IN THE SUPREME COURT OF FLORIDA

MICHAEL GLENN PATRICK REILLY,

Appellant,

v.

CASE NO. 73,571

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The Appellant's statement is generally accepted. The Appellee, State of Florida, offers specific additions and corrections on a point by point basis as follows:

Facts: Point I
(Confrontation of Witness)

Mr. Reilly's first point on appeal involves his alleged inability to obtain, mid-trial, mental health evaluations relating to state witness Randy White.

White was an inmate in the Escambia County Jail who conversed with Reilly about this murder. (R 647). Reilly admitted killing Johnathan Wells and, in addition, revealed that Reilly's mother was helping to prepare a false alibi. (R 647-48).

On cross-examination[1] White conceded his past use of assorted aliases. (R 653). White was confronted with his criminal record (R 659-64) and with the fact that he was deemed temporarily incompetent to stand trial and "borderline retarded" at one time. (R 654). White was later deemed competent and was convicted and sentenced. (R 659). White appealed. (R 667).

On redirect, White explained the nature of his appeal (a "guidelines departure") and told the jury that he had filed his own notice of appeal. (R 668-69).

Mr. White denied being retarded. (R 669).

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[1] The issue of White's competence was raised by defense counsel during cross, **not** by the State or Mr. White himself.

Defense counsel then insisted upon access to White's mental health records. (R 671). Access was denied but full cross-examination was allowed. (R 671).

On recross, White admitted that he was sent to Chattahoochee as incompetent and borderline retarded. (R 672). White refused to waive any privilege relating to his files. (R 672). Defense counsel moved to strike White's testimony. (R 673).

On redirect, White stated that he was ultimately adjudicated "competent". (R 673).

Other than questioning White's intelligence, defense counsel did not link any "retardation" to White's credibility.

Facts: Point II
(Challenge for Cause)

In his second point on appeal Mr. Reilly alleged that he had to "waste" two peremptory challenges in order to remove two veniremen he wished to have stricken for cause; Mr. Blackwell and Mr. Powell.

As conceded by Appellant, Mr. Blackwell followed the case in the newspapers during the first three or four days and then stopped. (R 207). His recollection of the facts was sketchy (R 207) and, although he had heard there was a confession, he had no opinion at all regarding Reilly's guilt. (R 208-09). Blackwell stated that he would not rely on media stories but would rely solely upon evidence given to him in court. (R 212).

When defense counsel challenged Blackwell for cause the challenge was denied due to the strength of Blackwell's

assertions. (R 219). Defense counsel did not object to the decision (R 220) but simply exercised a peremptory challenge.

William Powell had no memory of the case at all. (R 237). Powell stated that he would consider lesser penalties than death (R 239-43) even though, in the past, he felt death would be a proper punishment. (R 239-43).

Powell seemed genuinely confused by defense counsel's discussion of the "two parts" of a capital trial. As quoted in Reilly's brief (brief, pp. 35-36), Powell could not follow Mr. Terrell's questions and seemed to be confused as to whether "guilt" would be tried two times. Even the judge, in denying Mr. Terrell's challenge for cause, noted that Terrell's abstract questions were confusing. (R 251). The judge felt Powell was clearly unbiased. (R 251). The challenge for cause was denied without objection. (R 251).

The court liberally granted defense challenges for cause as to any jurors demonstrating "fixed opinions". (R 169, 170, 175-6, 194, 267, 268, 340, 351, 357, 371, 376, 393, 403, 411). The court denied state challenges for cause against a anti-death-biased juror. (R 259). The court did not stack the jury against Reilly.

Mr. Terrell, after tendering the panel, stated he was "out of" peremptories but "would have" stricken venirepersons Messick, Bradly and Fisher. (R 427).

Mr. Fisher (R 343) had very little recollection of what was reported on television and had not followed the case or discussed it for months. (R 344). He specifically stated it would be

"unfair" to prejudge anyone and he would not do that. (R 345). He was a totally inoffensive venireman. Fisher was tendered by the State (R 350) and Terrell never challenged Fisher though, at the time, he had peremptory challenges available. (R 351).

Mr. Bradly (R 228) had forgotten all about this reported murder. (R 228). He thought the boy drowned. (R 229). He had no knowledge of any arrest in the case or anything. (R 229). When asked about the death penalty, he replied "Let's hear the facts and then we'll come to that". (R 230). Terrell never challenged Bradly.

Mrs. Messick did not recall the case other than being aware a boy died (R 245) or was raped and killed. (R 246). She felt she could recommend a life sentence. (R 248). She would not suggest a sentence for Reilly without hearing evidence. (R 249). Terrell never challenged her. (R 249-50). He had peremptories available.

The record is devoid of any statement as to "why" these three venirepersons would have been challenged.

Facts: Point III
(Venue)

Although most of the veniremen had heard of the case, a jury was selected from people who only vaguely recalled it and who were impartial. The petit jury contained twelve people never challenged by the defense.

Facts: Point IV
(Statements)

Reilly, after receiving his rights and both a "first appearance" and appointment of counsel, uttered incriminating comments to fellow inmates. The comments were voluntary - if not unexpected- utterances made to fellow card players, (R 650, 704) or made to fellow inmates during conversations, not interrogations. (R 646, 859).

As indicated in Reilly's brief, Reilly was no stranger to the justice system and he was a college student.

The court denied Reilly's motion to suppress due to the intervening first appearance and the appointment of counsel between the original confession and his comments to his fellow inmates. (R 1445).

Facts: Point V (Indictment)

Michael Reilly was indicted for first-degree murder. (R 1208). For reasons about which we can only speculate, the murder was charged under three separate theories. (R 1208). The defendant sought dismissal of any two of the three counts due to the existence of only one death. (R 1239, 1720-22).

Whether charged in one general count or three separate counts, Reilly would have been subject to conviction under any (or all three) of these theories anyway.

The court adjudicated Reilly guilty and sentenced him to death on all three counts. (R 1447-77).

Facts: Point VI (Death Sentence)

Reilly's advisory jury recommended a death sentence by a 9-3 vote. (R 1203).

The trial judge properly sentenced Reilly to death, finding three aggravating factors and one mitigating factor.[2]

The State called no witnesses, offering only Reilly's prior conviction as additional evidence. (R 1116-17).

The defense counsel called James Larson, a psychologist who saw Reilly five years before. (R 1120). Larson conceded that Reilly was not retarded but rather was of "low average" intelligence. (R 1123). While Reilly had emotional problems, Larson confessed on cross that Reilly was not "insane" and he was fully aware of what he was doing during his 1983 sexual battery. (R 1129). Larson had no information on this case. (R 1129).

Reilly, Larson said, fell within the 40% of the population with an IQ below 90. (R 1130).

Jill Scroggs was Reilly's teacher in a drug-counselor training course at Pensacola Junior College. (R 1134). Scroggs said her course was a college level course employing complicated terminology. (R 1138). Although Reilly failed his first exam,

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[2] The aggravating factors were:

(1) Prior conviction for a violent felony.

(2) Murder committed in the course of a sexual battery.

(3) "Heinous, atrocious and cruel" murder.

The mitigating factor was the defendant's low intelligence as a partial impairment of his capacity to appreciate the criminality of his conduct. (R 1461-67).

he was active in class discussions and had some understanding of the material. (R 1139).

Reilly had "trouble with eye contact" (R 1136) but we know from Dr. Larson that Reilly had a physical problem with a wandering eye. (R 1125).

Michael Horton, another Pensacola Junior College instructor, said that Reilly looked like he was on tranquilizers due to his having small eye pupils. (R 1148-49). Lawrence Reilly, however, testified that Michael did not use drugs or alcohol while at home. (R 1164).

Mr. Reilly repeated his alibi testimony. (R 1162).

Dr. Gilgun, another psychologist, found Reilly to have a low-average IQ of 86. (R 1168). He felt that Reilly had an anti-social personality. (R 1169). In examining Reilly for this case, however, Gilgun found Reilly to be competent to stand trial and sane at the time of the offense. (R 1172).

Thus, the sentencer was able to correctly conclude that Reilly, though not bright, was not *so* mentally impaired as to overcome the aggravating factors at bar.

The court's findings in aggravation included a finding that the murder of little Johnathan Wells was especially heinous, atrocious and cruel.

Johnathan was strangled with Reilly's bare hands, causing torturous death by asphyxiation. (R 612). Bruises on the four year old's temple and forehead (R 608) coupled with semen in the child's mouth made it quite clear that this little child was brutalized prior to his death. In fact, Johnathan's throat was

slashed not "once", but several different times. (R 608). Dr. Birdwell said that while these wounds may have been made after Johnathan died, he would not rule out the horrible prospect that the child was - as Reilly himself claimed - alive when his throat was cut. (R 613).

SUMMARY OF ARGUMENT

Mr. Reilly has failed to show - or in some cases even allege - reversible error in this case.

Reilly's claim regarding witness White's mental health records ignores both the facts of the case and the law governing said records. Mr. White did not raise the competency issue, Reilly did. Reilly cannot manufacture a waiver of a witness' privilege of non-disclosure. Reilly has failed to show any impeachment value of White's records as well.

Reilly's "challenge for cause" issue neglects to relate the law to the facts and wholly neglects to show - as required - that he was prejudiced.

Reilly's "venue" claim is specious, at best, since the news reports detailed in his brief - as he tacitly concedes by his silence - were never viewed by his jurors.

The statements uttered voluntarily by Reilly to various inmates were not subject to suppression since they were post-Miranda and totally unsolicited.

Reilly was not prejudiced when the state charged him with one murder but separated its various theories into distinct counts.

Reilly was properly sentenced to death.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING MID-TRIAL ACCESS TO THE MENTAL HEALTH RECORDS OF A STATE WITNESS

Mr. Reilly alleges that his constitutional right to confront and cross-examine a state witness, Randy White, was violated when the trial judge denied defense counsel's mid-trial motion for production of White's mental health records.

Mr. White testified to Reilly's incriminating conversations with various inmates in the county jail. Mr. White did not volunteer any information regarding his mental abilities on direct examination and the State did not offer evidence or testimony on the subject. Mr. White's testimony was corroborated by two other inmates whose mental abilities are unquestioned.

Mr. Reilly complains that White was permitted to invoke a psychiatrist-patient privilege regarding his stay at Chattahoochee. At the outset, we would note that the issue of whether any such privilege existed (in the first place) has not been raised on appeal and has been waived. The existence of any privilege would be contingent, under §90.503(4), Florida Statutes, upon the nature of any order appointing any psychiatrist to examine White. We must assume (since all facts and inferences on appeal must be taken in favor of the State), that a privilege existed.

Since the privilege existed, we must contend with Reilly's assertion that it was waived.

Mr. White did not volunteer, on direct, any mental health information. This entire issue was brought up during cross-examination when Mr. White was compelled to answer defense counsel's questions regarding a prior adjudication of incompetence and the nature of his alleged mental problems (i.e. "borderline retardation").

The law is well settled that a witness cannot be trapped into waiving a psychiatrist-patient privilege by a clever cross-examination of this kind. **Mohammed** v. **Mohammed,** 358 So.2d **610** (Fla. 1st DCA 1978); **McIntyre** v. **McIntyre,** 404 So.2d 208 (Fla. 2nd DCA 1981); **Khairzdah** v. **Khairzdah,** 464 So.2d 1311 (Fla. 4th DCA 1985). If a lawyer - by forcing a witness to deny being ill on cross - could manufacture a waiver of the privilege then the privilege would be worthless.

Here, White claimed the privilege after **defense counsel** raised the issue for the first time. White denied being retarded. That cannot be interpreted as a "waiver".

Having disposed of the alleged "waiver", we next turn to the issue of whether defense counsel was entitled to develop evidence of White's alleged retardation and use it to impeach the witness. The State does not accept the notion that "borderline retardation" is grounds for impeachment. We are not, after all, dealing with a mental condition involving hallucinations, perceptual problems, or improper conduct such as lying or stealing. All "borderline retardation" means is that White was not very smart. Indeed, to an average juror White's retardation might have made him seem **less** likely to lie; thus enhancing, rather than impeaching, his testimony.

Be that as it may, should the court have ordered access to White's records? The answer is clearly "no".

First, the timing of counsel's request must be questioned. White's situation was obviously known to counsel given the nature of cross-examination, yet no pretrial request for White's records was filed. In **Fields** v. **State,** 379 So.2d 408 (Fla. 3rd DCA 1980), the Third District, citing **Mitchell** v. **State,** 321 So.2d 108 (Fla. 1st DCA 1975), upheld the denial of a defense requests for a witness' psychiatric records filed on the eve of trial. The request was denied as untimely. **(Fields** also holds that there was no improper restriction of cross-examination since the witness, on direct, did not place his mental health at issue).

If White's earlier commitment was the product of a court ordered evaluation under 890.503(4)(c), Florida Statutes, it was never privileged and his files could have been obtained before trial. If they (the records) were privileged, they would never have been used anyway.

Second, the State would note that a line of related cases exists on the general theory of defense-testing of the mental health of state witnesses. In Florida, courts will not order evaluations of state witnesses at the request of the defense just because the defense desires to ''impeach'' said witnesses by attacking their perception and/or credibility. See **Dinkins** v. **State,** 244 So.2d 148 (Fla. 4th DCA 1971); **Hawkins** v. **State,** 326 So.2d 229 (Fla. 2nd DCA 1976), **explained in State v. Coe,** 521 So.2d 373 (Fla. 2nd DCA 1988).

Coe recognized three reasons for disallowing psychiatric assaults on witnesses' credibility; to-wit:

> (1) The jury's function as arbiter of credibility would be usurped by psychiatric experts.
>
> (2) The practice could lead to a "corroboration requirement" in certain kinds of cases.
>
> *(3)* The witness' right of privacy would be violated.

Coe thus held that a witness' mental health should only be subjected to defense-testing in rare cases when "strong" or "compelling" reasons exist.[3] No such reasons were present in this case, since "borderline retardation" does not compromise credibility and since White's testimony was corroborated, at least in part, by two other witnesses who either heard Reilly or had similar encounters with him.

While Reilly did not ask for testing, the analogy between Coe, **et al,** and this case is apt. Just as the defense in **Coe, Baker** and **Dinkins** could not compel testing of a witness absent some showing of an actual credibility problem, *so,* too, Reilly could not demand access to White's existing records without some showing that White's retardation impacted upon his honesty. The need for such a defense proffer was recognized in **Fields** v. **State, supra.**

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[3] In **Hawkins** v. **State, supra,** for example, the witness had a mental health history of paranoia and was apparently known to be untruthful by her doctor. Thus, her ability to abide by her oath was at issue. When the witness' testimony was corroborated, however, as in **Baker v. State,** 526 So.2d **202** (Fla. 4th DCA 1988), no testing was allowed.

Reilly's inability to show how retardation affects honesty undermines his entire case. In **Clark** v. **State,** 379 So.2d 97 (Fla. 1979), this Court found no error in a trial court's refusal to permit cross-examination of a state witness (whose mental health was not at issue) on the topic of whether he had ever seen a psychiatrist. Clark never showed how either a "yes" or a "no" would have helped his case. In our case, White admitted that he had been declared incompetent as "borderline retarded" at one time and that he was later adjudged competent. White denied being "retarded", but so what? If he was retarded his answer could not be held against him unless he was a qualified mental health expert as well as being retarded. If he was not "retarded" he told the truth and, in fact, has an adjudication of competence to back him up. So where is the benefit to Reilly? Did White have access to his charts? Would he understand them if he did?

Mr. White was not on trial. His mental health was not at issue. There was nothing to indicate that White did not hear Reilly "confess". Defense counsel enjoyed full and wide ranging cross-examination.[4] The jury learned that White had been sent to Chattahoochee at one time. Since **Delaware** v. **Van Arsdall,** 475 U.S. 673 (1986), makes it clear that a defendant is not entitled to a particular "quality" of cross, and given the full examination permitted here, Reilly is not entitled to relief.

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[4] In fact, the Court erred in **favor** of Reilly by permitting improper cross-examination on White's past use of other names. See **Banda** v. **State,** 536 So.2d 221 (Fla. 1988).

Indeed, even if the court erred, any error was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ARGUMENT

ISSUE II

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S CHALLENGES (FOR CAUSE) TO TWO IMPARTIAL VENIREMEN

The Appellant challenged two veniremen, Powell and Blackwell, for cause. The challenges were denied, forcing Appellant to use peremptory challenges to remove these potential jurors. Despite Reilly's effort to take their voir dire responses out of context, the record shows that these veniremen were not subject to removal for cause.

Mr. Blackwell read about the case, months before trial, for only three or four days. He did not follow the case. (R 207). While he was "opinionated about the whole issue" (R 208) at first, he never formed an opinion about the guilt or innocence of Reilly. (R 208). Counsel never developed the meaning of "opinionated about the whole issue", but clearly that remark was unrelated to any issue regarding the Appellant. The comment could have easily meant that Blackwell had an opinion about the crime (or if there was one), the odds of finding the weapon in the bay, or whether Johnathan's father killed him as first suspected, or even the negligence of Mrs. Wells in letting a four-year-old go off on his own for an entire day. Blackwell said a death sentence was possible (R 209) and he was correct. He also said he would not prejudge Reilly. (R 209). Blackwell rejected media stories and said he would have to see evidence in court. (See R 212).

Mr. Powell had no recollection of the case. (R 237). He did not even remember names. (R 237). At most, some person at work said that whoever did that ought to be killed, (R 238) a comment Powell agreed with at the time. (R 238). Powell, like many of the veniremen, was confused by defense counsel's questions regarding the penalty phase, but Powell stated he would assuredly consider penalties less than death. (R 239-43). Even the court noted that counsel's abstract questions confused Powell and that Powell was "clearly unbiased". (R 251).

These, then, were the veniremen Reilly struck peremptorily. Apparently Reilly believes that trial judges must grant challenges for cause, on demand, no matter how impartial the venireman is. This argument is specious. Judge Anderson freely granted challenges for cause (excusing some fifteen veniremen) and he denied state challenges to veniremen who opposed capital punishment. It cannot logically or honestly be said that Judge Anderson, in any way, stacked the jury against Reilly.

In **Pentecost v. State,** 14 F.L.W. 319 (Fla. 1989), this Court, citing Lusk **v. State,** 446 So.2d 1038 (Fla. 1984), held that the test for any challenge for cause centers upon the ability of the prospective juror to "lay aside" any bias and render a verdict on the basis of the evidence. Then, citing **Davis v. State,** 461 So.2d 67 (Fla. 1984), this Court held that the trial judge, not the appellate court, was the proper person to resolve the issue.

The trial court in our case made a fair (and record-supported) decision regarding these unbiased veniremen.

We submit that the trial judge saw and heard these veniremen and was in the best position to assess their demeanor and honesty. He cannot be reversed on a cold record. **Tibbs** v. **State,** 397 So.2d 1102 (Fla. 1981).

Mr. Reilly may argued that in recent weeks this Court, in **Stokes** v. **State, 14** F.L.W. 349 (Fla. 1989), held it would not examine a transcript to see why peremptory challenges were used but then, in **Roundtree** v. **State,** 14 F.L.W. 338 (E'la. 1989), engaged in that very tactic at defense request. He may also argue that **Pentecost** was also, subsequently, not followed in **Hamilton** v. **State,** ____ **So.2d** ____, Case No. 70,502 (Fla. 1989), when this Court second-guessed trial court rulings on challenges for cause at the defendant's behest. Thus, Reilly will contend he is entitled to a "second voir dire'' despite **Pentecost** and **Tibbs, et al.** The State, while ethically obliged to acknowledge these seemingly inconsistent cases, rejects any notion that this Honorable Court is obliged to engage in **ad hoc** decision making. It is consistency, not inconsistency, that our trial courts need to avoid endless appeals. Consistency demands that the law be the same from week to week and that fundamental principles be upheld. **Pentecost** correctly noted the role of the trial judge during voir dire. The judge is not subject to **ad hoc** review or the reweighing of (cold) testimony. **Tibbs, supra.** He should only be reversed for a clear abuse of discretion resulting in prejudice to the defense.

Returning to **Pentecost,** we note that the defense must **additionally** prove that the jurors it was forced to accept (by

exhausting peremptories) were also objectionable, citing **Rollins v. State,** 148 So.2d 274 (Fla. 1963), and **Nibert** v. **State,** 508 So.2d **1** (Fla. 1987). Reilly, while mentioning counsel's remark that he would have peremptorily stricken other jurors "but for" having to strike Powell and Blackwell, neither alleges nor shows how these other jurors prejudiced his case. Ross **v. Oklahoma,** ____U.S.____, 43 Cr.L. 3098 (1988).

The three' jurors Reilly refuses to discuss; Mr. Fisher, Mrs. Messick and Mr. Bradly, were totally unremarkable. Indeed, defense counsel barely questioned them and never challenged them either for cause or peremptorily even though - at the time - he had peremptories left. (Terrell only mentioned them as possible "backstrikes" - apparently to create a record). To this day we have no idea why these jurors were objectionable and, per **Stokes,** supra, we cannot go shopping for unspoken reasons.

Reilly has simply failed to show any abuse of discretion or resulting prejudice. This appeal must, therefore, fail.

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[5] Mr. Terrell named three venirepersons he was forced to accept by using two challenges. We do not account for his arithmetic.

ARGUMENT

ISSUE III

THE TRIAL COURT DID NOT ERR IN DENYING REILLY'S MOTION FOR CHANGE OF VENUE.

The Appellant's brief goes to great lengths to outline news media accounts of Reilly's crime, but conveniently neglects to mention that not one of the jurors in this case read or recalled those reports and, in fact, not one of his petit jurors was challenged (peremptorily or for cause) due to exposure to said articles.

The mere fact that a given case received extensive pre-trial publicity does not compel or require changing venue. **Bundy v. State,** 471 So.2d 9 (Fla. 1985). There is absolutely no requirement under the law that jurors arrive in court wholly ignorant of the case. **Dobbert v. Florida,** 432 U.S. 282 (1977); **Dobbert** v. **State,** 328 So.2d 433 (Fla. 1976); **Murphy v. Florida,** 421 **U.S.** 794 (1975); see **Irvin v. Dowd,** 366 U.S. 717 (1961). Reilly must show "utter corruption,'' **Rideau v. Louisiana,** 373 U.S. 723 (1963), of the community through pervasive publicity that inflamed and infected his jury.

Reilly has not and cannot make such a showing. Given full, individual, **voir dire,** he established nothing except the impartiality of the final petit jury to which he aired no objections.

ARGUMENT

ISSUE IV

THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS REILLY'S POST-MIRANDA STATEMENTS TO FELLOW INMATES.

The Appellant has the misfortune of having to assert the untenable position that one illegal confession forever taints all future, "post-Miranda," voluntary statements made to anyone, anywhere, whether a government agent or not. This, of course, is not the law. **Castro** v. **State,** 14 F.L.W. 359 (Fla. 1989); Aycock **v. State,** 528 So.2d 1223 (Fla. 2d DCA 1988); **DuBoise** v. **State,** 520 So.2d 260 (Fla. 1988); **DuFour** v. **State,** 495 So.2d 154 (Fla. 1986); **Perry** v. **State,** 522 So.2d 817 (Fla. 1988).

This issue does not center on what the police did. This issue is concerned only with Reilly's unsolicited comments made, in jail, to inmates who were **not** government agents and who were not "placed" with Reilly or under instructions to elicit statements from him. See **Maine** v. **Moulton,** 474 U.S. 159 (1985); **United States v. Henry,** 447 U.S. 264 (1980). We rely upon this Court's holding in **DuFour, supra** at 159:

> "We cannot find that either **Henry** or **Moulton** compel a finding that appellant's sixth amendment rights have been violated in this case. A review of the facts discloses 'no strategem deliberately designed to elicit an incriminating statement.' **Miller** v. **State,** 415 So.2d 1262, 1263 (Fla. 1982), **cert. denied,** 459 U.S. 1158, 103 S.Ct. 802, 74 L.Ed.2d 1005 (1983)."

The government did not ask an inmate to play cards with Reilly and receive a threat to his life - as merely overheard by other inmates. The government did not teach Reilly the card

trick he used to demonstrate how he killed Johnathan Wells. The government had no involvement in the incidents which Reilly refuses to discuss in his brief while going on, at length, about what the police did **before** Reilly was given counsel, **before** he saw his family and **before** his first appearance.

Reilly does not discuss the actual statements involved for the obvious reason that they were unsolicited, voluntary, post-Miranda statements that - as Reilly is well aware - were not subject to suppression.

ARGUMENT

ISSUE V

THE TRIAL COURT DID NOT ERR IN REFUSING TO DISMISS TWO OF THREE FIRST DEGREE COUNTS IN REILLY'S INDICTMENT.

Reilly was not charged with three murders. Reilly was charged with one murder under three different theories. If the trial judge had dismissed two of the three counts, one of two results would have obtained:

> (1) Reilly would have been tried under all three theories anyway, or
>
> (2) Reilly would allege that the state could only proceed on the surviving count and that it did not have the option of arguing the "dismissed" theories.

Reilly candidly concedes that the state had the right to charge him, in general, with first degree murder and then try him on all three theories anyway. Knight **v. State,** 338 So.2d 201 (Fla. 1976). Thus, there is no real difference between one general indictment and a specific, three-court, indictment.

This case is unlike the **Carawan**[6] line of cases inasmuch as three separate and distinct crimes were not charged.[7] This was

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ISSUE V

[6] **Carawan v. State, 515** So.2d **161** (Fla. 1987).

[7] The state will not argue 8775.021, held not to be retroactive in **Rivera** v. **State, 14** F.L.W. 1021 (Fla. 4th DCA 1989) since multiple crimes were not charged. If anything, this case is more akin to **Combs** v. **State,** 403 So.2d 418 (Fla. 1981), wherein the "cold, calculated and premeditated" aggravating factor was applied "retroactively" because, practically speaking, the defendant was not subjected to a new or different factor. Here, Reilly did not face any theories of murder which would not have confronted him anyway.

simply one crime, capable of being tried under all three theories anyway, that simply was charged with specificity. Indeed, Reilly had what many defendant's seek - the equivalent of a bill of particulars specifying all of the state's intended theories.

While the Indictment - as a mere charging document - was not defective the state is ethically obliged to note a minor error alluded to but misidentified by Reilly's appellate counsel.

Since juries are not required by law to select the "theory of murder" supporting their verdicts, a single verdict of guilty would have sufficed and Reilly's conviction, on appeal, would be upheld under any or all of these theories. (This Court can and repeatedly has recognized that various convictions had multiple bases of support.)

We submit that rather than enter three adjudications and three sentences, the trial judge probably should have "merged upward" (See Rivera, supra) all three counts into a single conviction for first degree murder - or even "premeditated murder" and then entered a single sentence.

The error, if any, committed in this regard was harmless since the "surplus" murders were never used to aggravate Reilly's sentence and since the advisory jury knew full well that only one murder was committed. (The prosecutor's comment taken out of context on page **48** of Reilly's brief was not a contention that two killings were committed and Reilly cannot, in good faith, argue otherwise.)

ARGUMENT

ISSUE VI

MR. REILLY WAS PROPERLY SENTENCED TO DEATH.

Mr. Reilly raises only one challenge to his sentence of death and that is the amount of weight given to his alleged "low intelligence."

No matter his statistical games, Reilly had an "IQ" in the average (albeit low-average) range. He was not retarded. He was never found incompetent, he never pled insanity. He was a college student (who failed a **first** exam due to problems with what his professor called "complex" terminology. This hardly makes him unique.)

Reilly's complaint with the "amount of weight" given the mitigating factor at bar (low intelligence) is an "insufficient basis for challenging a sentence." **Quince v. State, 414** So.2d **185** (Fla.), **cert. denied, 459** U.S. **895 (1982).** This is particularly true when the mitigating factor is merely a finding of "low-normal" intelligence. **Doyle v. State, 460** So.2d **353** (Fla. **1984).**

Mr. Reilly's low-normal intelligence cannot offset the three valid and uncontested aggravating factors at bar.

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[8] See also Cook v. **State, 14** F.L.W. **187** (Fla. **1989)** wherein this Court held that the weight to be given alleged "mental impairment" - or even a finding of same - is strictly within the trial court's domain and is not subject to review because the defendant disagrees with the court. See **Stano v. State, 460** So.2d **890** (Fla. **1984).**

Although Reilly did not raise the issue, the state would like to address the aggravating factor of "heinous, atrocious and cruel'' due to Reilly's assertion that he slit Johnathan Wells' throat only once, after he was dead.

The victim in this case died by strangulation. As this Court held in **Doyle, supra** at 357:

> "Murder by strangulation has consistently been found to be heinous, atrocious and cruel because of the nature of the suffering imposed and the victim's awareness of death."

[Citing **Alvord v. State,** 322 So.2d 533 (Fla. 1975) and **Adams** v. **State,** 412 So.2d 850 (Fla. 1982)].

Johnathan's facial bruises could not be identified as having been inflicted after his death. Similarly, Johnathan's throat was slit not once, but **several** times. While the slash that cut his jugular vein did not generate sufficient blood to be proveably inflicted prior to death, the doctor still refused to rule out this prospect. The other slashings were not discussed in this context. Thus, taking the facts and inferences in favor of the sentence (as required), Johnathan's throat was cut while he was still alive. The murder at bar is comparable to others in which this factor was upheld. See **Brown** v. **State,** 473 So.2d 1260 (Fla. 1985) (victim beaten and asphyxiated); **Rutherford v. State,** 14 **F.L.W. 300** (Fla. 1989) (victim beaten and drowned); Mendyk v. **State,** 14 F.L.W. 303 (Fla. 1989) (victim sexually tortured and strangled - similar to Johnathan's having to perform oral sex prior to being strangled); **Dudly** v. **State,** 14 F.L.W. 305 (Fla. 1989) (victim strangled and throat slit).

None of the three aggravating factors have been or can be challenged. Reilly's low - but normal - IQ cannot offset these substantial factors in support of death. Reilly - courtesy of the sentencing guidelines - only served four years for his first sexual battery. Once free, he abused and strangled a little boy. Society will not be protected from Reilly without capital justice.

CONCLUSION

The Appellant is not entitled to relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W. C. McLain, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 2nd day of August, 1989.

MARK C. MENSER
Assistant Attorney General