would "give great weight and serious consideration to [their] verdict in imposing sentence." (R1039, 1481) Instead, the court read to the jury the standard jury instructions, which repeatedly said that the jury's recommendation was only advisory and that the decision on punishment was the sole responsibility of the judge. (R918, 1055)

In Florida, however, a jury recommendation of life can be

overridden only if virtually no reasonable person could differ on the appropriateness of imposing death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the standard jury instructions misled the jurors and deceptively suggested that the jury's recommendation was mere advice which the judge could easily ignore. The jurors were incorrectly "led to believe that the responsibility for determining the appropriateness of the defendant's death rest[ed] elsewhere." Caldwell v. Mississippi, 472 U.S. 320, 329 (1985). The court should have given the requested defense instruction, which would have corrected the misleading impression created by the standard instruction. See Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988).

Appellant recognizes that Combs v. State, 525 So.2d 853 (Fla. 1988) rejected this argument.

ISSUE XIV

THE KILLINGS WERE NOT COLD AND CALCULATED, BECAUSE (1) THE EVIDENCE WAS SUSCEPTIBLE TO THE CONCLUSION THAT THE KILLINGS WERE NOT COLD AND CALCULATED, (2) THE KILLINGS WERE COMMITTED WITH A PRETENSE OF LEGAL JUSTIFICATION, AND (3) THE INTENT NECESSARY FOR THE KIDNAPPINGS COULD NOT JUSTIFY A FINDING OF THIS AGGRAVATING CIRCUMSTANCE.

The trial judge found that the killings were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R1510) This finding was wrong for three reasons.

First, as in Harmon v. State, 527 So.2d 182 (Fla. 1988), the evidence was "susceptible to conclusions other than that [the killings were] committed in a cold, calculated, and premeditated

manner." Id.527 at 188. The prosecutor argued that Thompson had the intent to kill when he entered the Myrtle Hill offices. (R1032) Thompson then, according to the state, took Swack and Walker on a two-mile death ride. (R1029) This interpretation was not the only possible interpretation nor even the most plausible.

A more plausible interpretation begins with the expert testimony that Thompson did not intend to kill when he entered the cemetery offices or when he rode to Williams Park. (R974, 976) Thompson could not think clearly enough at that time to know what he would do. (R976) Instead, circumstances gradually overwhelmed him to the point that, because he paranoidly believed that Swack and Walker were cheating him, Thompson confused the aggressor and victim and believed that Swack and Walker were threatening and attacking him. (R966-67) When Swack struck Thompson with the tree branch, Thompson reacted impulsively and murderously to eliminate the perceived threat against him. (R967, 976) See Thompson v. State, 456 So.2d 444 (Fla. 1984) (psychological testimony suggested that mentally retarded defendant acted impulsively and not in a calculated manner).

In his taped statement, Thompson repeatedly said he never intended to kill and acted only in self-defense. (R1207, 1220, 1224) Moreover, as Dr. Berland pointed out, Thompson said he told Swack and Walker to take off their clothes because he did not want them to get help after he left them in the park. (R1014, 1207) Needless to say, had he planned to kill them, he would not have had to worry about this possibility.

Rosers v. State, 511 So.2d 526, 533 (Fla. 1987) requires proof of a "careful plan or prearranged design" before the trial judge

can find that the murder was cold and calculated. In this case, the psychological testimony and the nature and placement of the stab wounds showed that these killings were performed in an impulsive rage. As in Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988), "the number of stab wounds and the force with which they were delivered were consistent with a killing consummated by one in a rage. A rage is inconsistent with the premeditated intent to kill someone." Because the killings were susceptible to conclusions other than that they were performed in a cold and calculated manner, the trial court improperly found this aggravating circumstance to exist in this case. Harmon.

Second, the state also failed to prove that the killings were committed "without any pretense of moral or legal justification." Section 921.141(5)(i), Fla. Stat. (1985); Banda v. State, 13 F.L.W. 451 (Fla. July 14, 1988). A pretense of justification is "any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculated nature of the homicide." Id. at 452. A pretense is "something alleged or believed on slight grounds: an unwarranted assumption." Id. at 452 n.2 (quoting Webster's Third New International Dictionary 1797 (1981)).

In his taped statement, Thompson said he acted only in self-defense. (R1220, 1224) Dr. Maher agreed that Swack's attack with the tree branch touched off the killing rage. (R974, 976) These facts make this case indistinguishable from Cannadv v. State, 427 So.2d 723 (Fla. 1983). As in the present case, the defendant in Cannadv kidnapped the victim, William Carrier, drove him to a

wooded area, and shot him. As in the present case,

> [t]he only direct evidence of the manner in which the murder was committed was appellant's own statements. When he first began incriminating himself, he repeatedly denied that he meant to kill Carrier. During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of a moral or legal justification, protecting his own life.

Id. at **730-31.** Cannadv mandates a reversal of the trial court's finding that Thompson acted in a cold, calculated, and premeditated manner.

Finally, this finding was improper because it relied on the kidnapping as evidence of the requisite calculated intent. (R1510) The intent necessary to prove the underlying felony of kidnapping, however, could not be transferred to the murders, to show that they were cold, calculated, and premeditated. Perrv v. State, 522 So.2d **817** (Fla. **1988).**

These killings were susceptible to the conclusion that they were committed in an impulsive rage rather than in a cold and calculated manner. Thompson had at least the pretense that he acted justifiably in self-defense. The intent necessary for the kidnappings could not be transferred to the murders. Accordingly, this court should strike the finding of this aggravating circumstance and remand to the trial court for appropriate proceedings.

ISSUE XV

THE KILLINGS WERE NOT HEINOUS, ATROCIOUS, OR CRUEL, BECAUSE THE EVIDENCE DID NOT SATISFY A CORRECT UNDERSTANDING OF THIS VAGUELY DEFINED AGGRAVATING CIRCUMSTANCE.

A

Section 921.141(5)(h), Florida Statutes (1985) authorizes the jury and the trial court in a capital case to consider as an aggravating circumstance whether the killing was especially heinous, atrocious, or cruel. The difficulty with section (5)(h) is that "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" Maynard v. Cartwrisht, 108 S. Ct. 1853, 1859 (1988). Because this aggravating circumstance can characterize every first degree murder, section (5)(h) is unconstitutionally vague. It "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972)." Cartwrisht, 108 S. Ct. at 1858.

Since Furman, the Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Cartwrisht, 108 S. Ct. at 1858; Spaziano v. Florida, 468 U.S. 447, 462 (1984). For example, in Godfrey v. Georgia, 446 U.S. 420 (1980), the jury sentenced the defendant to die, and the Georgia Supreme Court affirmed, based solely on a finding that the murder was "outrageously or wantonly vile, horrible and inhuman." The United States Supreme Court, however, reversed, finding that

> nothing in these few words, standing alone, ... implie[d] any inherent restraint on the arbitrary and capricious infliction of the

> death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of [this aggravating circumstance]. In fact, the jury's interpretation of [this circumstance] can only be the subject of sheer speculation.

Id. at **428-29.**

Similarly, in Cartwrisht, the Court applied Godfrev to Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance. This language was identical to that used in Florida's section (5)(h). A unanimous Court found that the language was unconstitutionally vague.

> [T]he language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrev.... To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous."

Cartwrisht, **108** S. Ct. at **1859** (citation omitted).

In the present case, in accordance with section (5)(h), the court instructed the penalty phase jury to determine whether the "crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel." (R1056) **As** in Godfrev, the court read to the jury no other limiting instruction on this subject. **As** in Cartwrisht, this instruction did not limit the jury's or trial court's discretion in any significant way. In fact, this

instruction was identical to the one condemned in Cartwrisht. Accordingly, allowing the defendant Thompson to be sentenced to die under this unconstitutionally vague law was error.

B

The state has only two counterarguments here. The first counterargument -- that the defendant did not preserve this error by an objection below -- is easily disposed of. This error is a sentencing error apparent from the face of the record which requires no objection to preserve the issue. State v. Whitfield, 487 So.2d 1045 (Fla. 1986). This issue is similar to the typical sentencing guidelines case, in which the defendant objects for the first time on appeal that the judge's reason for departure is invalid and that the evidence does not support it.

Moreover, in capital cases, this court always takes a fresh look at the evidence, to insure that it supports the trial court's findings. Harvard v. State, 375 So.2d 833 (Fla. 1977). Because this court does undertake a de novo review of the sufficiency of the evidence in capital cases, a capital defendant on direct appeal may advance de novo objections to the sufficiency of the evidence and to the legal standard that the evidence must satisfy.

The state's second counterargument is that, unlike Oklahoma, Florida has by judicial construction substantially limited its "heinous, atrocious, or cruel" aggravating circumstance. In State v. Dixon, 283 So.2d 1 (Fla. 1973), this court said

> that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of

> pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Id. at 9. Because Proffitt v. Florida, 428 U.S. 242, 255-56 (1976) approved this judicial construction of section (5)(h), the state's second counterargument then is that Dixon and Proffitt take section (5)(h) outside the ambit of Cartwrisht and Godfrey.

This argument is incorrect for three reasons. First, if the Dixon language is supposed to limit the jury's discretion, then the court in the present case should have read it to the jury. As in Godfrev, the jury's discretion was not guided in any way on this aggravating circumstance. Instead, the court merely read section (5)(h) to the jury without explanation.

Second, although Dixon's limiting construction may have passed the Proffitt test, it did not pass the test with flying colors. Its phrases, such as "extremely wicked," "shockingly evil," and "outrageously wicked and vile," make it look suspiciously like the "outrageously or wantonly vile, horrible or inhuman" language condemned in Godfrey. Dixon's final phrase -- "the conscienceless or pitiless crime which is unnecessarily torturous to the victim" -- is no better. As the California Supreme Court said in the course of rejecting almost identical language,

> any attempt to determine what constitutes "necessary" torture -- to clarify the meaning of "unnecessary" -- appears to be futile. Furthermore, even assuming that hurdle were overcome, to find the special circumstance to be proved, the jury must agree that the crime was "conscienceless or pitiless" -- terms

> that only add to the vagueness problem. As "unnecessary" torturous assumes the existence of conduct that is necessarily torturous, *so* a conscienceless or pitiless first degree murder assumes the existence of such murder performed with conscience or pity. We cannot fathom what it could be.

People v. Superior Court (Engert), **31** Cal. 3d **797, 647 P.2d 76, 78, 183** Cal. Rptr. **800 (1982).**

An aggravating circumstance like section (5)(h) must "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrev, **446** U.S. at **428.** The Dixon language **--** with words such as "wicked," "evil," "vile," "pitiless," and "conscienceless" **--** is not clear, objective, specific, and detailed. Instead, it is unclear, subjective, inexact, and general. Although the Dixon test passed constitutional muster when Proffitt was decided, the test's continuing vitality is now suspect after Godfrev and Cartwrisht. Cf. Franklin v. Lynaush, **108** S. Ct. **2320 (1988)** (five justices now apparently willing to overrule Jurek v. Texas, **428** U.S. **262** (1976), which was decided the same day as Proffitt).

Third, Proffitt's approval of the Dixon language was tentative and tacitly assumed that Florida would continue to apply this language in a manner that genuinely limited the class of people eligible for the death penalty. **426** U.S. at **255-56.** If, in practice, Florida is applying this language too broadly, then Florida is violating the eighth amendment, Proffitt notwithstanding. Godfrev made this point very clearly. The issue in Godfrev was precisely whether the Georgia Supreme Court

had applied too broadly its previously approved limiting language. 446 U.S. at 423. The Godfrey court found that the Georgia court had applied it too broadly. Id. at 433. Thompson, contends that, like the Georgia court, the Florida Supreme Court is improperly applying the limiting language approved in Proffitt.

C

A review of Florida's capital cases reveals that this court has upheld a finding of (5)(h) in almost every conceivable situation. As applied, the rule in Florida is that all first degree murders are especially heinous, atrocious, or cruel. Mello, Florida's "Heinous, Atrocious, or Cruel" Aggravating Circumstance, 13 Stetson L. Rev. 523, 551 (1984). This rule is not surprising, since all first degree murders actually are especially heinous, atrocious, or cruel. Id.

Three narrowly defined exceptions prove this rule. First, if the victim had no foreknowledge of death and suffered no pain, this court usually rejects a (5)(h) finding. Garron v. State, 528 So.2d 353 (Fla. 1988); Herzog v. State, 439 So.2d 1372 (Fla. 1983). But see Harvard v. State, 375 So.2d 833 (Fla. 1977).

Second, this court in a few cases did not sustain a (5)(h) finding if the victim had no foreknowledge and was struck by a single killing blow but fortuitously remained alive for some time before dying. Mills v. State, 476 So.2d 172 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984). These cases are consistent with Booth v. Maryland, 107 S. Ct. 2529 (1987), which teaches that a sentence of death must be based on the defendant's "personal responsibility and moral guilt," and not on factors

beyond the defendant's control. Id. at 2533. But see Mason v. State, 438 So.2d 374 (Fla. 1983).

Third, in one case, this court did not sustain a (5)(h) finding because the circumstances of the killing could not be determined. Bundy v. State, 471 So.2d 9 (Fla. 1985) (partially decomposed body).

In theory, aggravating circumstances "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877 (1983). The three narrow exceptions listed above stand this theory on its head. Rather than separate "the few cases in which [the penalty] is imposed from the many cases in which it is not," Godfrey, 446 U.S. at 427 (citation omitted), Florida's "heinous, atrocious, or cruel" aggravating circumstance separates the many cases in which the penalty is imposed from the few cases in which it is not. Section (5)(h) for the most part excludes only a few painless and unexpected murders and suggests to the jury and to the trial court that all other murders deserve the ultimate penalty. As applied, section (5)(h) therefore gives the jury and the trial court unbridled discretion to choose death and insufficiently minimizes "the risk of wholly arbitrary and capricious action." Cartwrisht, 108 S. Ct. at 1858.

Comparing the present case with other cases buttresses this conclusion. The evidence in the present case showed that Swack's body had been stabbed nine times. (R657) Juries and trial courts have often determined that multiple stab wounds like these support a (5)(h) finding. Nibert v. State, 508 So.2d 1 (Fla.

1987) (seventeen stabbings); Hooper v. State, 476 So.2d 1253 (Fla. 1985) (numerous wounds); Duest v. State, 462 So.2d 446 (Fla. 1985) (eleven stab wounds); Morsan v. State, 415 So.2d 6 (Fla. 1982) (one or more stab wounds).

In several other cases, however, juries and trial courts found that multiple stab wounds did not satisfy section (5)(h). Williamson v. State, 511 So.2d 289 (Fla. 1987) (repeated stabbings); Kelley v. State, 486 So.2d 578 (Fla. 1986) (three or four stab wounds plus gunshot); Williams v. State, 438 So.2d 781, 786 (Fla. 1983) (defendant died a few minutes after stab wounds were inflicted); Provence v. State, 337 So.2d 783 (Fla. 1976) (eight stab wounds).

In Demps v. State, 395 So.2d 501 (Fla. 1981), yet another case involving multiple stab wounds, the trial court did make a (5)(h) finding. This supreme court reversed the finding, even though the victim went to several hospitals before dying. Demps is hard to reconcile with cases like Morsan. Of course, this list of cases does not include those cases in which the defendant stabbed the victim but received a life sentence.

The "especially heinous, atrocious, or cruel" aggravating circumstance is so vague that juries, trial courts, and this court arbitrarily and capriciously apply it to some cases and not to other, factually identical cases. Section (5)(h) as applied does not inhibit "standardless [sentencing] discretion." Gregg v. Georgia, 428 U.S. 153, 196 n.47 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Instead, it permits cruel and unusual punishment "in the same way that being struck by lightning is cruel and unusual." Furman v. Georgia, 408 U.S. 238, 309 (1972)

(Stewart, J., concurring). Nothing in these cases explains why the defendants in Nibert, Hooper, Duest, Morsan and the present case were struck by lightning, but the defendants in Williamson, Kelley, Provence, and Demps were not.

This state of affairs cannot be allowed to continue. In Herrins v. State, 446 So.2d 1049 (Fla. 1984), Justice Ehrlich argued that the "cold, calculated, and premeditated" aggravating circumstance, as applied by the majority, might be unconstitutionally vague. Id. at 1058 (Ehrlich, J., concurring in part and dissenting in part). In Roaers v. State, 511 So.2d 526 (Fla. 1987), this court adopted Justice Ehrlich's views and overruled Herring. See Herrins V. Dugger, 528 So.2d 1176 (Fla. 1988). This court should likewise overrule Dixon and adopt a better, clearer standard on the "heinous, atrocious, or cruel" aggravating circumstance.

D

The objective factors which sometimes guide this court's decisions on the (5)(h) aggravating circumstance are the degree of physical pain, the amount of mental torture, and the time the pain or torture lasts. If these are the relevant factors, this court's interpretation of (5)(h) should specifically include them, rather than rely on vague, subjective judgments like whether the murder is wicked, vile, or conscienceless.

Moreover, the sentencing jury should have the benefit of this interpretation and should not be left with what, according to Cartwrisht, is effectively no standard at all to guide its discretion. A statement of the law should say what it means and

mean what it says. Section (5)(h) and Dixon do neither.

Appellant therefore suggests the following standard for the (5)(h) circumstance. A murder is especially heinous, atrocious, or cruel if, for an extended period of time and during the time that the victim is in contact with the murderer, the victim experiences great physical or mental pain or is the subject of deliberate and extreme mental torture. The evidence must satisfy this standard beyond a reasonable doubt. In accordance with the principle of Booth that a sentence of death must be based on the defendant's moral blameworthiness, the defendant must know about the pain. The length of time necessary to satisfy this standard varies with the degree of pain.

Mere foreknowledge by the victim for a short time that death is imminent is not enough to satisfy the standard because most murder victims know at least briefly they are about to die. The victim's mental pain does not satisfy the standard unless it is far greater than that common to most violent felonies or to the underlying felony (if the charge is felony murder). A proper understanding of this standard recognizes that most victims of violent crime experience substantial mental fear and anguish.

E

Judged by this standard, the deaths in this case were not especially heinous, atrocious, or cruel. The evidence did not show extended foreknowledge of death or extreme mental terror greater than that inherent in being kidnapped. According to Dr. Maher, Thompson did not think of killing until Swack swung at him with the tree limb, and the two started struggling. (R976) In his taped statement, Thompson repeatedly said he never meant to

kill and only killed in self-defense. (R1207, 1220, 1224) The evidence did not show that Swack and Walker went to the park with full knowledge of impending doom. The evidence suggested instead that, rather than intend to kill them, Thompson took them to the park and took their clothes because he did not want them to call immediately for help after he left. (R974, 976, 1014, 1207) Of course, if Thompson did not know he would kill them, then they could not have known either. Their fear was no more than that inherent in any kidnapping.

The struggle was probably quick and could not have allowed much time for Swack or Walker to reflect. Walker did not even see it because she was lying on the ground with her face in her hands. (R616) These facts showed a generalized fear from the kidnapping and a brief foreknowledge of death. They did not show an extended mental trauma greater than that common to many violent felonies.

These facts also did not show extended physical pain. Walker died instantly. (R670) After a brief struggle, Swack also died quickly, either from a knife in his chest or a gunshot to his head. (R665) His physical pain was probably less than that suffered by many victims who survive violent crimes.

The killings in this case were not heinous, atrocious, or cruel, because they were brief, relatively painless, and did not involve torture. This supreme court should strike the trial court's finding of section (5)(h) in this case (R1510) and remand to the trial court for appropriate proceedings.

ISSUE XVI

THE SCORESHEET IS INCORRECT, AND THE REASON FOR DEPARTURE INVALID.

The scoresheet in this case (R1507) incorrectly failed to score the two kidnappings as multiple counts of the same primary offense. Doner v. State, 515 So.2d 1368 (Fla. 2d DCA 1987). In addition, because Thompson committed his offenses before October 1, 1986, (R1303-04) scoring his sexual battery -- for which he had been on probation -- as prior record was incorrect. Compare Fla. R. Crim. P. 3.701(d)(4) with Committee Note to Fla. R. Crim. P. 3.701(d)(5) (effective October 1, 1986). See Mincey v. State, 525 So.2d 465 (Fla. 1st DCA 1988); Ruiz v. State, 516 So.2d 46 (Fla. 4th DCA 1987). Finally, a person can be guilty of the version of kidnapping charged in this case without causing victim injury. Accordingly, scoring victim injury points was improper. Hansbroush v. State, 509 So.2d 1081 (Fla. 1987).

Correcting these scoresheet errors reduces the sentencing range to nine to twelve years in prison. This court cannot say beyond a reasonable doubt that the trial judge would have departed from the guidelines as far as he did, had a correct scoresheet been before him. Parker v. State, 478 So.2d 823 (Fla. 2d DCA 1985).

By imposing consecutive life sentences, the trial judge did depart from the guidelines. Rease v. State, 493 So.2d 454 (Fla. 1986). His sole reasons for departure were the two unscored first degree murders. (R1512) Even if he had scored these murders at two million points apiece, however, he could not have departed this far without other reasons for departure. Thompson

was worse off because the convictions could not be scored. This result was irrational and violated due process. The following proviso should therefore be added to Weems v. State, 469 So.2d 128 (Fla. 1985) and similar cases. If the sole reason for departure is an unscored conviction or victim injury, then the resulting sentence should not be greater than the sentence would be if the conviction or injury were scored.

ISSUE XVII

EXECUTING THE MENTALLY RETARDED IS CRUEL AND UNUSUAL PUNISHMENT.

Thompson's overall IQ was seventy. (R992, 1187) His verbal IQ was sixty-six. (R992) His mental age was about ten, and his emotional age was about two and a half. (R1187-88, 1199) His intelligence was two standard deviations from the population mean. (R992) In Florida, a person is mentally retarded if his intelligence is two standard deviations from the mean. Section 393.063(23), Fla. Stat. (1985). Accordingly, Charlie Thompson was and is retarded. (R1187)

Defense counsel argued that executing someone who was both mentally ill and mentally retarded constituted cruel and unusual punishment. (R1516-18) By imposing the death penalty, the trial judge rejected this argument. Thompson now renews it on appeal.

A

The eighth amendment prohibition of cruel and unusual punishment acquires meaning from the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). The Supreme Court, in cases

such as Coker v. Georgia, 433 U.S. 584 (1977) (rape) and Enmund v. Florida, 458 U.S. 782 (1982) (accomplice liability), employed a two-fold analysis for determining whether a particular death sentence was consistent with society's evolving standards of decency. First, the Court looked to objective signs of how society viewed the punishment. Second, the Court evaluated the offense, to see if the death penalty for that offense would satisfy society's desire for deterrence and retribution.

In Thompson v. Oklahoma, 108 S. Ct. 2687 (1988), the Court adopted the same two-fold analysis but applied it to the offender rather than the offense. The Court determined that executing an offender with a chronological age less than sixteen was cruel and unusual punishment. The present case presents the question whether executing an offender with a chronological age greater than sixteen but a mental age of ten is also cruel and unusual punishment. The Court accepted certiorari on this question in Penry V. Lynaugh, 108 S. Ct. 2896 (1988).

B

The analysis first looks for objective signs of society's attitude on executing the retarded. Appellant has found three such signs. First, two polls conducted in Florida showed overwhelming disapproval of executing the retarded. In a 1985 poll of 104 Florida residents, seventy-nine percent opposed executing the retarded, fourteen percent favored it, and eight percent did not know. Cambridge Survey Research, An Analysis of Attitudes Toward Capital Punishment in Florida (1985). The percentages for executing juveniles were only forty-six percent

opposed, thirty-eight percent in favor, and seventeen percent undecided. Id.

In a 1986 poll of 900 registered voters in Florida, seventy-one percent would not recommend death for someone who was retarded, twelve percent favored such a recommendation, and seventeen percent did not know. Cambridge Survey Research, Attitudes in the State of Florida on the Death Penalty 61 (1986). The percentages for executing juveniles were forty-two percent opposed, thirty-five percent in favor, and twenty-three percent undecided. Id.

The Florida results were consistent with polls in Connecticut (eighty-three percent opposed), Georgia (sixty-six percent opposed), and Nebraska (sixty-six percent opposed). P. Tuckel & S. Greenberg, Capital Punishment in Connecticut (1986); R. Thomas & J. Hutcheson, Georgia Residents' Attitudes Toward the Death Penalty, the Disposition of Juvenile Offenders, and Related Issues (1986); D. Johnson & A. Booth, The Nebraska Annual Social Indicators Survey (1988).

A second objective sign of society's views on executing the retarded was the decision by Florida's neighboring state, Georgia, to prohibit such executions for those who committed their offenses after July 1, 1988. Ga. Code Ann. section 17-7-131(j) (1988). The Georgia Senate also resolved, in resolution 388, to ask the state's board of parole and pardons to commute existing death sentences of retarded defendants. The relevant portions of this resolution were as follows:

> WHEREAS, the Center for Public and Urban Research at Georgia State University conducted a survey and found that two-thirds

> of the Georgians sampled are in favor of life imprisonment instead of the death penalty as the maximum penalty for retarded offenders; and
>
> WHEREAS, executing a retarded offender destroys public confidence in the criminal justice system.
>
> NOW, THEREFORE, BE IT RESOLVED BY THE SENATE that, with respect to retarded persons sentenced to death, this body urges the State Board of Pardons and Paroles to give special consideration to commuting the sentences of such offenders to life imprisonment.

These decisions by the Georgia legislature were prompted in part by widespread criticism of the 1986 execution of Jerome Bowden, who had an IQ of sixty-five. Georsia Barrinq Executions of Mentally Retarded Killers, N.Y. Times, April 12, 1988, at 8. Even Georgia's Attorney General said these decisions were "progressive and a step forward in explicitly recognizing we are not going to impose the death penalty on persons who are mentally retarded." Id.

A third objective sign is the plethora of laws that the Florida Legislature has passed to protect the rights of the retarded. Even a cursory review of the statutory indexes reveals numerous laws on this subject. Of particular interest is section 393.13, Florida Statutes (1987), whose short title is "The Bill of Rights of Retarded Persons."

According to this Bill of Rights, the retarded have a special right to liberty and the pursuit of happiness. Section 393.13(2)(e). The potential of the retarded to lead independent and productive lives should be maximized. Section 393.13(2)(b)(3). The retarded should not be subjected to a treatment program designed "to eliminate bizarre or unusual behaviors." Section 393.13(3)(j). The law prohibits treatment

programs "involving the use of noxious or painful stimuli." Section 393.13(3)(j)(1). It would be cruel and unusual if this law prohibited the use of all noxious or painful stimuli on the retarded except the ultimate noxious or painful stimulus, electrocution in the electric chair.

Polls show Floridians and others overwhelmingly opposed to executing the retarded. Georgia has already prohibited such executions. The Florida legislature has said it does not want "noxious or painful stimuli" to be used on the retarded for the purpose of eliminating "bizarre or unusual behaviors." These substantial and objective signs show that Florida's society looks with disfavor on the execution of the retarded.

C

This court must next determine whether executing the retarded "measurably contributes" to the penological purposes served by the death penalty. Enmund, 458 U.S. at 798. As the Supreme Court has said, "[a]lthough the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty." Id. at 797.

The two purposes served by the death penalty are retribution and deterrence. Thompson, 108 S. Ct. at 2699. The deterrence rationale is weak because every study shows that the deterrence achieved by the death penalty is no greater than the deterrence obtained by the threat of life imprisonment. H. Bedau, Death is Different 33-34 (1987). See Thompson, 108 S. Ct. at 2700 n.45. In any event, the deterrence rationale has no application to the

retarded. Retarded offenders do not have the intelligence and knowledge to figure out that the death penalty might or might not apply to their crimes. What the Court said about teenagers applies equally well to the retarded. "The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is *so* remote as to be virtually nonexistent." Id. at **2700**.

The retribution rationale likewise fails to justify the execution of the retarded. The Supreme Court rejected this rationale for juvenile offenders, id. at **2699**, and it is even weaker for the retarded. Even in the common law, "ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, is not *so* much measured by years and days, as by the strength of the delinquent's understanding and judgment." **4** W. Blackstone, Commentaries ***23**.

Imposition of the death penalty requires a "highly culpable mental state," Tison v. Arizona, **107** S. Ct. **1676, 1680 (1987)** and must be directly related to the defendant's "personal responsibility and moral guilt." Booth v. Maryland, **107** S. Ct. **2529, 2533 (1987)**; Enmund, **458** U.S. at **801**. The Court determined that juveniles did not have this highly culpable mental state,

> for the very assumptions we make about our children when we legislate on their behalf tells us that it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions and toward whom society may legitimately take a retributive stance.

Thompson, 108 S. Ct. at **2693 n.23**. "The difference that separates children from adults for most purposes of the law is

children's immature, undeveloped ability to reason in an adult manner." Id. at 2699 n.43 (citation omitted).

If juveniles presumptively do not have this highly culpable mental state, then retarded offenders certainly do not, because, unlike juveniles, the retarded person's mental status and ability to reason are by definition less developed than a normal adult's would be. "[I]t is undeniable ... that those who are mentally retarded have a reduced ability to cope with and function in the everyday world." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985). Unlike the mentally ill, who have disturbed thought patterns and emotions but not necessarily a reduced ability to learn or think rationally, retarded persons necessarily have "inefficient cognitive functioning." Zigler, Balla, & Hodapp, On the Definition and Classification of Mental Retardation, 89 Am. J. Mental Deficiency 215, 227 (1984).

Retarded persons have limited abilities to communicate, to remember, to control their impulses, to develop moral concepts of blameworthiness, to recognize or admit their own disability, and to acquire basic knowledge. Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 428-31 (1985). Even more than teenagers, the retarded are "less able to evaluate the consequences of [their] conduct while at the same time [they are] much more apt to be motivated by mere emotion or peer pressure...." Thompson, 108 S. Ct. at 2699.

By definition, then, mentally retarded offenders do not have the highly culpable mental state that the eighth amendment requires to justify the retributive punishment of death.

Moreover, to suppose that the retarded have the knowledge and reasoning power to be deterred by the possible prospect of capital punishment for their crimes is "fanciful." Id at 2700. Sentencing the retarded to die in the electric chair does not measurably contribute to either of these two penological "goals that capital punishment is intended to achieve. It is, therefore, 'nothing more than the purposeless and needless imposition of pain and suffering' and thus an unconstitutional punishment." Id. (citation omitted).

ISSUE XVIII

THE SENTENCES OF DEATH IN THIS CASE ARE DISPROPORTIONATE BECAUSE THOMPSON SUFFERED FROM MENTAL RETARDATION, BRAIN DAMAGE, MENTAL ILLNESS, A LOW EMOTIONAL CAPACITY, AND AN IMPOVERISHED UPBRINGING; IN ADDITION, THE KILLINGS PROBABLY OCCURRED UPON REFLECTION OF ONLY A SHORT DURATION.

This court should reduce Thompson's death sentences to life in prison because death is disproportionate to the mercy shown in other cases. Thompson was retarded, mentally ill, and brain damaged. He had a low emotional age and an impoverished upbringing. The killing probably occurred upon reflection of only a short duration. These factors made his death sentence proportionately incorrect.

A

The trial court found that Thompson's diminished capacity and emotional and mental disturbance were statutory mitigators. (R1510) The prosecutor presented no rebuttal testimony to the defense evidence on these two mitigators, and his closing argument on these points was perfunctory at best. (R1034-36) In

fact, the prosecutor almost conceded to the jury that the defense doctors' testimony had established these two statutory mitigators. ("You balance those two mitigating circumstances which were established by the testimony of the doctors." (R1035))

Certainly, the defense doctors' testimony strongly supported the trial court's findings. Dr. Maher and Dr. Berland determined that Thompson suffered from brain damage which disrupted the even flow of his brain's neurotransmitters and hampered his ability to think logically and to understand what was happening around him. (R961, 990) This brain damage reduced his ability to use the little intelligence he had. (R961-62) He was also psychotically paranoid and thought that others were trying to cheat and humiliate him. (R962, 998-99) Because of his psychosis, his conclusions about reality were different from the conclusions of others around him. (R962-63, 1000, 1011) His actions went beyond mere anger and reflected the poor judgment and altered reasoning typical of paranoia. (R1012)

Because of these mental disabilities, Thompson always functioned under some stress. (R965) On August 27, 1986, this stress was greatly increased by Thompson's paranoid belief that he was being unfairly cheated out of money. (R965) His paranoia was therefore such that he was operating under the influence of an extreme mental and emotional disturbance. (R964-65, 1002)

Moreover, his capacity to conform his conduct to the requirements of the law was substantially impaired. (R965, 1002) During periods of high stress, Thompson could not keep clear in his mind what he was doing. (R966) His paranoid belief that

Swack and Walker were cheating him confused him into thinking that Swack and Walker were threatening and attacking him. (R966-67) He then reacted impulsively and murderously to eliminate the perceived threat against him. (R967)

The doctors found that the history of mental illness in Thompson's family was highly significant. (R967, 1000-01) This genetic inheritance, when combined with Thompson's physical brain dysfunction and his impoverished, unstable home environment, gave him little chance to overcome the strikes against him. (R969) He did not have much going for him to begin with and little opportunity to make it better. (R969)

B

The judge also found Thompson's age to be a statutory mitigating factor. (R1510) Although Thompson's chronological age was thirty-six, (R1510) his mental and emotional age was much lower. His educational level was around the second or third grade, his mental age was about ten, and his emotional age was about two and a half. (R960, 1187-88, 1199)

Whether the defendant's age is a statutory mitigator depends more on the defendant's emotional and mental maturity than on his chronological age. Echols v. State, 484 So.2d 568 (Fla. 1985). This court emphasized in Amazon v. State, 487 So.2d 8, 13 (Fla. 1986) that the nineteen-year-old defendant "was an 'emotional cripple' who ... had the emotional maturity of a thirteen-year-old with some emotional development at the level of a one-year-old." In Fitzpatrick v. State, 527 So.2d 809, 812 (Fla. 1988), the defendant was an "emotionally disturbed man-child" with an emotional age between nine and twelve. Since the evidence in

Amazon and Fitzpatrick was similar to the evidence in the present case, the trial court correctly found that Thompson's age was a statutory mitigator.

The trial court found that the other evidence presented by the defense constituted non-statutory mitigating evidence. (R1510) This non-statutory evidence rose "to a sufficient level to be weighed as a mitigating circumstance." Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986).

This evidence showed that Thompson's father was handicapped, his sister spent twenty years in a mental hospital, and his brother spent two years there. (R930, 932-33) Family history of mental illness is valid mitigation. Thompson v. State, 456 So.2d 444 (Fla. 1984).

In addition, the Thompson home in Mississippi had no running water or electricity. (R933) Charlie had eleven siblings. (R928-29) His mother died when he was seven. (R929) He went to school two or three days each week and worked the other days in the cotton fields where he made only $2.50-3.00 a day. (R931, 939) He did not finish the fourth grade. (R929) This negative family setting and impoverished upbringing were also valid non-statutory mitigation, particularly because Thompson was a borderline defective, functioning emotionally as a disturbed child. Brown v. State, 526 So.2d 903, 908 (Fla. 1988); Livingston v. State, 13 F.L.W. 187 (Fla. March 10, 1988).

Finally, the evidence showed from several sources that Thompson was a good worker with varied work experience. (R791-92, 947-48, 997) He made little money but nevertheless paid child

support for his three children. (R948) Except for a previous sexual battery committed with slight force and violence on the mother of his children, the witnesses had not known Thompson ever to be aggressive or violent. (R934, 938, 944-45) He had been a model prisoner in jail while awaiting trial. (R940-41)

C

The trial judge found two mental statutory mitigators, one other statutory mitigator (age), and substantial non-statutory mitigation. This court has affirmed a death sentence in only one case in which the trial court found the two mental mitigators. In only eight cases did the trial court impose death despite finding both mental mitigators. This small number of cases, when combined with the large number of capital defendants who are mentally ill, suggests that capital defendants in Florida who have both a diminished capacity and an emotional or mental disturbance are normally sentenced to life in prison rather than death in the electric chair.

This court reversed three of these eight cases for a new trial. Garron v. State, 528 So.2d 353 (Fla. 1988); Gibson v. State, 474 So.2d 1183 (Fla. 1985); Freeman v. State, 377 So.2d 1152 (Fla. 1979). In two of the cases, this court reduced the death sentence to life in prison. Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988); Ferry v. State, 507 So.2d 1373 (Fla. 1987). In the sixth case, Miller v. State, 373 So.2d 882 (Fla. 1979), this court remanded to the trial court for reconsideration of the sentence but almost forced the trial court to impose a life sentence. On remand, the trial court did impose a life sentence. Miller v. State, 399 So.2d 472 (Fla. 2d DCA 1981).

In the seventh case, Long v. State, 13 F.L.W. 417 (Fla. June 30, 1988), this court also remanded for reconsideration of the sentence, in part because of strong mitigating evidence. In the eighth case, Fersuson v. State, 474 So.2d 208 (Fla. 1985), the trial court reaffirmed the death sentence after this supreme court remanded for a new sentencing. This court then affirmed. In Long and Ferguson, however -- unlike the present case in which the defendant had a low emotional and mental age and was mentally retarded -- the trial court did not find any mitigation besides the two mental mitigators. Moreover, both Long and Ferguson involve gruesome murders of eight or more people in separate incidents.

In several other cases, this court determined that the trial court should have found the two mental mitigators but did not. This court then remanded and directed the trial court to enter a life sentence. Huckabv v. State, 343 So.2d 29 (Fla. 1977); Shue v. State, 366 So.2d 387 (Fla. 1978); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976). Although Shue, Burch, and Jones involved jury overrides, Huckabv did not. In Mines v. State, 390 So.2d 332 (Fla. 1980), the trial court expressly rejected the two mental mitigators. This court remanded for reconsideration of the sentence, because the trial court should have considered the mental mitigation. On December 30, 1982, Judge Royce Lewis did impose a life sentence.

Thus, this court has only once affirmed a death sentence in a case in which the trial judge found that the two mental mitigators applied. At some point in Florida's legal process, defendants in such cases normally get a life sentence. In the

present case, Thompson had not only the two mental mitigators but also additional mitigation. He suffered from mental retardation, brain damage, a low emotional age, and an impoverished upbringing. His family had a history of mental illness, yet he had been a productive member of society.

Furthermore, the killings probably occurred upon reflection of but a short duration. Thompson repeatedly said he never meant to kill and only acted in self-defense. (R1207, 1220, 1224) Dr. Maher testified that Thompson did not have a preconceived plan to kill. (R974, 976) He could not think clearly enough at that time to know what he would do. (R976) Dr. Berland pointed out that Thompson made Swack and Walker take off their clothes because he did not want them to get help after he left them in the park. (R1014) He probably acted in a impulsive and paranoid rage rather than by design. (R967) The death penalty was therefore disproportionate under the theory of Wilson v. State, 493 So.2d 1019 (Fla. 1986) and Ross v. State, 474 So.2d 1170 (Fla. 1985).

Finally, although the present case is similar to several cases, (see, e.g., Livingston; Brown; Ferry; Amazon; Thompson) it is particularly similar to Fitzpatrick. In Fitzpatrick, the trial court found the same three statutory mitigators that the court found in the present case (including low emotional age). Although the evidence of mental disturbance in Fitzpatrick was stronger, the evidence in the present case showed mental retardation and brain damage in addition to mental disturbance. Moreover, Fitmatrick had five statutory aggravators, as opposed to at most four and probably three or two statutory aggravators in the present case. This court in Fitzpatrick reduced the

sentence to life, despite the jury recommendation of death. This court should do the same in the case at hand.

CONCLUSION

Appellant requests this court to remand with directions to dismiss the indictment or acquit the defendant. Alternatively, appellant requests a new trial. If this court chooses not to reverse on the merits, then it should direct the trial court to impose a sentence of life in prison. This court should at least direct the trial court to hold a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammel Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602, by mail on this 3rd day of October, 1988.

Douglas S. Connor for
STEPHEN KROSSCHELL