IN THE

SUPREME COURT OF FLORIDA

CASE NO. 72,462

CIRCUIT COURT CASE NO. 81-9310 CF

DANIEL LEE DOYLE,

Defendant/Appellant,

v.

STATE OF FLORIDA,

Plaintiff/Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY

APPEAL FROM DENIAL OF VERIFIED MOTION TO VACATE JUDGMENT AND SENTENCE FILED PURSUANT TO RULE 3.850, FLORIDA RULES OF CRIMINAL PROCEDURE

INITIAL BRIEF OF APPELLANT/DEFENDANT DANIEL LEE DOYLE

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STATEMENT OF THE CASE

This is an appeal from the Broward County Circuit Court's denial of: (1) a motion to vacate a conviction for first degree murder and a sentence of death; and (2) a motion for a stay of execution pending resolution of post-conviction proceedings.

On May 6, 1988, Governor Martinez signed the Death Warrant for Defendant/Appellant Daniel Lee Doyle ("Doyle"). The Death Warrant is valid from Noon, July 7, 1988 to Noon, July 14, 1988. Execution is scheduled for 7 A.M. on July 8, 1988.

In 1982, Doyle was convicted of first degree murder and sentenced to death. Doyle appealed, and his conviction and sentence were affirmed by this Court. See, Doyle v. State, 460 So.2d 353 (Fla. 1984). The judgment and sentence became final on February 6, 1985. Doyle timely filed a Verified Motion to Vacate Judgment and Sentence ("Motion to Vacate") pursuant to Rule 3.850, Florida Rules of Criminal Procedure, in Broward County Circuit Court on February 6, 1987. The circuit court held an evidentiary hearing on the Motion to Vacate on September 13, 1987. No other post-conviction motion has been filed by Doyle. On May 11, 1988, immediately after being notified of the signing of the Death Warrant, Doyle filed a Motion for Stay of Execution. The Motion to Vacate and Motion for Stay of Execution were denied by the circuit court on May 16, 1988. Doyle timely commenced this appeal

from such denials on May 19, 1988, pursuant to Rule 3.851, Florida Rules of Criminal Procedure.

STATEMENT OF THE FACTS

Introduction

Doyle is retarded. His conviction and sentence are in large part a product of such retardation and related psychological factors, as well as statements made by the court and the State to the jury which mislead the jurors as to their role in Doyle's trial and sentencing.

A. The Trial Court And Prosecutor Lead The Jury To Believe It Had A Minimal Role In The Sentencing Process.

The court and the prosecutor in Doyle's trial repeatedly mislead the jury about its responsibility in the capital sentencing process under Florida law.[1] The court made the following comments during jury selection:[2]

> THE COURT: Now, some of you initially may be feeling a little bit squeamish about sitting in judgment of your fellow-man. It is not an unusual feeling for jurors to have either. You are new at this game. My telling you that your job is going to be easy may not make it so in your mind. Actually, it is easy for me

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[1] The Court in the evidentiary hearing on Doyle's Motion to Vacate stated that the Caldwell issue may be viable, hearing Tr. 104-05, although this motion was denied months later.

[2] "R. ___" shall refer to the record of the trial. "Hearing Tr. ___" shall refer to the transcript of the hearing on the Motion to Vacate. "App. ___" shall refer to the appendix to this brief.

to say that. I have been doing this for over 11 years now. So in my mind there is nothing too complicated about a criminal trial. You will find that to be the case as this trial goes on. You will find that to be the situation. There is nothing difficult about sitting as jurors in a criminal case.

R. 316 (emphasis added).

If any of you are harboring any feelings of nervousness or of fear of what to say or what to do, first of all, I want to assure you that's a perfectly normal, natural feeling. That is probably how you should be feeling really.

The second thing I want to assure you of is this: Whatever feelings you have along those lines that you may have will disappear. They will go away. As we get in the trial, you will be perfectly comfortable in your role as jurors. You will know what to expect. Quite frankly, some of it may be somewhat, even boring-

R. 318-19 (emphasis added).

I assure you of this: I want you to keep in mind, what we do here is judge what people do. We don't judge any moral guilt. We don't judge if a person is bad or if he is good. You as jurors determine what happened. When you have determined what happened by your verdict, your job in most cases is done.

So, once again, you are not sitting in judgment as to whether or not a person is good or bad or whether he is morally sound or immorally or anything else like that. That, of course, is left to a higher judge. You, as jurors, deal with facts. You determine just what a person did and that is what your job is. So any moral qualms you may have about sitting as a juror in any case, I hope are somewhat alleviated by that fact. Once again, you determine what people do or didn't do, not really who they are. Any sentence in

> this case, the ultimate decision is up to me, the Judge.

R. 319-20 (emphasis added).

Comments made by the prosecutor during jury selection complemented the court's statements:

> MR. HANCOCK: Do you understand that if we get that far, yours will only be a recommendation, the Honorable Judge Moe makes the final determination as to the sentencing?
>
> MRS. RUBIN: Right.
>
> MR. HANCOCK: Even if we get that far, yours is only a recommendation; do you understand that?
>
> MRS. RUBIN: True.

R. 355.

> MR. HANCOCK: Yes, but... you could impose the death sentence or recommend it because all it is a recommendation?
>
> MRS. JORGENSEN: Yes.

R. 557 (emphasis added).

The court's instructions to the jury at the close of the guilt/innocence phase of the trial emphasized to the jury that they did not "fix the penalty" and were not responsible for it. The court informed the jury once they decided the verdict their job was over:

> THE COURT: I am now going to go over the maximum and minimum penalties which are applicable to each crime we talked about. Of course, the penalty is up to the Court to decide. Jurors do not fix a penalty in the State of Florida. You are not responsible for the penalty in any way because of your verdict.

> The possible results of this case are to be disregarded as you exercise your verdict. Your duty is to discuss only the question of whether the State has proved the guilt of the Defendant in accordance with these instructions.
>
> The maximum penalty for the crime of murder in the first degree is death.

R. 1292 (emphasis added).

> Your duty is to determine whether or not the Defendant is guilty or not guilty in accordance with these instructions. Once you have done that, you have completely fulfilled your oath and your obligation as jurors.
>
> It's the Judge's job, that's me, to determine what a proper sentence would be if the Defendant is found guilty.

R. 1291 (emphasis added).

Finally, at the conclusion of the sentencing hearing, having conditioned the jury to believe it was not responsible for the imposition of the death penalty, the prosecutor reiterated to the jury that its role in sentencing was minimal:

> MR. HANCOCK: What you do, you sit there and you determine what weight you should put on each of those [referring to aggravating and mitigating circumstances] and at that time you come back and give a recommendation to the Honorable Judge Moe and he makes the final determination. Yours is just a recommendation.

R. 1375 (emphasis added). No mention was made of the weight to be given such a recommendation in the sentencing.[3/]

[3/] See, e.g., Justice Shaw's specially concurring opinion in Grossman v. State, 13 F.L.W. 349, 350 (Fla. May 25, 1988), discussing the viability of Tedder v. State, 322 So.2d 908 (1975), which clearly makes the jury's recommendation of great (continued...)

> MR. HANCOCK: And yours is just a recommendation that you make here. Judge Moe will make the final determination after considering Mr. Doyle's entire background, his entire history.

R. 1381-82 (emphasis added). The jurors were not told whether that "entire background" or "entire history" were in front of them.

In the instructions to the jury before retiring for sentencing deliberation, the court once again minimized the great importance of the jury's recommendation by reinforcing the court's prior statements:

> THE COURT: As you have been told, the final decision as to what punishment is going to be imposed is the responsibility of me as the judge.

R. 1387 (emphasis added).

The only indication the court gave to the jury that their sentencing verdict was of critical importance was when the court informed the jurors they should not "act hastily and without due regard to the gravity of these proceedings." R. 1390.

B. Doyle's Trial Counsel Failed To Use Psychological Experts in Sentencing.

Doyle's trial counsel was handling his first capital case. Hearing Tr. 50-51. He had thus never handled a case

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3/ (...continued)
importance, in light of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

where first guilt was decided, including resolution of issues of competency to stand trial and sanity, and then penalty was decided, where related, but different psychological issues might need to be resolved. Apparently because of that inexperience, although he requested that the court appoint medical experts to determine Doyle's competency to stand trial and Doyle's sanity or insanity at the time of the alleged defense, R. 1222, 1334, the subject of the penalty phase "wasn't something that I dwelled upon to any great extent." Hearing Tr. 49. In fact, the reports of the two psychologists he consulted with made no reference whatsoever to the penalty phase. See Evaluations of Seth R. Kreiger and John C. McClure. App. 1 and 2 respectively. Dr. Kreiger swore he was never even consulted regarding the penalty phase. See Kreiger Affidavit, App. 3. No investigation was requested by Doyle's trial counsel or made to determine whether Doyle was under the influence of extreme mental and emotional disturbance and did not appreciate the criminality of his conduct or was able to conform his conduct to the requirements of law at the time of the crime. See Section 921.141(6)(b) & (f), Florida Statutes.

The examinations and the written reports of the two psychologists, which were court exhibits at the hearing on the Motion to Vacate, never addressed any issues relevant to mitigation, which simply reflects the inability of Doyle's inexperienced trial counsel to appreciate the issues. See

Evaluations of Dr. Seth R. Kreiger and John C. McClure. Dr. Kreiger specifically said any conclusions he reached were not directed toward any mitigating circumstances relevant to the penalty phase and only reflected the purpose for which he was appointed, that is, Doyle's sanity and competency to stand trial and a related Baker Act issue. See Kreiger Affidavit. See also R. 1334 (testimony of Kreiger that the only purposes for which he examined Doyle were competency and sanity). The other psychologist, Dr. John McClure, who was never licensed in the State of Florida, could not be located by Doyle's present counsel, but his trial testimony was limited in the same way as Kreiger's. R. 1222 (testimony of McClure that the only purposes for which he examined Doyle were competency and sanity). The trial testimony of these two psychologists only vaguely referred to Doyle's retardation (Dr. Kreiger testified it was only his "impression" that Doyle was retarded, R. 1339-40) and did not address the full range of mental health issues relevant to sentencing. At the hearing on the Motion to Vacate, Doyle's trial counsel claimed he considered the mitigation issues, but had no explanation for how he acted, and why he did nothing in this regard. When asked direct questions regarding his failure to assign the experts to investigate these mitigating circumstances, and faced with a record which categorically shows he made no effort to have those issues addressed, Doyle's trial counsel simply could not recall ever

covering the penalty phase issues raised here with the psychologists. See Hearing Tr. 56-57.

Doyle's counsel testified at the Rule 3.850 evidentiary hearing he asked both psychologists to explore mitigating evidence applicable to the penalty phase of the trial. Hearing Tr. 39-40, 69. When asked for specifics, he had memory lapses. Hearing Tr. 56-57 He made no attempt prior to the hearing to review the reports, his file, or the record. His testimony is flatly contradicted by everything in the record, including Kreiger's affidavit and the reports issued by the psychologists, all of which indicate McClure and Kreiger were hired solely for sanity and competency purposes at the outset of the trial, and for no other reason. Kreiger has sworn in an affidavit that his examination did not relate to anything other than sanity and competency. See, Kreiger Affidavit. Finally, where Doyle's trial counsel was specific, he was often wrong. For example, he testified Kreiger examined a lengthy confidential school file and listened to the taped confession Doyle gave before he examined Doyle. Hearing Tr. 40-42. Kreiger stated he did not review the school file until the day before he testified at the suppression hearing. R. 224. Neither McClure nor Kreiger were asked to interview Doyle after the initial examinations and after Doyle had been found guilty to address issues of mitigation. Hearing Tr. 67-68.

Doyle's trial attorney elicited no testimony from Kreiger or McClure regarding mitigating circumstances applicable to Doyle. See R. 1332-1354. Doyle's psychologists were never informed of the statutory mitigating circumstances that might be applicable to Doyle. See Kreiger Affidavit. No questions of the psychologists were asked regarding Doyle's mental or emotional disturbance at the time of the crime or whether Doyle was able to conform his conduct to the requirement of the law or appreciate the criminality of his conduct.

C. Testimony Which Could Have Been Offered On Doyle's Behalf During The Penalty Phase.

Dr. Russel M. Bauer, Director of Neuropsychology Service for the Department of Clinical Psychology at Shands Hospital, conducted a comprehensive psychological evaluation of Doyle, including examination of general intellectual functioning, and neuropsychological examination consisting of testing memory ability, language skill, visuoperceptual and visuoconstructive ability, and frontal-subcotal functions. See Bauer Evaluation, App. 4. Dr. Bauer also conducted personality testing and collected collateral information from interviews with family members and friends. Dr. Bauer concluded Doyle was in the borderline range of intellectual functioning, with a full scale IQ of 75, showing a verbal IQ of 70 and a performance IQ of 87. Bauer Evaluation at 9. Dr. Bauer found significant substance abuse, multiple head injuries and organic brain damage. Bauer Evaluation at 9. Dr. Bauer found that

Doyle had "significant deficits in memory and concentration and deficits in complex vasomotor and motor sequencing tasks." Bauer Evaluation at 8. Personality testing revealed "extremely primitive intellectual ability with few internal resources for coping with psychological stress." Doyle "is likely to become overwhelmed in stressful situations." Bauer Evaluation at 8. Dr. Bauer concluded that Doyle's intellectual deficits severely limit the range of situations with which he is able to effectively cope. Bauer Evaluation at 8. "In particular, he has difficulty thinking for himself, cannot effectively reason through complex problems, and has a severely limited fund of general information on which to draw." Doyle is largely dependent on others to do his thinking for him. Bauer Evaluation at 8.

Based on these results of his evaluation, Dr. Bauer unequivocally stated that Doyle met two statutory mitigating circumstances at the time of the crime. Bauer Evaluation at 9-10; Hearing Tr. 10-13. Regarding Section 921.141(6)(b) requiring that the felony be committed under the influence of extreme mental or emotional disturbance, Dr. Bauer wrote:

> It is my opinion that this statute is met by the facts of this case. There is evidence that in the year prior to the murder of Pamela Kipp, Mr. Doyle was emotionally disturbed by his brother's untimely death. He had become violent with his girlfriend on several occasions; she describes him as periodically "going berserk" and being remorseful afterwards. He had been drinking and taking drugs more heavily in the months before. His girlfriend had moved out the week earlier

> in the aftermath of a violent fight, and he was reportedly upset and angry about this, as well as fearful that he would do her further harm. He perceived the police to be harassing him, blaming him for nearly every offense committed in Miramar. Coupled with all of these stressors, Mr. Doyle has, on a developmental basis, suffered poor intellectual endowment, a reading disability, has had several minor head injuries, and has participated in significant substance abuse. These fact introduce possible organic factors which compound the effects of stress in this case.

Id. at 9.

Furthermore, regarding Section 921.141(6)(f) requiring that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law be substantially impaired, Dr. Bauer wrote:

> The weight of the evidence suggests that the requirements of this statute are also met . . . [T]he factors described above (intellectual impairment, organic factors, recent stressors) would in my opinion combine to substantially impair Mr. Doyle's appreciation of the consequences of his conduct or his ability to control his behavior.

Id. at 9.

D. Doyle Invoked His Right To Counsel, But The Police Ignored Him.

Doyle made three confessions. On the morning of September 6, 1981, police asked Doyle to make a statement. R. 30; 1012-13. A tape recorded statement was made. R. 1024-41. Doyle was read his Miranda rights and requested counsel, which request was ignored by the interrogators. Immediately

after the taped statement was made, Doyle made an unrecorded confession. R. 247; 1042-47. On September 8, 1981, a taped confession was given by Doyle which the police initiated. R. 1120-31. On September 11, 1981, a second taped confession was given by Doyle, when the police again initiated a discussion with Doyle. R. at 1133-48. At no time did Doyle initiate any discussions with the police or waive his request for counsel made during the first interrogation.

The following recorded dialogue occurred regarding Doyle's right to an attorney during his first statement:

> Question: Do you wish to have an attorney present at this time?
>
> Answer: Well, he's out of town right at the moment.
>
> Question: Well, you do wish to have an attorney here though, you know, while I talk to you now?
>
> Answer: If, you know, we'll talk about that later. I can, yes.
>
> Question: So, what I am saying is, you're willing to talk to me now; right, without your attorney?
>
> Answer: Yes.
>
> Question: Okay. Knowing your rights as I have just related them to you, are you now willing to answer my questions without having your attorney present?
>
> Answer: Yes.

R. 40.

The statements by Doyle clearly invoked his right to counsel. Police interrogation should have stopped at this point, unless

to clarify Doyle's statements. This Court in Doyle's direct appeal erroneously looked at subsequent statements to determine Doyle did not invoke his right to counsel.

The following are facts from the trial record showing Doyle's desire to have an attorney present. Doyle had wanted to contact an attorney before going down to the police station. R. 248, 254. The attorney referred to by Doyle was in fact out of town and had represented Doyle in the past. R. 77-78. He called his sister-in-law during the interrogation and asked her to get in touch with his attorney. R. 20. His sister-in-law testified that Danny called because "he did not know what was going on." R. 210-211. He further stated to her that "[h]e was being questioned and didn't know what he was going to do." Id. Furthermore, Danny's girlfriend, who was present during the first interrogation and confession, testified that the detective "tried to get everyone confused." R. 256-57. These interrogators knew Doyle was "not too bright" and couldn't read or write. R. 1062. One interrogator, Detective Buzzo, also testified to the effect that he made no attempt at all in putting Doyle in contact with an attorney. R. 72-73. He testified that at no time during the day did he take any measures to put the defendant in touch with his attorney or with the Public Defender's Office. R. 72-73.

E. Two Confessions Were Made After Doyle's Right To An Attorney Attached.

After Doyle's first confession was made two more confessions were elicited. Under Fla.R.Crim.P. 3.130 (First Appearance) every arrested person must be taken before a judicial officer within 24 hours of his arrest. Doyle was arrested on September 6, 1981. Doyle's right to an attorney attached 24 hours after his arrest. Consequently, Doyle's confessions on September 8 and 11, 1981 violated his constitutional right to an attorney.

SUMMARY OF ARGUMENTS

1. Doyle's Eighth and Fourteenth Amendment right to a reliable capital sentencing procedure was violated by impermissible comments made by the trial court and the prosecutor that mislead the jury as to its role in imposing the death penalty. This claim is based on Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), which represents a change in constitutional law, allowing the claim to be raised for the first time in a collateral proceeding. The Court should vacate Doyle's death sentence, reversing the trial court's denial of his Motion to Vacate, and order a new sentencing trial.

2. Doyle's Fifth and Fourteenth Amendment right to due process and equal protection of the law at the penalty phase of the trial was violated by incompetent examinations of Court appointed psychologists. Additionally, Doyle's Sixth and Fourteenth Amendment right to effective assistance of counsel was violated by defense counsel's failure to investigate and present available mitigating evidence. Doyle's counsel, who was defending his first capital case, failed to present testimony that Doyle's retardation and organic brain damage were mitigating circumstances allowed by law that showed: (1) the capital felony was committed while the defendant was under the influence of extreme mental and emotional disturbance; and (2) the capacity of Doyle to appreciate the criminality

of his conduct and to conform his conduct to the requirements of law was substantially impaired. See, Section 921.141(6)(b) & (f), Florida Statutes. The court appointed psychologists only evaluated Doyle for competency to stand trial and sanity at the time of the offense, making this medical testimony incompetent at the sentencing phase. The Court should vacate Doyle's sentence, reversing the trial court's denial of his Motion to Vacate, and order a new sentencing trial. Due process and equal protection claims, as well as ineffective assistance of counsel claims, are cognizable in postconviction collateral proceedings, State v. Sireci, 502 So.2d 1221 (Fla. 1987); Smith v. State, 400 So.2d 956 (Fla. 1981).

3. Doyle's Sixth Amendment right to counsel was violated by refusal of police interrogators to honor or clarify statements made by Doyle invoking his right to counsel. Doyle's interrogators knew he was retarded and ignored his request for counsel, while pressuring Doyle to confess. This Court applied an erroneous standard, disapproved by the Supreme Court of the United States, in Doyle's direct appeal by looking at subsequent statements of Doyle's to determine he had not invoked his right to counsel under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Because the Court incorrectly applied Miranda, this claim is cognizable in post-conviction collateral proceedings. The Court should vacate Doyle's judgment and sentence, reversing the trial

court's denial of Doyle's Motion to Vacate, and order a new trial.

4. Doyle's Sixth Amendment right to counsel was violated by failure of police to provide him with an attorney at arraignment. The court should vacate Doyle's sentence, reversing the trial court's denial of his Motion to Vacate, and order a new trial.

5. Execution of retarded persons, including Doyle, is cruel and unusual punishment prohibited by the Eighth Amendment. This issue is cognizable in post-conviction collateral proceedings because it calls into question the propriety of the death penalty. See generally, Palmes v. Wainwright, 460 So.2d 362, 365 (Fla. 1984); Henry v. State, 377 So.2d 692 (Fla. 1979). The Court should vacate Doyle's death sentence, reversing the trial court's denial of his Motion to Vacate, and enter a life sentence.

ARGUMENT

I

THE TRIAL COURT AND THE PROSECUTOR IMPERMISSIBLY DIMINISHED THE JURY'S UNDERSTANDING OF THE IMPORTANCE OF ITS ROLE AND RESPONSIBILITY IN THE SENTENCING PHASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Caldwell v. Mississippi

In 1985, after this Court affirmed Doyle's conviction on direct appeal, the Supreme Court of the United States decided Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985), ruling it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere". Id. at 2639. Under the Eighth Amendment, the difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination. Id. at 2639, quoting California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 3451, 77 L.Ed.2d 1171 (1983). In 1986, the United States Court of Appeals for the Eleventh Circuit ruled that the jury's role in Florida's sentencing process is so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of Caldwell. Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted sub nom. Adams v. Dugger, ___ U.S. ___, 108 S.Ct. 1106, 99 L.Ed.2d 267 (1988). The Eleventh

Circuit in Adams ruled Caldwell represents a change in constitutional law cognizable in a Rule 3.850 proceeding so that failure to raise the Caldwell claim on direct appeal, prior to the Supreme Court's decision in Caldwell, does not procedurally bar the claim. Adams, 816 F.2d at 1597.[4/] Subsequent to Adams the Eleventh Circuit has reaffirmed that the Caldwell doctrine applies to Florida's sentencing procedures. Mann v. Dugger, 844 F.2d 1446, (11th Cir. 1988); Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988). This Court has refused to recognize Caldwell as a change in constitutional law and has indicated that Caldwell is not applicable to Florida's sentencing procedures. See, Bertolotti v. State, 13 F.L.W. 253, 255 n.2 (April 15, 1988); Grossman v. State, 13 F.L.W. 127, 129-30 (February 26, 1988), reh'g denied, 13 F.L.W. 349 (May 25, 1988); Combs v. State, 13 F.L.W. 142, 143-44 (February 26, 1988); Preston v. State, 13 F.L.W. 341, 342 (May 26, 1988). The Supreme Court recently granted certiorari in Adams, which should decide these issues. Adams,

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[4/] Failure to comply with an independent and adequate state procedural rule ordinarily precludes federal habeas review of a claim, absent a showing of cause for, and prejudice resulting from, the procedural default. The Eleventh Circuit, in addition to ruling Caldwell represents a change in constitutional law, held the Florida Supreme Court's ruling that the Caldwell claim was procedurally barred represented application of a procedural bar to a claim that Florida does not regularly and consistently bar, allowing review by a federal court. Id. at 1497. A state procedural rule sporadically applied is not an independent and adequate state ground precluding federal habeas review of a claim. Id. Furthermore, because Caldwell represented a novel constitutional claim, cause for and prejudice resulting from, the procedural default was established, allowing federal habeas review. Id.

108 S.Ct. 1106 (1988). See also, Grossman, 13 F.L.W. at 350 (Fla. May, 1988) (specifically concerning opinion of Justice Shaw).

B. The Trial Court And The Prosecutor Misled The Jury About Its Role In Sentencing Doyle.

The trial court and the prosecutor in Doyle's trial repeatedly mislead the jury about its responsibility in the capital sentencing process under Florida law.[5/] In voir dire, the court conveyed to the entire assembled venire a sense that sitting in judgment of a man's life was not complicated or difficult, that the trial could be boring to some jurors, and that any feelings of apprehension would disappear as the trial progressed. The court assured the venire that any moral qualms should be alleviated because their job was not to judge people but to determine what they did or did not do. Furthermore, the court told the venire "[a]ny sentence in the case, the ultimate decision is up to me, the Judge." The prosecutor at the same time stressed to the entire venire that they should be able to impose the death penalty because it was only a recommendation. In the penalty phase the court and prosecutor again minimized the jury's role. The court, right before it informed the jury the maximum penalty for first degree murder is death, told the jury it was not responsible in any way for

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5/ The Court in the evidentiary hearing on Doyle's Motion to Vacate stated that the Caldwell issue may be viable, Hearing Tr. 104-05, although months later, he denied the Motion.

Doyle's guilt or innocence. The court then told the jurors that once they had decided the penalty, they had completely fulfilled their job as jurors. The prosecutor at the sentencing phase stressed to the jurors that their decision was just a recommendation and that the judge made the final determination after considering Doyle's entire background (as though the court was better qualified to make the determination and may have additional information not available to the jury, and therefore the jury need not worry about what it recommended). The court approved these comments by telling the jurors "as you have been told" the final determination is up to the court. These comments undermined the serious and grave task of the jurors in ultimately considering whether a man should die. The jury was told throughout the trial their decision was of little importance. From the very beginning to the end of Doyle's trial the atmosphere established by the court and the prosecutor created a bias in favor of death. Not once was the jury ever informed their recommendation was entitled to any weight by the court nor was the significance of the jury's recommendation ever stressed.

At no point did the court ameliorate the effect of its and the prosecutor's derogation and mischaracterization of the jury's critical role by informing them that their advisory sentence would be accorded "great weight" (under Tedder v. State, for example) or would be of any particular importance in the ultimate sentencing decision. The only

indication the court gave to the jury that their sentencing verdict was of critical importance was when the court informed the jurors they should not "act hastily and without due regard to the gravity of these proceedings." This hardly gave the jury any sense of it "awesome" responsibility in imposing the death sentence.

Because the jury was led to believe that it had little or no effect on sentencing when in fact their function at capital sentencing is critical, and because this created a reduced sense of responsibility incompatible with Florida sentencing procedure and with the Eighth Amendment, the recommendation of Doyle's jury is constitutionally unreliable and a new sentencing hearing is required.6/

Caldwell prohibits incorrect comments and instructions which cannot be said to have had no effect on sentencing and which diminish the sentencers' sense of responsibility for its decision. Statements by the prosecutor or court that diminish the jury's sentencing responsibility violate the Eighth Amendment:

> This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury

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6/ As Justice Shaw noted in his specially concurring opinion in Grossman v. State, "The practical effect of Adams and Mann is to hold Florida's death penalty statute unconstitutional as applied." 13 F.L.W. at 352 In the circumstances of this case, where no indication was given to the jury of the impact on the sentencer, the judge, of a jury recommendation for life, as opposed to death, it would seem Justice Shaw is correct, or at minimum has identified why, under Caldwell, Doyle's sentence must be vacated.

> recognizes the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the eighth amendment requires. The sentence of death must therefore be vacated.

Caldwell, 105 S.Ct. at 2646.

In an exhaustive post-Caldwell opinion involving imposition of the Florida death penalty, the Eleventh Circuit recently vacated the death sentence in Adams v. Wainwright, 804 F.2d 1526, 1529 (11th Cir. 1986) where the "judge's statements . . . created an intolerable danger that the jury's sense of responsibility for its advisory sentence was diminished, thereby rendering Adam's death sentence unreliable in violation of the eighth amendment." Id. at 1529. In Mann v. Dugger, 844 F.2d 1466 (11th Cir. 1988), the Eleventh Circuit strengthened its position in Adams by ruling ". . . the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role is unimportant." Id. at 10. In Doyle's trial the jury was barraged with comments by the court and the prosecutor that undoubtedly caused it to believe its role in sentencing was unimportant:

> . . . you are not responsible for the penalty in any way because of your verdict.

R. 1292.

> The possible results of this case are to be disregarded as you exercise your verdict.

R. 1292.

> It's the Judge's job, that's me, to determine what a proper sentence would be if the Defendant is found guilty.

R. 1295.

Caldwell involved prosecutorial comments during closing arguments informing the jury that its decision was not final because it was subject to automatic review by the Georgia Supreme Court. 105 S.Ct. at 2638. The United States Supreme Court ruled that "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Id. at 2641-42. The gist of the Caldwell argument is that the burden of imposing death is shifted to someone other than the members of the jury. It is irrelevant if that burden is shifted to an appellate court, as it is in Mississippi, or to the judge, as it is in Florida. The Eleventh Circuit summarized the ruling in Caldwell as following:

> [T]he prejudicial effect of the prosecutor's argument was increased by the fact jurors would be likely to find minimization of their otherwise difficult role of determining whether another should die attractive, particularly when they were told that the alternative decision makers were legal authorities that they might view as having more of a right to make such an important decision.

Adams, 804 F.2d at 1532 (emphasis added). Again, this is precisely the harm done by the court and the prosecutor in Doyle's trial when members of the jury were told there was nothing difficult about sitting as a juror and the jurors were not responsible for the penalty. Of particular importance is that these comments were made at the voir dire, guilt/innocence and penalty phases of the trial, reinforcing throughout the trial that the juror's role in sentencing was unimportant. The prosecutor in final argument during sentencing impressed upon the jury's mind that the legal authorities had more information and more of a right to make the final determination of life or death. The court reinforced this by instructing the jury ". . . as you have been told the final decision as to what punishment is going to be imposed is the responsibility of me as the judge." Thus the court reinforced the prior comments made by the prosecutor to the effect that the court was better able to make the determination of death.

In Adams and in Doyle's case, the Caldwell error was exacerbated by the fact that the source of the erroneous information as to the jury's proper responsibility was not only the prosecutor, but the trial court itself.

> Indeed, because it was the trial judge who made the misleading statements in this case, representing them to be an accurate description of the jury's responsibility, the jury was even more likely to have believed that its recommended sentence would have no effect and to have minimized its role than the jury in Caldwell. Cf. Id. at 2645 (noting importance

> of fact trial judge agreed with prosecutor's remarks).

Adams, 804 F.2d at 1532.

Several courts have affirmed death sentences, rejecting Caldwell claims where the trial court ameliorated by curative instructions the harm of statements derogating the jury function. For example, in Tucker v. Kemp, 802 F.2d 1293 (11th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987), the Eleventh Circuit noted:

> Of critical importance in Caldwell was the fact that the trial judge approved of the prosecutor's comments, stating that it was proper that the jury be told that its decision was automatically reviewable. See Id; Caldwell v. Mississippi, 105 S.Ct. at 2638. Because of the trial judge's agreement with the prosecutor's comments, it was as if the jury received an erroneous instruction from the court at the sentencing phase of a capital proceeding, thus triggering the eighth amendment's heightened requirement of reliability in a capital case and mandating reversal.

Tucker at 1295. The Court then distinguished Tucker from Caldwell: "Unlike Caldwell, however, the trial judge in this case correctly instructed the jury and did not put his imprimatur on erroneous information." Tucker, 802 F.2d at 1296.

While it is true in Florida that the jury sentence is an advisory recommendation and not the final sentencing determination, it is nonetheless improper to minimize the "great weight" to be accorded a jury recommendation. Adams, 804 F.2d at 1529; State v. Tedder, 322 So.2d 908 (1975). Indeed, while this Court has approved instructions that inform

the jury that its sentence is "advisory" subject to a "final" or "ultimate" decision by the court, such instructions are acceptable only "as long as the significance of its [the jury's] recommendation is adequately stressed." Pope v. State, 496 So.2d 798, 805 (Fla. 1986) (emphasis added). In Pope, "[i]n his final instructions to the jury, the trial judge stressed the significance of the jury's recommendation and the seriousness of the decision they were being asked to make." Pope, 496 So.2d at 805.

This crucial stressing of the jury's integral responsibility was absent in Doyle's case. The instructions in the guilt/innocence phase and sentencing phase are erroneous and represent precisely the diminution condemned in Caldwell, without ameliorative instructions present in Tucker and Pope. See also, Teffeteller v. State, 439 So.2d 840, 845 n.2 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984), appeal after remand, 495 So.2d 744 (1986) ("Although a jury's sentencing recommendation is only advisory, it is an integral part of the death sentencing process and cannot properly be ignored.") It simply cannot be said that the improper instructions and comments made by the court before the jury "had no effect on the sentencing decision" as demanded by Caldwell. Caldwell, 105 S.Ct at 2646.

For the foregoing reasons, Doyle's sentence should be vacated and a new sentencing trial ordered under the Eighth Amendment.

II

THE DEFENDANT WAS DENIED HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW BECAUSE OF INCOMPETENT MEDICAL EVALUATIONS AND DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS BY FAILURE OF HIS COUNSEL TO PRESENT COMPETENT EXPERTS TO TESTIFY THAT TWO CRITICAL STATUTORY MITIGATING CIRCUMSTANCES APPLIED.

Under Florida law and the United States Constitution, as articulated in Ake v. Oklahoma, 465 U.S. 1099, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), Doyle was entitled to the independent and competent assistance of a mental health expert during the sentencing phase of the trial. As the Supreme Court stated in Ake:

> The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern.
>
> . . . .
>
> Many States, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great as to preclude this assistance.
>
> . . . .
>
> These statutes and court decisions reflect a reality that we recognize today, namely, that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists

> gather facts, both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question.

Ake, 105 S.Ct. at 1094-95 (footnotes omitted, Rule 3.216 cited in footnote) (emphasis added).

When the state makes "mental condition" relevant to either guilt or sentencing in a capital case, an indigent defendant is entitled to competent and independent assistance by a psychiatrist and/or psychologist. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). The State of Florida has made mental state relevant to guilt and punishment in capital punishment cases. Three statutory mitigating circumstances and numerous unenumerated non-statutory mitigating circumstances are mental health based. Yet, because of his trial attorney's inexperience and inability to even identify the need for the mental health experts for the sentencing phase, Doyle did not receive competent assistance by his mental health expert at the sentencing phase of his trial. In State v. Sireci, 502 So.2d 1221 (Fla. 1987), this court upheld the trial court's determination, in a second post-conviction relief motion, that:

> a limited evidentiary hearing [was] necessary to address the claim that Sireci was deprived of his rights to due process and equal protection because the two psychiatrists appointed before trial to evaluate his sanity at the time of the

> offense failed to conduct competent and appropriate evaluations. The trial court further held that the hearing is necessary solely to determine the effects, if any, this claim may have had on the sentencing hearing. The court specifically found, and we agree, that the alleged violation of due process/equal protection has no bearing on the prior determination of Sireci's guilt.

Id. at 1223. (emphasis added). Doyle is entitled to the same protection in having competent medical experts testify at his sentencing hearing.

There is no doubt that Doyle met two of the statutory criteria for mitigating circumstances. Dr. Bauer testified he was under the influence of extreme mental or emotional disturbance because of the death of his brother and his mental retardation and organic brain damage impaired his capacity to appreciate the criminality of the act or to conform his conduct to the law. However, Doyle's retardation, his emotional distress and brain damage were only touched upon at the sentencing phase of the trial and were never fully presented to the jury. This was because Doyle's attorney never had psychologists appointed to examine him for mitigating circumstances. Doyle's psychologists only examined him for competency and sanity, issues not relevant to mitigating evidence. These facts would have been extremely relevant to the jury's deliberations and, in all probability, would have tipped the balance in favor of life imprisonment, especially in view of the fact that the vote was 8 to 4. It is intolerable that this state can execute

a mentally retarded individual without permitting his jury to consider the individual factors upon which his life hinges.

Doyle was denied due process and equal protection of the law and is entitled to a new sentencing trial. Furthermore, no reason can be advanced for Doyle's trial counsel's failure to raise these issues at Doyle's sentencing trial. Any attorney whose client is retarded and suffers from brain damage would immediately seek such mitigating testimony. It is incredible that any attorney should ignore mitigating circumstances spelled out in the law. Counsel's performance undoubtedly fell below the "wide range of professionally competent assistance" as demanded by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). For the foregoing reasons, the Court should vacate Doyle's sentence and order an new sentencing hearing.

III

DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL BY REFUSAL OF POLICE TO HONOR HIS REQUEST FOR COUNSEL DURING INTERROGATION.

A. The Supreme Court Of Florida Applied An Incorrect Standard In Determining Whether Doyle Invoked His Right To Counsel.

Doyle's constitutional right were violated by the refusal of police to honor his request for counsel at the first confession. Smith v. Illinois, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984), was decided by the United States Supreme Court after Doyle's direct appeal was decided by the Supreme Court of Florida. Smith confirmed that the mandate of Miranda established that a defendant invokes his right to an attorney 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. Smith, 105 S.Ct. at 493. An invocation of the right to an attorney, even if only one statement during a colloquy with police, represents a bright line over which the police must not step. Id. at 494. Once this invocation is made, subsequent remarks made by the defendant indicating his willingness to talk with the police cannot be used to revoke his constitutional rights under the Sixth and Fourteenth Amendments. Id. at 495. All interrogation must cease until counsel is provided to the accused. "[A]n accused's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Id. at 495.

Nevertheless, in its original affirmance of his conviction and sentence this Court looked at the entire context in which his statements were made to determine if Doyle had invoked his right to counsel, concluding: "At no time in the questioning did Doyle indicate an unwillingness to answer questions in the absence of counsel." Doyle v. State, 460 So.2d 353, 356 (Fla. 1984) (emphasis added). The Court should not have looked at the entire questioning, including subsequent statements of Doyle's, to determine if he invoked his right to counsel, but only at the actual statements made by Doyle to request counsel. The Supreme Court ruled in Smith that it is untenable to construe defendant's request for counsel by looking at subsequent remarks. Smith, 105 S.Ct at 494.

After a defendant has invoked his right to counsel under the Sixth Amendment he is not subject to further interrogation unless he initiates further discussions with the police and knowingly and intelligently waives his previous request for counsel. Smith v. Illinois, 469 U.S. 91, 105 S.Ct. 490, 493, 83 L.Ed.2d 488 (1984) (per curiam); Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378 (1981). See also, Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983); U.S. v. Webb, 755 F.2d 382, reh. denied, 762 F.2d 1004 (5th Cir. 1985). Doyle did not initiate the two subsequent confessions. Police went to Doyle's cell of their own accord. R. 1042-1048. At no time did Doyle knowingly and intelligently waive his prior

invocation of his right to counsel. Therefore, all statements and confessions made by Doyle to the police on September 6, 8 and 11, 1981 should be suppressed as a violation of his Sixth and Fourteenth Amendments rights. Doyle's judgment and sentence should be vacated with a new trial ordered.

B. Doyle Clearly Invoked His Right To Counsel.

In Smith v. Illinois, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984), the Supreme Court ruled that interrogation of a suspect must cease once the suspect expresses his desire to deal with police only through counsel. 105 S.Ct. at 492. The accused must validly waive his earlier request for the assistance of counsel before further interrogation proceeds. Id. In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court stated that if the individual "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning". Id. at 444-445. (emphasis supplied) (In Smith, the Supreme Court quoted this language. 105 S.Ct. at 494). Statements made after the accused invokes his right to counsel may be admitted only upon finding that he: (a) initiated further discussions with the police; and (b) knowingly and intelligently waived the right he had invoked. Smith, 105 S.Ct. at 493. See also Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). A valid waiver of the right to counsel cannot be established by showing

only that the accused responded to further police-initiated interrogation. Edwards, 451 U.S. at 484, 101 S.Ct. at 1885.

The threshold inquiry is whether the defendant invokes his right to counsel. Smith, 105 S.Ct. at 493. If nothing about the request for counsel or the circumstances leading up to it renders it ambiguous, all questions must cease. 105 S.Ct. at 494. If the request is ambiguous all questioning must cease except for narrow questions designed to clarify the earlier statement and the accused's desire respecting counsel. Long v. State, 517 So.2d 664 (Fla. 1987); Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979).

The following recorded dialogue occurred regarding Doyle's right to an attorney during his first statement:

> Question: Do you wish to have an attorney present at this time?
>
> Answer: Well, he's out of town right at the moment.
>
> Question: Well, you do wish to have an attorney here though, you know, while I talk to you now?
>
> Answer: If, you know, we'll talk about that later. I can, yes.

It is at this point that the inquiry should be made whether Doyle invoked his right to counsel. These responses by Doyle should be considered a clear invocation of his right to have an attorney present. Under the Miranda test, Doyle's statements indicate he wanted to consult with an attorney. At this stage, all questioning should have ceased. It is

significant that Doyle is borderline retarded and suffers from organic brain damage. Although the police officers cannot be considered to have full knowledge of Doyle's mental condition, they certainly can be considered to have an awareness of Doyle's low intelligence. These interrogators knew Doyle was "not too bright" and couldn't read or write. When a retarded individual is able to indicate in interrogation that he has an attorney, it should be sufficient to stop the questioning. Nor can Doyle's further remark of "I can, yes", even when coupled with "we'll talk about that later," be construed as anything but a clear indication to consult with his attorney. Surely, it cannot be expected that a retarded individual will always clearly, distinctly and unequivocally demand an attorney and state outright that he refuses to say anything until an attorney is present. To give any meaning to the Miranda rights, police in interrogations should give some leeway to the mental deficiencies of an accused, otherwise a retarded individual would never be able to invoke the Miranda rights, but always be steamrolled into a confession.

The following conversation is quoted in Smith, where the Supreme Court found the defendant clearly asserted his right to have counsel:

> Question: You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that?
>
> Answer: Uh, yeah. I'd like to do that.
>
> Question: Okay.

> Question: . . . If you want a lawyer and you're unable to pay for one a lawyer will be appointed to represent you free of cost, do you understand that?
>
> Answer: Okay.
>
> Question: Do you wish to talk to me at this time without a lawyer being present?
>
> Answer: Yeah, and no, uh, I don't know what's what, really.
>
> Question: Well. You either have to talk to me this time without a lawyer being present and if you do agree to talk with me without a lawyer being present you can stop at any time you want to.
>
> Answer: All right. I'll talk to you then.

Smith, 105 S.Ct. at 491-492.

The Illinois Supreme Court ruled that Smith's statements considered in total with his subsequent remarks were ambiguous and did not effectively invoke his right to counsel. Id. at 492. The Illinois Supreme Court ruled that Smith did "not clearly assert his right to counsel." Id. The United State's Supreme Court, in rejecting this argument, ruled that it is "unprecedented and untenable" to construe the defendant's request for counsel as ambiguous and therefore not an effective invocation of a defendant's right to counsel by looking at the subsequent responses to continued interrogation. This Court did exactly that by looking at the entire interrogation, including subsequent remarks by Doyle, to conclude "it is impossible to find any indication" that

Doyle wanted counsel present at his interrogation. Doyle, 460 So.2d at 356.

Once a defendant has expressed his desire to consult a lawyer, all questioning must cease and any subsequent questioning cannot be used to cast doubt as to the initial request. Id. This is a bright line prohibition to protect against badgering or overbearance, whether explicit, subtle or unintentional, which might persuade the accused to incriminate himself. Id. Doyle's remarks are unequivocal, especially his statement "I can, yes", and all interrogation should have ceased.

In Smith v. State, 492 So.2d 1063 (Fla. 1986), appeal after remand, 421 So.2d 146 (1982). ("Smith II"), this Court addressed the doctrine of complete bar to further questioning after an invocation of Miranda rights as established by the United States Supreme Court in Smith v. Illinois. In Smith II the defendant signed a Miranda waiver form, but he initially responded no when asked if he wanted to talk with the police. Id. at 1065. This response came during a colloquy with police strikingly similar to the one in Smith v. Illinois, Id. at 1066, and in Doyle's case. This Court noted that after the suspect said no, the police added "an ambiguous statement that could be interpreted to mean the accused had to talk, but could stop at any time." Id. This is similar to what occurred in Doyle's case. The detective asked four times whether Doyle wanted to see an attorney. Twice Doyle indicated he did want

his attorney. Ignoring these responses, the detective asked twice more if Doyle was willing to talk without an attorney, to which Doyle answered yes. The detective ignored Doyle's first two responses and kept asking the question until he got the answer he wanted.

This Court ruled in Smith II that at the precise point when a clear and unequivocable request for counsel is made, an accused is not subject to further interrogation by the authorities until counsel has been made available to him, unless he waives his earlier request for assistance of counsel. Id., quoting Smith v. Illinois, 105 S.Ct. 490 (1984). The court quoted the language in Miranda that if the individual indicates in any manner that he wishes to remain silent, the interrogation must cease. Id. Although this Court was addressing the invocation of the right to remain silent, the same language is in Miranda regarding indicating in any manner that an attorney is desired. Certainly Doyle in his way, and given his retardation and limited ability to express himself, (See Bauer Evaluation) indicated that he wanted an attorney, which should be interpreted as an invocation of his right to consult with counsel. This is a constitutional bar to all further questioning, Smith v. State, 492 So.2d at 1065, and is not subject to the harmless error rule. Id. at 1066.

C. If Doyle's Statements Were Not A Clear Invocation Of His Right To Counsel, Then They Were Equivocal Statements That Were Not Clarified By Police Interrogators.

If the statements by Doyle are not a clear invocation of the right to counsel, they certainly are equivocal statements showing his desire to have an attorney. When an accused makes a statement that is equivocal, interrogation must immediately cease except for narrow questioning designed to "clarify" the earlier statement and the accused's desire to see counsel. Long v. State, 517 So.2d 664 (Fla. 1987); Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979). No statement taken after the equivocal request is made and before it is clarified can clear the Miranda bar. Long, 517 So.2d at 667; Thompson, 601 F.2d at 771-72.

Doyle made three statements that could be considered equivocal statements regarding his right to see an attorney. When first asked if he wanted an attorney present he stated his attorney was out of town. When asked a second time if he wanted an attorney he stated ". . . we'll talk about that tomorrow," and "I can, yes." These are three separate equivocal statement ignored by the police. As in Smith Doyle's interrogator did nothing more than plow ahead with the questioning after getting ambiguous responses he did not like and did not attempt to clarify Doyle's remarks. The questioning after the two ambiguous remarks proceeded thus:

> Question: So, what I am saying is, you're willing to talk to me now; right, without your attorney?
>
> Answer: Yes.
>
> Question: Okay. Knowing your rights as I have just related them to you, are you now willing to answer my questions without having your attorney present?
>
> Answer: Yes.

R. 40.

This questioning is only designed to press Doyle to talk, and is not designed to clarify an ambiguous statement. Nothing about Doyle's attorney is clarified. The police officer could have asked Doyle if his attorney were in town would he want him present. He could have asked what Doyle meant by saying they could talk about his right to counsel later. He could have informed Doyle they could not talk about his right to counsel later but had to clarify his desire to have counsel now. Finally, the police officer could have asked Doyle if he was asking for an attorney by answering "I can, yes". These questions would easily have clarified Doyle's statements. Instead the whole substance of Doyle's remarks are ignored; the officer merely rephrased his last question about whether Doyle was willing to talk without an attorney. If the interrogator intended to clarify the so-called ambiguous statement, a wealth of information regarding Doyle's desire to speak with an attorney would have been discovered.

Doyle had wanted to contact his attorney before going down to the police station. Doyle's attorney was in fact out

of town and had represented Doyle in the past. He called his sister-in-law during the interrogation and asked her to get in touch with his attorney. His sister-in-law testified that Danny called because "he did not know what was going on." He further stated to her that "[h]e was being questioned and didn't know what he was going to do." This shows the confusion of a retarded individual who has organic brain damage and does not know where to turn for help. Furthermore, Danny's girlfriend, who was present during the first interrogation and confession, testified that the detective "tried to get everyone confused." One interrogator, Detective Buzzo, also testified to the effect that he made no attempt at all in putting Doyle in contact with an attorney. This shows that his intention was to ignore Doyle's statements and that he had no desire to clarify Doyle's statements. He testified that at no time during the day did he take any measures to put the defendant in touch with his attorney or with the Public Defender's Office. At any rate, this information about Doyle's desire to have an attorney could have been discovered had the interrogators bothered to clarify Doyle's statement.

For the foregoing reasons, Doyle's confession on September 6, 1981 was admitted into evidence in violation of his Sixth Amendment right to counsel. The judgment and sentence should be vacated and a new trial ordered.

IV

DEFENDANT WAS DEPRIVED OF COUNSEL AFTER FIRST APPEARANCE IN VIOLATION OF STATE LAW AND CONSTITUTIONAL RIGHTS.

The Supreme Court has ruled that the Sixth Amendment right to an attorney attaches at the time of arraignment. Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 1407, 89 L.Ed.2d 631 (1986). After attachment of the right to counsel, the accused must make an intentional relinquishment or abandonment of his privilege of counsel. Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977). Merely informing an accused of his right to counsel is not sufficient, even if the accused understands these rights. Id. at 1242. Under Fla.R.Crim.P. 3.130 (First Appearance), every arrested person has a right to be taken before a judicial officer within 24 hours of his arrest. At this time counsel must be appointed, although counsel may be appointed for the limited purpose of the first appearance or at subsequent proceedings. Id. At least two courts, including the Eleventh Circuit, have ruled that, in Florida, the right to an attorney attaches at the time of first appearance. Thus, Doyle's interrogation of September 8, 1981, was illegal because his right to an attorney had attached.

In Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983), the Eleventh Circuit ruled that the accused's right to an attorney attaches after his first appearance. Id. at 1073. However, the court upheld admission of the confession based

on the district court's finding that he had made a voluntary, knowing and intelligent waiver of his right to counsel. Id. The accused in Witt had initiated the contacts leading up to his confession. Id. The court, however, found that the accused's right to an attorney had attached based upon the First Appearance right to counsel under Florida criminal procedure rules. In State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984), the Fourth District ruled that Florida's constitution and state law affords greater protection than the federal constitution. Id. at 1185. In Douse, the accused was represented by retained counsel at the first appearance. Id. at 1184. The next day, police elicited incriminating statements. The court found that the right to an attorney had attached, and the police could not deliberately elicit statements through surreptitious means. Id. at 1185. Article I, Section 16 of the Florida Constitution guarantees the right to assistance of counsel in all criminal prosecutions. This constitutional right coupled with Rule 3.130 mandating an attorney at first appearance caused the right to an attorney to attach. Id. at 1185. Doyle was illegally deprived of an attorney in violation of his state constitutional and legal rights.

For the foregoing reasons, Doyle's second and third confessions were elicited in violation of his constitutional rights. This conviction and sentence should be vacated and a new trial ordered.

V

EXECUTION OF THE MENTALLY RETARDED IS CRUEL AND UNUSUAL PUNISHMENT.

Daniel Lee Doyle is mentally retarded. At best, he is in the borderline range of intellectual functioning ("[H]e was at the cutting point between the mentally retarded range and borderline retarded range.") His IQ has been measured as low as 57. He cannot read or write, and has a limited vocabulary. He is barely able to sign his name. A thorough psychological evaluation conducted after Doyle's conviction and direct appeal by Dr. Bauer revealed Doyle has "an extremely primitive intellectual ability."

The Eighth Amendment prohibition against imposition of cruel and unusual punishment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." Gregg v. Georgia, 428 U.S. 153, 172-73, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). It is necessary in determining whether a punishment is cruel and unusual to assess contemporary values by looking at objective indicia that reflect the public attitude toward a given sanction. Id. at 2925. A death penalty must also accord with the dignity of man, which is a basic concept underlying the Eighth Amendment. Id.

The execution of the mentally retarded is neither approved by society or accords with the dignity of man. Florida voters overwhelmingly oppose execution of the mentally retarded. See, An Analysis of Political Attitudes Towards the Death

Penalty in the State of Florida, Prepared for Amnesty International, Cambridge Survey Research, (May, 1986), App 5. This is true even if the retarded person to be electrocuted is found guilty beyond a reasonable doubt. In a recent survey conducted by Cambridge Survey Research 71% of the Florida voters polled opposed such execution. Only 12% favored executing the mentally retarded and 17% did not know. The same survey revealed overwhelming support of the death penalty in general. 84% of the Florida voters polled either strongly favored or somewhat favored capital punishment. Regarding execution of the mentally retarded, Cambridge Survey Research asked voters the following question:

> [I]'d like you to imagine you are a member of a jury. The jury has found the defendant guilty beyond a reasonable doubt and now needs to decide about sentencing. You are the last juror to decide and your decision will determine whether or not the offender will receive the death penalty. How would you feel about recommending the death penalty if . . . [t]he convicted person was mentally retarded?

Id. at 60. This overwhelming response of 71% of Florida voters who would not vote for execution shows that if Doyle's jury had been fully informed of his retardation they would not have imposed the death penalty. See discussion infra at 36-48. Even as it was, the jury was badly split with an 8 to 4 vote in favor of the death penalty. Two votes represent death for Doyle, two votes that would have been for life had the jury known the full facts of his retardation.

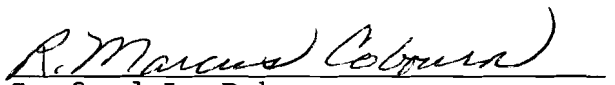
Mental retardation is often confused with mental illness. Mental retardation impairs a person's ability to learn and to adapt to social norms. One of the primary characteristics of the retarded is cognitive disintegration or the breakdown in the ability to think and reason and a breakdown in the perception of reality during periods of stress. See, Sovner and Hurley, Four Factors Affecting The Diagnosis Of Psychiatric Disorders In Mentally Retarded Persons, 5 Psychiatric Aspects of Mental Retardation Reviews 45 (Sept. 1985), App. 6. Another characteristic is that the retarded have stunted moral development. James Ellis and Ruth Luckasson, Mentally Retarded Criminal Defendants, 53 Ga.L.Rev. 414 at 429-30 (1985), App. 7. Studies on the moral development of people with mental retardation reveal that they have incomplete or immature concepts of blameworthiness and causation. Id. Indeed, the factors that appear to be related to moral development include intelligence, opportunity for interaction with others, living in an enriching environment, chronological age and mental age, all of which are missing for the mentally retarded. Doyle's retardation has in many ways stunted his ability to cope with the pressures of living every day life. It is without a doubt that his mental retardation played a crucial role in the events of his life. It is inconceivable to any of us what it would be like to be retarded.

On March 7, 1988 the Georgia legislature decided that the death penalty could not be imposed on a victim of

mental retardation, regardless of the crime committed. Act of March 7, 1988, No. LC 10 8070S (to be codified at Ga.Code.Ann. § 17-7-131), App. 8. The Georgia legislature, in concluding executing a retarded offender destroys public confidence in the criminal justice system, relied on survey results showing two-thirds of Georgia's citizens opposed applying the death penalty to the mentally retarded. Amendment to Act of March 7, 1988, No. LC 18-26395, App 9. Here, this Court must recognize that execution of the mentally retarded in Florida violates the Eighth Amendment's prohibition against cruel and unusual punishment.

For the foregoing reasons, Doyle's conviction and sentence should be vacated and a new trial ordered.

THOMSON ZEDER BOHRER WERTH
& RAZOOK



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