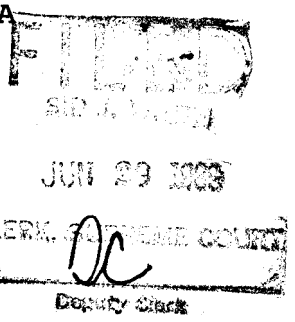
IN THE SUPREME COURT OF FLORIDA



MICHAEL G. PATRICK REILLY,

Appellant,

v

CASE NO. **73,571**

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT
COURT OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNT, FLORIDA

INITIAL BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

An Escambia County grand jury indicted Michael Glen Patrick Reilly for first degree murder, sexual battery and aggravated child abuse committed upon Jonathan Wells. (R **1208)** The five count indictment was filed on February **23, 1988.** (R **1208)** Although only one death was involved, the indictment charged three counts of first degree murder -- premeditated, felony murder during a sexual battery, and felony murder during an aggravated child abuse. (R **1208)** Reilly moved to dismiss two of the three murder counts because only one death occurred. (R **1239, 1720-1722)** The trial court denied the motion. (R **1273, 1722)** Reilly proceeded to a jury trial on October **24, 1988,** relying on the defense of alibi. (R 1, **1286)** On October **28, 1988,** the jury found Reilly guilty of all five counts as charged. (R 1100, **1419-1420)** The jury heard additional evidence at the penalty phase of the trial and recommended a death sentence. (R **1425)**

Circuit Judge William H. Anderson adjudged Reilly guilty of all five counts on December **7, 1988.** (R **1469-1470)** He sentenced Reilly to death on each of the three murder counts, to life for the sexual battery and to **15** years for the aggravated child abuse. (R **1447-1477)** In his written findings in support of the death sentences, Judge Anderson found three aggravating circumstances: (1) Reilly had a previous conviction for a violent felony, a sexual battery; **(2)** the homicide occurred during the commission of a sexual battery; and (3) the

homicide was especially heinous, atrocious or cruel. (R 1466-1467) In mitigation, the court found that Reilly's "capacity ... to appreciate the criminality of his conduct and to conform his conduct to the requirement of law was somewhat, but not substantially, impaired.'' (R 1466-1467)

Reilly filed his notice of appeal to this Court on January 9, 1989. (R 1515)

Facts -- Guilt Phase

Four-year-old Jonathan Wells went fishing alone at the bayou near his home on February 2, 1988. (R 810-811) His mother, Jamie Wells, said Jonathan left home around 12:30 and returned for help with a tangled line a short time later. (R 811) Jonathan's father, Paul Wells, arrived home at 1:45 p.m. (R 802) He had had a dispute with his boss and quit his job. (R 794, 802, 807-808) Paul and Jamie began looking for Jonathan at 2:30 or 3:00. (R 803) A neighbor, Ronald Moe, saw Jonathan at 2:35 walking up from the bayou carrying a stick which could have been a fishing pole. (R 742-743) Sybil Knight, who lived in the same neighborhood on the bayou, saw Jonathan at approximately 3:15 or 3:30. (R 765-770 ,779) Jonathan walked through her yard almost everyday to fish off the Knight's dock. (R 762) Around 4:15, Jamie Wells found Jonathan's body near the edge of the water. (R 501-502, 786789, 791, 813-815) She had taken a path from the Knight's dock which followed along the edge of the water. (R 813-814) Jonathan was down an embankment near the edge of the water and

partially hidden behind roots and brush growing there. (R **503-504, 520-521, 533, 814)** **His** body could not be seen from the dock. (R **548)** Ervin Page, a neighbor who was jogging nearby and heard Jamie Wells' screams, came to assist and had his parents call the paramedics. (R **494-512)** The dispatcher for Emergency Communication received the call at **4:37,** and the paramedics arrived on the scene at **4:41.** (R **512-516)**

Dr. Thomas Birdwell performed an autopsy the following day. (R **601-605)** He found evidence of strangulation and an incision to the neck, made by a sharp instrument, which cut the trachea and jugular vein. (R **608-610)** Birdwell concluded that the cause of death was strangulation. (R **610-613)** The incision to the neck probably occurred after death, since Birdwell did not find an inhaling of blood into the trachea which would have happened if the heart had been vigorously beating at the time of the incision. (R **617-618)** Other than two slight bruises to the head and some small scratches on the cheek and ear lobe, Birdwell found no other evidence of trauma. (R **608-609)**

Physical evidence discovered during the course of the investigation included shoe impressions, a knife, blood and semen. Investigators found footprints near the body and footprints on a sandbar which was in excess of **520** feet away from the body's location. (R **533, 536, 556, 558-560, 565, 568)** The footprints near the body proved to be those the police officers who first arrived, the paramedic or Irvin Page, the neighbor who was jogging and came to assist. (R **555-557, 565)** Tennis shoe tracks found on the sandbar were later matched to

Michael Reilly's shoes which had been seized from his home. (R **563, 747-760)** Reilly's mother also gave investigators two knives, one was a camping knife with a multiple blades and the other a lock-blade type pocket knife with only one blade. (R **675-677)** An FDLE seriologist found type A human blood on the lock-blade knife. (R **686-691)** He said the blood stains could have been on the knife as long a year. (R **694)** The victim had type A blood. (R **690)** Michael Reilly also has type A blood. (R **695-696)** Tests for the presence of semen performed on the swabs taken of the victim's mouth at autopsy and on a stain found on the victim's sweat shirt were positive. (R **582-584, 721-723)**

Two State's witnesses testified to seeing Michael Reilly on the day of the homicide. (R **744-746, 828-852)** Ronald Moe said he saw Jonathan walking from the bayou around **2:35** p.m. (R **742-746)** He did not see Michael at that time. (R **744-745)** However, Moe had seen Michael earlier at approximately 11:00 a.m. (R **744)** Michael was getting off a bus, and he was wearing camouflage pants and a red stocking cap. (R **744-745)** Robert Potts was the substitute mail carrier for the neighborhood where Jonathan and Michael lived. (R **819-827)** He delivered mail there on the day of the homicide. (R **819-829)** Although he did not know Michael's name, Potts recognized him since he had given him his family's mail in the past. (R **836-837, 852)** Potts said he saw a man walking toward the bayou between 3:00 and 3:30. (R **833-839)** A few minutes later, Potts saw the same man walking by and recognized him as Michael. (R **834-835)**

Michael was wearing khaki pants, a dark windbreaker and a knit toboggan type hat. (R **835)** Potts saw Michael on the television report about the crime, and he called the police to give his information. (R **839-840, 875-886)**

Three jail inmates who were incarcerated in the jail's infirmary with Michael testified that he made incriminating admissions to them. (R **642, 700, 854)** Randy White testified first. (R **642)** He was awaiting trial on two robbery charges and had recently returned from the state hospital in Chata-hoochee (R **643, 654)** White had been declared incompetent to stand trial and spent six months in the hospital on a diagnosis of borderline retardation. (R **654)** White said he heard Michael make statements about the homicide. (R **646-651)** Once Michael approached White and asked if he could talk to him. (R **646)** According to White, Michael said he was in big trouble because he was arrested for killing a little boy. (R **646)** Michael allegedly said that he had the boy perform oral sex, he became excited and cut his throat. (R **647)** White asked Michael where the knife was located, and he answered that it was at home. (R **647)** On a second occasion, Michael was playing cards with another inmate, Alvin Johnson. (R **648-651)** An argument arose over the card game and White said he heard Michael tell Johnson, "I will fuck you up just like I did that little boy." (R **650)** During cross-examination, White said he was declared incompetent to stand trial and sent to the state hospital with a diagnosis of retardation. (R **654)** However, on redirect, White denied being retarded. (R **669)** Before recross, defense

counsel asked the court to open White's court records containing his mental evaluation. (R **671)** The court refused, and White also refused to waive his psychotherapist privilege. (R **671-672)** Counsel moved to strike White's testimony because denying access to the mental evaluation denied Reilly his right to effective confrontation of the witness. (R **673)**

Guillermo Martinez was Michael's roommate for a time while in the jail infirmary. (R **702-703)** He testified that Michael made an incriminating statement while playing a card game. (R **703-704)** Michael allegedly told a story as he showed Martinez a card trick stating "this is me walking down the beach, bumped into a little boy and made him suck my dick and cut his throat." (R **704-706)** Martinez also overheard Michael statements to Alvin Johnson when a confrontation arose over a card game. (R **707)** Michael told Martinez that he was on "four-way acid" at the time of the homicide. (R **713)**

Kenny Peck was incarcerated in the county jail infirmary on a violation of his community control on three counts of aggravated child abuse. (R **857, 864-869)** He was in the infirmary for injuries to his back, hand and "problems with his nerves." (R **855, 860)** Michael came to the infirmary on a Saturday and was isolated for a time. (R **858)** Peck talked to Michael on Tuesday. (R **858)** He was reading his Bible in the day room when Michael approached and asked, "Well, tell me why your God took my little sister when she was small?" (R **859)** After giving Michael an answer, Peck then asked Michael why he strangled the little boy. (R 859) Michael said, "Because he

wouldn't suck my dick." (R **859)** According to Peck, Michael said he cut the boy's throat to make it look as if someone else did the crime and that the knife would not be found. (R **860)**

Michael presented an alibi defense at trial. Lawrence Reilly, Michael's father, testified that Michael was at home on the afternoon of the homicide. (R **890-905)** He is a nurse and was working the 11:00 p.m. to 7:00 a.m. shift at the hospital. (R **890, 892)** Normally, Lawrence returned home by **7:30** and went to sleep from **9:00** to **3:00.** (R **894)** On the day of the homicide, however, he awoke round **2:00** and began watching television in the living room of the family's small, frame house. (R **891, 894)** Michael's bedroom door was easily visible from the living room. (R **891-892)** Between **3:00** and **3:30,** Michael walked out of his room, where he had been studying, passed his father and went outside to check the mail. (R **893)** Within a couple of minutes, Michael returned, joked with his father and handed him the mail. (R **893)** Michael went back into his room. (R **893)** Lawrence sat in his chair in the living room until **4:30** or **5:00.** (R **894)** He ate dinner and went to his bedroom to sleep. (R **894)** Michael did not come out of his room during that time period. (R **894-895)**

Mary Reilly, Michael's mother, was home all day on the day of the homicide. (R **906-909)** She said Michael left home around **6:30** a.m. to take a bus to the Port Authority to check on a job. (R **910)** He did not get a job and he returned home by **10:20.** (R **909-910)** Mary asked Michael to run a couple of errands which he did, returning about 11:30. (R 910) Around

12:00, Michael decided to go fishing. (R **911)** He usually fished at the dock on the bayou which was a two-minute walk from his house. (R **916-917)** Michael wore camouflage pants, a toboggan hat and red tennis shoes. (R **909-910)** He returned from fishing between **1:30** and **1:45** p.m. and remained inside the rest of the afternoon, except for a minute when he picked up the mail around **3:00.** (R **913-914)**

Brandon Hartjen, who lived in the neighborhood, testified he saw someone, other than Michael, running from the crime scene immediately after he first heard screams from the scene. (R **947-958)** Since he knew Michael, Brandon was sure the man he saw someone else. (R **953-955)** The man had dark hair and was larger than Michael. (R **955)** After the screams, Brandon went to the location and talked to Erv Page, whom he also knew. (R **953, 956-958)** He had first seen Page jogging on the street. (R **957-958)**

Motion to Suppress Statements to Inmates

Investigators focused on Michael as a possible suspect. (R **1542-1545)** On Saturday, February **6, 1988,** they went to Michael's house at 11:00 a.m. and asked him to accompany them to the sheriff's department for questioning. (R **1544-1545)** The investigators began the questioning at **11:59.** (R **1548)** Michael was interrogated for over two hours. (R **1551-1552)** Ultimately, Michael confessed, and on that basis, he was arrested. (R **1673)** Michael was incarcerated in the jail infirmary Saturday afternoon, and within three or four days, he allegedly made the

incriminating statements to three inmates: Randy White, Guillermo Martinez and Kenny Peck. (R **642, 700, 854)** After an extensive hearing on a motion to suppress the statement given to the investigators on February 6th, the trial court concluded that Michael's statement was involuntary. (R **1268-1271, 1526-1710, 1272)** The investigators had used coercive tactics, lead Michael to believe the homicide was being considered as an accident, and made promises of mental health treatment rather than prosecution. (R **1278)** (see, also, transcript of the taped statement appearing at R **1479-1514** and **1566-1666)** The trial judge's written order granting the motion stated,

> The defendant is of less than average intelligence and is emotionally handicapped. Promises were strongly implied to the defendant that confessing to involvement in the killing would result only in his receiving treatment and counseling, whereas denial of such involvement would result in much harsher consequences. It is evident that such promises induced the defendant to make the statements sought to be suppressed. Under these circumstances, statements were not voluntary.

(R **1272)**

After the trial court suppressed the involuntary confession, Reilly moved to suppress the statements allegedly made to the inmates. (R **1284-1285, 1372-1386, 1445)** The premise of the motion was that Reilly was illegally arrested on the basis of the involuntary confession, which rendered his incarceration and later statements tainted fruit of the illegal confession and arrest. (R **1284-1285)** At the hearing, the only evidence presented was depositions of the inmates detailing the

circumstances surrounding the statements. (R **1372-1373, 1377)** Defense counsel urged that Reilly, who had been arrested and incarcerated in the jail infirmary only a few days before the statements, was still under the influence of the promises of treatment which induced the confession to investigators. (R **1374-1377, 1384-1385)** During argument, the prosecutor contended that the first appearance hearing, the appointment of counsel and a visit from his parents were sufficient intervening events to break the causal connection between the involuntary confession and the statements to the inmates. (R **1382-1383)** The trial court denied the motion. (R **1445)**

Pretrial Publicity and Motion for Change of Venue

The homicide in this case prompted extensive media coverage of the offense, the investigation and the criminal justice system generally. (R **1292-1348)** Newspapers carried articles detailing the crime and its impact on the relatives and community. (R **1292-1300)** Photographs of grieving relatives were published. (R **1292, 1298)** Even a photograph of pallbearers carrying the casket at the funeral appeared in the newspaper. (R **1300)** Several news accounts discussed the details of the investigation, including maps, diagrams and photographs. (R **1294-1299, 1302, 1306, 1339-1344)**

Reilly's arrest generated further media coverage of the crime and extensive coverage of Reilly's background. (R **1302-1315)** Readers learned of Reilly's prior conviction for sexual battery on an elderly woman and the fact that he served three

years and nine months in prison on a six year term. (R **1308, 1314-1315)** Additionally, Reilly's juvenile record was paraded in print. (R **1314-1315)** These articles also discussed the fact that his juvenile record was not used to enhance his adult sexual battery sentence. (R **1314-1315)** This generated a series of articles and letters to the editor expressing concern that the system was not protecting the public. (R **1312-1338, 1357)** Interviews with neighbors expressing their fear of Reilly in the neighborhood appeared. (R **1303-1304, 1310)** Finally, the media reported Reilly's confession to the homicide, including his alleged admission to having strangled the victim and cut his throat. (R **1309-1311)** The account included a statement of the investigators' opinions that Reilly's told the truth in his confession. (R **1309)** The order suppressing Reilly's confession as involuntary was front page news. (R **1346-1347)**

Reilly moved for a change of venue pretrial. (R **1263-1264, 1363-1369)** The court reserved ruling on the motion until after jury selection. (R **1369)** At jury selection, every member of the venire had heard or read something about the case. (R **76)** Several prospective jurors said they had fixed opinions about the case based on the news stories. (R **76-77)** All of the twelve primary jurors had read or heard something about the

case.' The court denied the motion for change of venue. (R **427)**

Jury Selection -- Challenges for Cause

During jury selection, the trial court denied defense challenges for cause to two prospective jurors: Jurors Blackwell and Powell. (R **219-220, 249-251)** Blackwell had knowledge of the confession, which had been suppressed pre-trial. (R **207-212)** Powell expressed beliefs in favor of imposing death for first degree murder which would interfere with his ability to fairly consider a life recommendation in this case. (R **238-243)** Defense counsel expended a peremptory challenge on each these two prospective jurors. (R **220, 251)** Counsel exhausted his peremptory challenges and requested additional ones. (R **425)** The court denied the request. (R **425-427)** Counsel noted that there were three seated jurors whom he would have excused if he had additional peremptory challenges. (R **427)**

Penalty Phase and Sentencing

The State presented no additional witnesses at penalty phase. (R **11115-1116)** Pursuant to a stipulation, the State did

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[1]The twelve jurors and the page reference where their respective individual voir dire begins are: 1. Krause, **200; 2.** Welch, **212; 3.** Motley, **224; 4.** Bradley, **228; 5.** Messick, **244; 6.** Haney, **251; 7.** Odom, **269; 8.** Wood, **283; 9.** Burt, **318;** 10. Fisher, **343;** 11. Baker, **404; 12.** Woodbury, **418.**

submit a judgment for Reilly's conviction for a sexual battery committed in **1983.** (R **1116)** In mitigation, Reilly called five witnesses. (R 1117, **1132-1133,** 1144, **1151,** 1164)

Lawrence Reilly testified about his son's background, chronic emotional problems and learning disabilities. (R **1151-1164)** Michael was born on April **29, 1964,** and was the middle of three children. (R **1152-1153)** By **1978,** several chronic problems had developed with Michael. (R **1153)** He had speech impairments necessitating therapy, an eye problem requiring surgery which left him with a wandering eye, and learning and emotional disabilities. (R **1154-1155)** Other children would ridicule him about his speech, his eye and his red hair. (R **1154)** He began to strike out against others. (R **1154)** Michael attended several different schools for those suffering learning and emotional disabilities. (R **1154-1157)** While attending **J.** Lee Pickens School, Michael was referred to a psychiatrist because of behavioral problems. (R **1155-1157)** When Michael was 16-years-old, he went to E-Ma-Chamee which is a boys' camp for those chronically in trouble. (R **1156)** He was there over two years. (R **1156)** Michael did not graduate from high school, but he did receive a certificate of attendance from George Stone School where he was in a vocational courses program. (R **1156-1157)** In **1983,** Lawrence Reilly lost his job. (R **1158)** He told his family. (R **1158)** That night, Michael went out, got drunk and committed a sexual battery. (R **1158-1160)** He was sentenced to seven years and served four. (R 1160) Michael's father was upset and did not visit Michael in

prison for two years. (R **1156-1157)** Michael feared for his safety in prison and became involved in some fights. (R **1162)** Since his release from prison, Michael had been looking for work every day and was enrolled in a community college introductory drug counseling program. (R **909, 1133, 1144)**

A psychologist, Dr. James Larson, examined Michael after his arrest for sexual battery in **1983**. (R **1117-1120)** He testified that Michael had a history of learning disabilities and emotional problems since third grade. (R **1122-1125)** Testing showed that Michael has a low average I.Q., but his performance level was much lower. (R **1123-1124)** Larson noted that Michael suffered from many disabilities which affected his intellectual and emotional functioning. (R **1124-1125)** Although Larson did not perform any neurological tests, he stated the degree of Michael's disabilities suggested the possibility of organic problems. (R **1125)** Larson concluded that Michael was intoxicated at the time of the sexual battery which further impaired his functioning. (R **1129-1132)**

Two professors in the psychology and sociology department who had Michael as a student in an introductory counseling course testified about their observations of Michael as a student. (R **1133-1140, 1144-1149)** Jill Scroggs, an assistant professor of psychology, had Michael as **a** student for a few weeks prior to his arrest. (R **1137)** She noted that Michael did not relate well. (R **1136-1140)** He had a hard time making eye contact. (R **1136)** However, he always came to class and sat right in front. (R **1135-1137)** He also had a difficult time

understanding the material. (R **1135-1137)** Scroggs said Michael talked to her about his difficulty with the course, and other students mentioned Michael's poor understanding. (R **1136)** Michael failed the only test he took in the course. (R **1135)** Michael Horton also had Michael in a introduction to substance abuse class during the same time period. (R **1145-1146)** Horton said Michael sat on the front row but never talked. (R **1147-1148)** Horton had the impression that Michael was on tranquilizers because of the small size of his pupils. (R **1149)**

Dr. Lawrence J. Gilgun, a clinical psychologist, examined Reilly in connection with the homicide charges. (R **1164-1174)** After his evaluation and testing, Gilgun concluded that Michael suffered from a low I.Q., a personality disorder and learning disabilities;. (R **1168-1170)** Michael has a full scale I.Q. of **86,** which is low normal. (R **1168-1169)** This means that he falls in the bottom **16** percent of the population intellectually. (R **1168-1169)** Gilgun was aware that Michael suffered a concussion while in prison as the result of having his head slammed on the floor. (R **1170)** He said that concussions can damage people in many ways, but he did not have any neurological tests performed on Michael. (R **1170)** Gilgun did not know if Michael suffered any brain damage. (R **1174)** Michael's antisocial personality disorder makes him impulsive and unable to conform his behavior to societal norms. (R **1171-1174)** This defect would have an impact on Michael's awareness of criminal conduct. (R **1171)** Gilgun stated that Michael's low I.Q.

coupled with his personality disorders would affect his ability to conform his conduct to the requirements of law. (R 1171)

SUMMARY OF ARGUMENT

1. Randy White, a jail inmate, testified to alleged admissions Michael made to him or in his presence. White had recently returned from the state hospital in Chatahoochee having been declared incompetent to stand trial on a diagnosis of borderline retardation. During cross-examination, White said he had been declared incompetent to stand trial and sent to the state hospital with a diagnosis of retardation. However, on redirect, White denied being retarded. Defense counsel asked the court to open White's court records containing his mental evaluation. The court refused, and White also refused to waive his psychotherapist privilege. Counsel moved to strike White's testimony because denying access to the mental evaluation denied Reilly his right to effective confrontation of the witness. The trial court denied Reilly his Sixth Amendment right to confront and cross-examine the witness. Any privilege or right to confidentiality should have given way to Reilly's interest in effective confrontation. See, Davis v. Alaska, **415** U.S. **308, 94** S.Ct. **1105, 39** L.Ed.2d **347 (1974).**

2. The trial court improperly denied two defense challenges for cause to prospective jurors. One juror had knowledge of the confession, which had been suppressed pretrial, from newspaper stories he read about the crime. The second juror expressed beliefs in favor of imposing death for first degree murder which would interfere with his ability to fairly consider a life recommendation. Defense counsel expended a peremptory challenge on each these two jurors. Counsel

exhausted his peremptory challenges during jury selection and requested additional ones without success. There were three seated jurors whom counsel would have excused if he had had additional peremptory challenges. Denial of the cause challenges violated Reilly's rights under the Sixth, Eighth and Fourteenth Amendments.

3. Extensive media coverage of this case included details of the offense, the investigation and articles on the criminal justice system. The crime's impact on the victim's relatives and community was also vividly portrayed. Reilly's arrest generated further coverage. Readers learned of Reilly's prior conviction for sexual battery and the fact that he served less than four years in prison on a six year term. Additionally, Reilly's juvenile record was published. Interviews with neighbors expressing their fear of Reilly appeared. Finally, the media reported Reilly's confession to the homicide, including his alleged admission to having strangled the victim and cut his throat. The account included a statement of the investigators' opinions that Reilly told the truth in his confession. The order suppressing Reilly's confession as involuntary was front page news. Every member of the jury admitted having read or heard something about the crime. Reilly's motion for change of venue should have been granted to preserve his Sixth Amendment right to a fair trial.

4. Reilly moved to suppress statements he allegedly made to three jail inmates within four days of his arrest. Reilly's arrest was based upon a confession he gave investigators, which

the trial court later ruled involuntary. The investigators had promised Reilly mental health treatment, instead of prosecution, in exchange for an admission of guilt. At the time of the statement to the inmates, Michael was still under the influence of the prior involuntary confession. This rendered the later statements likewise involuntary in violation of the Fifth Amendment. Furthermore, Reilly was illegally arrested which rendered his incarceration and later statements tainted fruit in violation of the Fourth Amendment. The trial court improperly denied the motion to suppress the alleged statements to the inmates.

5. Although only one death occurred, Reilly was convicted and sentenced for three counts of first degree murder. The indictment charged three separate counts of first degree murder: count one alleged a premeditated murder, count two alleged a felony murder during the commission of a sexual battery and count three alleged a felony murder during the commission of an aggravated child abuse. Reilly moved to dismiss two of the three murder counts, but the trial court denied the motion. The State has the right to prove first degree murder under a premeditation and felony murder theories. With only one death, however, the State is prohibited from prosecuting more than one murder charge. Houser v. State, 474 So.2d 1193 (Fla. 1985). The motion to dismiss two of the three murder counts should have been granted.

6. Michael Reilly should not have been sentenced to death. The trial judge failed to assign the proper qualitative

weight to the aggravating and mitigating circumstances. He improperly concluded that death was the appropriate sentence. When properly weighted, the mitigating circumstances outweighed the aggravating ones. The crime was a product of Michael's many mental and emotional problems, and the trial court should have imposed a life sentence.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN RESTRICTING REILLY'S SIXTH AMENDMENT RIGHT TO CONFRONT A MATERIAL STATE'S WITNESS BY PROHIBITING THE DISCLOSURE OF THE WITNESS'S MENTAL EVALUATION PERFORMED WHEN HE WAS FOUND INCOMPETENT TO STAND TRIAL, SINCE THE EVALUATION WOULD HAVE IMPEACHED THE WITNESS'S TRIAL TESTIMONY CONCERNING HIS MENTAL ABILITIES.

Randy White, an inmate in the jail infirmary with Michael, testified to alleged admissions Michael made to him or in his presence. (R 642) White was awaiting trial on two robbery charges and had recently returned from the state hospital in Chatahoochee (R 643, 654) He had been declared incompetent to stand trial and spent six months in the hospital on a diagnosis of borderline retardation. (R 654) During cross-examination, White admitted he was declared incompetent to stand trial and sent to the state hospital with a diagnosis of retardation. (R 654) However, on redirect, White denied being retarded. (R 669) Before recross, defense counsel asked the court to open White's court records containing his mental evaluation. (R 671) The court refused, and White also refused to waive his psychotherapist privilege. (R 671-672) Counsel moved to strike White's testimony because denying access to the mental evaluation denied Reilly his right to effective confrontation of the witness. (R 673) Denying the defense request and motion to strike, the trial court denied Reilly his Sixth Amendment right to confront and cross-examine the witness. Any privilege or right to confidentiality White may have had in his mental

evaluation should have given way to Reilly's interest in effective confrontation of the witness. See, Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

Initially, White did not have a psychotherapist privilege in the mental evaluation performed to determine his competency to stand trial. Section 90.503(4) Florida Statutes specifically excluded from the privilege the following:

> (4) There is no privilege under this section:
> (a) For communications relevant to an issue in proceedings to compel hospitalization of a patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has reasonable cause to believe the patient is in need of hospitalization.
> (b) For communications made in the course of a court-ordered examination of the mental or emotional condition of the patient.
> (c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

White's mental evaluation for competency to stand trial falls squarely within these sections. Florida Rule of Criminal Procedure 3.211(e) does provide for the confidentiality of the information obtained during a competency evaluation. However, White testified about the substance of the report which waived any confidentiality as to those portions of the evaluation. See, Sec. 90.507 Fla. Stat. The defense had the right to introduce the evaluation to rebut White's self-serving

testimony about his mental abilities. See, Sec. 90.108 Fla. Stat.

Assuming the pyschotherapist privilege or the confidentiality rule applied, such state evidentiary rules cannot be applied in such a manner as to deprive Reilly of his Sixth Amendment right to confront and effectively cross-examine witnesses. Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); Davis v. Alaska; Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). In Davis the defendant was precluded from using a witness's juvenile adjudication as impeachment because of Alaska's law making juvenile records confidential. The Supreme Court ruled the defendant's right to confront and cross-examine witnesses outweighed the need to enforce the state's evidentiary rule. In Chambers, Mississippi's evidence rule preventing the impeachment of one's own witness was used to prohibit a murder defendant from cross-examining a witness who had confessed to the crime and then repudiated the confession on the witness stand. The defendant was also prevented from introducing the witness's oral confessions as hearsay. The Supreme Court reversed holding that Chamber's right to confront and cross-examine the witness was paramount to the state's evidence rules. In Van Arsdall, the trial court would not allow the murder defendant to cross-examine a prosecution witness on the fact that a public drunkenness charge against him had been dismissed when he agreed to talk to the prosecutor about the murder. The ruling was based on a Delaware rule of evidence

which allowed exclusion of relevant evidence which is unfairly prejudicial, cumulative or a waste of time. Holding that the application of the rule violated the defendant's right to cross-examine the witness about a potential bias, the Supreme Court remanded the case. The circumstances in this case are similar.

The situation in Davis v. Alaska is particularly applicable, since it, too, involved a witness's assertion of the right to maintain certain material confidential. Defense counsel in Davis wanted to expose the fact that the juvenile witness was on probation for a delinquency adjudication at the time he identified the defendant. Counsel's theory was to show that the witness may have made a faulty identification out of concern for his own probation status and to divert suspicion from himself. The trial court applied Alaska's statute and rule which provided for the confidentiality of juvenile records. On cross-examination, defense counsel asked the witness if he had concerns when the police questioned him about the crime, and he replied that he did not. Counsel further asked the witness if he had ever before been questioned like that by the police. The witness replied with an emphatic "No." Because to the trial judge's ruling, the witness's questionably truthful answer could not be challenged. On appeal the Alaska Supreme Court held that the indirect references were sufficient to place the credibility of the witness before the jury, in spite of the witness's self-serving statement that he had no

anxiety when questioned. The United States Supreme Court reversed stating:

> We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial.. ..
>
> * * * *
>
> On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'[citation omitted]"

415 U.S. at 318.

Randy White's self-serving statements about his mental abilities also went unchallenged. Although counsel was permitted to ask White about the basis for his hospitalization, he was not allowed to refute White's later answer to the prosecutor's question that the mental evaluation was wrong. White admitted that the mental evaluation said he was retarded, but later denied being retarded. Just as in Davis v. Alaska, the jury was left with only some confusing references on a matter affecting the witness's credibility. See, Sec. 90.608(d) Fla. Stat. (witness may be impeached by "[s]howing a defect of

capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which he testified") Reilly's interest in fully portraying the mental ability of the witness outweighed any remaining confidentiality concerns of the witness. The Sixth and Fourteenth Amendments compel a reversal of Reilly's convictions for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN DENYING A DEFENSE CHALLENGE FOR CAUSE TO TWO PROSPECTIVE JURORS: ONE HAVING KNOWLEDGE FROM MEDIA ACCOUNTS OF REILLY'S CONFESSION WHICH WAS SUPPRESSED AS INVOLUNTARY AND THE SECOND HAVING BELIEFS IN FAVOR OF THE DEATH PENALTY WHICH WOULD INTERFERE WITH HIS ABILITY TO FAIRLY CONSIDER A LIFE SENTENCE.

The trial court improperly denied two defense challenges for cause to prospective jurors. **(R** 219-220, 249-251) Juror Blackwell had knowledge of the confession, which was suppressed pretrial, from newspaper stories about the crime. **(R** 207-212) Juror Powell expressed beliefs in favor of imposing death for first degree murder which would interfere with his ability to fairly consider a life recommendation in this case. (R 238-243) After the court denied the challenges for cause, defense counsel expended a peremptory challenge on each of these two prospective jurors. (R 220, 251) Counsel exhausted his peremptory challenges during jury selection and requested additional ones. (R 425) The court denied the request. (R 425-427) Counsel noted that there were three seated jurors whom he would have excused if he had additional peremptory challenges. (R 427)

This Court, in Singer v. State, 109 So.2d 7 (Fla. 1959), set forth the standard to be applied when a prospective juror's competency to serve has been challenged:

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

> on motion of a party, or the court on its own motion.

Ibid. at 23-24; accord, Moore v. State, 525 So.2d 870 (Fla 1988); Hill v. State, 477 So.2d 553 (Fla. 1985). A juror must unequivocally express his ability to be fair and impartial on the record. Moore v. State; Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986), rev. denied, 506 So.2d 1043 (Fla. 1987). Merely expressing an ability to to control any bias or prejudice is insufficient. Singer v. State: Leon v. State, 396 So.2d 203, 205 (Fla. 3rd DCA 1981), rev. denied, 407 So.2d 1106 (Fla. 1981). Moreover, a juror's statement that he has the appropriate state of mind and will follow the law is not determinative of the question of his competence to serve. Singer, 109 So.2d at 24; Graham v. State, 470 So.2d 97, 98 (Fla. 1st DCA 1985); Leon, 396 So.2d at 205. Finally, when a defendant exhausts his peremptory challenges, the improper denial of a cause challenge compels a reversal for a new trial. See, Moore v. State, 525 So.2d at 873; Hill v. State, 477 So.2d at 556; Leon, 396 So.2d at 205; Auriemme, 501 So.2d at 43. Applying these principles here demonstrates the trial court's reversible error in denying the challenges for cause.

JUROR BLACKWELL

Defense counsel challenged Juror Blackwell because of his exposure to pretrial publicity, particularly the fact that a confession was involved in the case. (R 218-220) The standard to be applied is whether there existed a reasonable doubt as to

Blackwell's ability to decide the case solely on evidence received in the courtroom. E.g., Singer; Moore; Hill. Voir dire of Juror Blackwell on the subject proceeded as follows:

> MR. TERRELL: Yes, sir. Sir, you indicated that you knew something about this case from the news or talking about it. What do you remember about it?
>
> PROSPECTIVE JUROR: When the case first happened.
>
> MR. TERRELL: What do you remember about that?
>
> PROSPECTIVE JUROR: The first three or four days I kept up with what was in the newspaper, what was on the television, and then after -- I think before the investigation was even -- had gotten out of the media, I kind of got away from following it and that sort of thing.
>
> MR. TERRELL: Those first few days, what do you remember about the case? Give us any detail of what you recall.
>
> PROSPECTIVE JUROR: The young boy was fishing close to home, his age, that towards the end of it that the young man had been accused, and they had the little map about the path that the boy took, and he showed some lady a fish or gave some fish to a lady, that there was a knife that they were diving for for several days. That was about it.
>
> MR. TERRELL: Do you have any idea what it was that led to any arrest in the case?
>
> PROSPECTIVE JUROR: That led to the arrest?
>
> MR. TERRELL: Yes. Why the police arrested the person they arrested.
>
> PROSPECTIVE JUROR: No, but I had heard there was a confession or I think that was in the paper. There was a confession.
>
> MR. TERRELL: What do you remember about that?

PROSPECTIVE JUROR: Just that there was a confession.

MR. TERRELL: Okay. Do you have any idea where this question about diving for a knife came from?

PROSPECTIVE JUROR: Question?

MR. TERRELL: Uh-huh. I mean, why the police would have been diving for a knife, where that information came from so they would do that?

PROSPECTIVE JUROR: No, other than it was in the newspaper that they were diving for a knife.

MR. TERRELL: At that time based on that information did you form any opinion about the person that was arrested?

PROSPECTIVE JUROR: Well, I was opinionated about the whole issue. To form an opinion about this young man, no, not form an opinion about whoever did it.

MR. TERRELL: Right. That's what I'm asking you, about your opinion back then as to who --

PROSPECTIVE JUROR: I thought it was a rather terrible thing.

MR. TERRELL: Did you form any opinion about the quilt or innocence of whoever did it back then?

PROSPECTIVE JUROR: Well --

MR. TERRELL: I know that's a tough --

PROSPECTIVE JUROR: How -- I mean, it's kind of tough to say somebody was guilty, but if you're asking me if I decided then that this young man was guilty, no.

* * * *

THE COURT: Mr. Blackwell, let me ask one thing. Whatever you read in the paper or heard about the case to begin with, are you able to set aside any impressions that you

have from that and judge this case just on the evidence that you receive here during the trial?

PROSPECTIVE JUROR: I believe I will, Your Honor.

THE COURT: You apparently don't have any fixed opinion concerning quilt or innocence of anybody in connection with this matter?

PROSPECTIVE JUROR: Fix opinion someone was guilty?

THE COURT: Do you have an opinion that any particular person is guilty of a crime in connection with this incident from what you have --

PROSPECTIVE JUROR: No person. It's obvious that a crime was committed.

THE COURT: Any other questions of this witness?

MR. SCHILLER: No, Your Honor.

MR. TERRELL: Sir, if I can, just one other -- I'm sorry. You had mentioned something about you had read something about a confession and search for a knife. Do you remember anything about the details of that alleged confession?

PROSPECTIVE JUROR: No.

MR. TERRELL: Would that influence you in any way if there were no confessions presented in the case, or would you have that in your mind?

PROSPECTIVE JUROR: No. If the confession were presented and supported in court as fact, then it would -- then I would consider it, but not because -- not because of having read it in the newspaper.

(R 207-212)

Even though the juror said he could set aside the information he read in the newspaper about a confession, his statement does not decide the issue. As stated in Singer v. State:

> ...a juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so.

109 So.2d at 24. Knowledge of a confession, which was not to be presented in evidence at trial, simply created too much of a danger that the juror would be improperly influenced.

JUROR POWELL

Juror Powell should have been excused for cause because his beliefs in favor of the death penalty would interfere with his ability to fairly consider a life recommendation in the case. See, O'Connell v. State, 480 So.2d 1284 (Fla. 1986); Hill v. State, 477 So.2d 553 (Fla. 1985); Thomas v. State, 403 So.2d 371 (Fla. 1981). The applicable standard is the same one used to excuse jurors who oppose the imposition of the death penalty to the degree it would impair their ability to fairly consider a death sentence. Ross v. Oklahoma, 487 U.S. ___, 108 S.Ct. ___, 101 L.Ed.2d 80, 88 (1988); Fitzpatrick v. State, 437 So.2d 1072, 1075-1076 (Fla. 1983). In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court receded from the strict standard lower courts had applied in evaluating the excusal for cause of death scrupled

jurors and reinterpreted the standard originally announced in Witherspoon v. Illinois, **391** U.S. 510, **88** S.Ct. **1770, 20** L.Ed.2d **776 (1968).** The prior interpretation of Witherspoon had required a showing of unmistakable clarity that the juror's beliefs would cause him to automatically vote for life without considering a death sentence. In Witt, the Supreme Court adopted language from its decision in Adams v. Texas, **448** U.S. **38, 100** S.Ct. 2521, **65** L.Ed.2d **581 (1980),** and restated the standard:

> We therefore take this opportunity to clarify our decision in Witherspoon, and to reaffirm the above quoted standard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions his oath." We note that in dispensing with Witherspoon's reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity."

Witt, **469** U.S. at **424.** Therefore, the question, here, is whether Juror Powell's beliefs in favor of the imposition of the death penalty, in a case such as this one, created a reasonable doubt about whether those beliefs would prevent or substantially impair his ability to fairly consider a life recommendation. Questioning during voir dire revealed the following:

> MR. TERRELL: Did whoever you talked with or talked in your presence back then say anything about what ought to happen to the person that did it?

PROSPECTIVE JUROR: Sure.

MR. TERRELL: What was that?

PROSPECTIVE JUROR: Kill him.

MR. TERRELL: What were you thoughts about it back then?

PROSPECTIVE JUROR: If he's found guilty, that's what he ought to get.

MR. TERRELL: You heard me asking all of those questions out there about the death penalty, and I think I may have confused some people. Did I confuse you in what I asked?

PROSPECTIVE JUROR: When everybody else was confused, I was confused. For the most part I understand what you were trying to say.

MR. TERRELL: I apologize if I did confuse you.

PROSPECTIVE JUROR: It got straightened out.

MR. TERRELL: Do you understand the difference between these kinds of premeditation that we were talking about?

PROSPECTIVE JUROR: Yes, sir.

MR. TERRELL: Do you think you can find somebody guilty of premeditated murder and find them not to have committed this higher kind of premeditation that warrants the death penalty? Do you see the difference between those two?

PROSPECTIVE JUROR: I don't see what you're talking about between the lower and the higher.

MR. TERRELL: So for you if it's premeditated, it's premeditated?

PROSPECTIVE JUROR: Well, you know, if it's premeditated like seconds before, that's not premeditated to me. But like if it was

minutes or days or months or years, that would be premeditated.

MR. TERRELL: Okay. Now, back when you first talked about this and it was discussed that whoever was guilty should be killed, do you still have that view?

PROSPECTIVE JUROR: If he's found guilty, I do not -- I don't feel that anybody should be punished for anything they didn't do. If he did do it, I believe that's what his punishment should be.

MR. TERRELL: Would I have to show you anything special to convince you not to vote for death if -- and we're assuming that you have already decided quilt.

PROSPECTIVE JUROR: Well, if I decided guilty, there wouldn't -- it will be guilty, because it will take a lot to prove that.

MR. TERRELL: Okay. Let's say you have decided that.

PROSPECTIVE JUROR: Right.

MR. TERRELL: Would it take anything that you think death is the proper penalty -- if you decided a person guilty, would I have to show you anything special to convince you to vote for life?

PROSPECTIVE JUROR: No. I don't understand what you're saying.

MR. TERRELL: Okay.

PROSPECTIVE JUROR: Once he's been proven guilty, there is nothing else you can do.

MR. TERRELL: Okay. Do you understand when we talked about those two different trials that will be involved in a first degree murder case?

PROSPECTIVE JUROR: Right.

MR. TERRELL: There is one trial for you to decide whether or not a person is guilty of the crime.

PROSPECTIVE JUROR: Right.

MR. TERRELL: And the if you do decide they are guilty of first degree murder --

PROSPECTIVE JUROR: Right.

MR. TERRELL: -- then you have this second trial about penalty phase. Do you see what I mean? And during that the State has the right to put on evidence about reasons for the death penalty that might be totally different from what was heard in this first trial, and the defense can put on evidence, if they have any, about reasons for a life sentence, life without parole for a minimum of 25 years.

What the State -- in your mind would the State have to put on any evidence in that second trial to convince you that death was proper or would they have already gotten that far just by convincing you that the accused was guilty?

PROSPECTIVE JUROR: I do not follow what you're saying. If the first time he's proven guilty, then he's guilty.

MR. TERRELL: Right. And death is proper then?

PROSPECTIVE JUROR: Unless you can prove he's -- but, if you can prove otherwise, you would have done it before they proved him guilty.

MR. TERRELL: All right, sir. Thank you. I think Mr. Schiller may have some questions.

* * * *

THE COURT: In other words, let me explain. After the trial and if there is a finding of guilt, then there will be a second hearing where the jury will hear additional evidence from the State and from the defense as to --

PROSPECTIVE JUROR: Right.

THE COURT: -- the extent of his punishment.

PROSPECTIVE JUROR: I understand that.

THE COURT: And would -- at that point if you found him guilty, would you have your mind made up already as to what the penalty should be or will you be able to hear the evidence that both sides produced and determine --

PROSPECTIVE JUROR: Right.

THE COURT: -- from additional evidence --

PROSPECTIVE JUROR: The extent of punishment?

THE COURT: Or whether there is some mitigating circumstances that might make a lesser penalty.

PROSPECTIVE JUROR: I understand that.

THE COURT: Would you have an open mind on that question?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: So you would be able to hear any additional evidence that might be presented --

PROSPECTIVE JUROR: Yes, sir.

THE COURT: -- on the penalty to be imposed?

PROSPECTIVE JUROR: Yes, sir.

(R 238-243)

Powell's responses demonstrate a reasonable doubt about his ability to fairly consider a life sentence. Although he told the judge he would listen to additional evidence at penalty phase, he never abandoned his position that death is presumed appropriate if the jury convicts for premeditated murder. He merely said he would have an open mind to hear evidence in mitigation of sentence. This is not the same as

entering the penalty phase process with no presumption concerning the appropriate sentence.

The trial judge should have granted Reilly's challenges for cause to Jurors Blackwell and Powell. Reilly has been deprived of his rights under the Sixth, Eighth and Fourteenth Amendments, and he urges this Court to reverse his case for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN DENYING REILLY'S MOTION FOR CHANGE OF VENUE.

The Sixth and Fourteenth Amendments secure every criminal defendant the right to a fair and impartial jury. Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); Singer v. State, 109 So.2d 7, 14 (Fla. 1959). When pretrial publicity so taints the community as to render the selection of an impartial jury unlikely, a change of venue must be granted. Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed. 589 (1975); Holsworth v. State, 522 So.2d 351 (Fla. 1988); Manning v. State, 378 So.2d 274 (Fla. 1980).

> An application for change of venue is addressed to the sound discretion of the trial court, but the defendant has the burden of coming forward and showing that the setting of the trial is inherently prejudicial because of the general atmosphere and state of mind of the inhabitants in the community. A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result. The trial court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process, see Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), or may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause. Murphy v. Florida.

Manning, 378 So.2d at 276.

The prejudicial publicity in this case, which included references to Reilly's con'ession, prejudiced the community

requiring a pretrial change of venue. Rideau, 374 U.S. 723; Manning, 378 So.2d 274; Oliver v. State, 250 So.2d 888 (Fla. 1971); Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985). Although the publication of a confession, alone, does not require a change of venue, Holsworth, 522 So.2d 348, it was apparent that the community had actually been prejudiced by the media coverage. A fair and impartial jury was not selected.

Every member of the jury had heard or read about the case. Media coverage included details of the offense, the investigation and articles on the criminal justice system generally. (R 1292-1348) The crime's impact on the victim's relatives and community was vividly portrayed via photographs of grieving relatives. (R 1292, 1298) A photograph of pallbearers carrying the casket at the funeral appeared in the newspaper. (R 1300) Several news accounts discussed the details of the investigation, including maps, diagrams and photographs. (R 1294-1299, 1302, 1306, 1339-1344) Reilly's arrest generated further coverage of the crime and of Reilly's background. (R 1302-1315) Readers learned of Reilly's prior conviction for sexual battery on an elderly woman and the fact that he served three years and nine months in prison on a six year term. (R 1308, 1314-1315) Additionally, Reilly's juvenile record was paraded in print. (R 1314-1315) These articles also discussed the fact that his juvenile record was not used to enhance his adult sexual battery sentence. (R 1314-1315) This generated a series of articles and letters to the editor expressing concern that the system was not protecting the public. (R 1312-1338, 1357)

Interviews with neighbors expressing their fear of Reilly in the neighborhood appeared. (R **1303-1304, 1310)** Finally, the media reported Reilly's confession to the homicide, including his alleged admission to having strangled the victim and cut his throat. (R **1309-1311)** The account included a statement of the investigators' opinions that Reilly's told the truth in his confession. (R **1309)** The order suppressing Reilly's confession as involuntary was front page news. (R **1346-1347)**

A jury composed of twelve people, each of whom admitted potential exposure to this media material, posed too much of a threat to a fair trial. This threat endangered the penalty phase of the the trial as well as the guilt phase. The media coverage included facts which were inadmissible nonstatutory aggravating circumstances. Information of the crime's impact on the relatives and the community was improper sentencing material. See, Booth v. Maryland, **482** U.S. **, 107** S.Ct. **, 96** L.Ed.2d **440 (1987);** Jackson v. State, **498** So.2d **906, 910** (Fla. **1986).** Reilly's juvenile record was also irrelevant aggravating factor. Consequently, the prejudice of denying the change of venue extended to the sentencing phase and violated Reilly's rights under th Sixth, Eighth and Fourteenth Amendments. The trial judge should have granted a change of venue. Reilly asks this Court to reverse his judgments with directions to afford him a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF THREE JAIL INMATES WHO TESTIFIED TO ALLEGED ADMISSIONS OF GUILT REILLY MADE WHILE HE WAS INCARCERATED PENDING TRIAL, SINCE REILLY'S ARREST WAS ILLEGALLY BASED ON HIS INVOLUNTARY CONFESSION.

Michael Reilly moved to suppress incriminating statements he allegedly made to three jail inmates within four days of his arrest. **(R 1284-1285, 1372-1386, 1445)** The basis for the motion was twofold: (1) that at the time of the statement to the inmates, Michael was still under the influence of the prior involuntary confession, rendering the later statements likewise involuntary in violation of the Fifth Amendment: and **(2)** that Reilly was illegally arrested which rendered his incarceration and later statements tainted fruit in violation of the Fourth Amendment. (R **1284-1285, 1374-1377, 1384-1385)** During argument, the prosecutor contended that the first appearance hearing, the appointment of counsel and a visit from his parents were sufficient intervening events to break the causal connection between the involuntary confession and illegal arrest and the statements to the inmates. **(R 1382-1383)** At the hearing, the only evidence presented was depositions of the inmates detailing the circumstances surrounding the statements. (R **1372-1373, 1377)** The trial judge had already heard evidence concerning the earlier confession to investigators and had ruled it involuntary. (R **1268-1272, 1526-1710)** The trial court improperly denied the motion to suppress the alleged statements to the inmates. (R **1445)**

The test to be applied to determine the admissibility of a confession secured as the result of an illegal arrest or as the result of a prior involuntary confession is the same -- whether intervening events have broken the causal link between the illegal activity and the confession. Taylor v. Alabama, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982); Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); Clewis v. Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). All of the circumstances from the taking of the involuntary confession and the illegal arrest to the making of the statements sought to be suppressed must be evaluated. Moreover, the State has the burden of establishing that a break in the causal link occurred. Ibid. The State failed in its burden in this case. Michael was still under the influences of the promises made to him to secure his initial confession to the investigators at the time he allegedly talked to the inmates. His alleged statements to the inmates should have been suppressed.

Investigators went to Michael's house around 11:00 a.m. on Saturday, February 6, 1988, and asked him to accompany them to the sheriff's department for questioning. (R 1544-1545) The investigators began questioning Michael at 11:59, and two hours later, they secured a confession and arrested Michael. (R 1548, 1551-1552, 1673) During the questioning, the investigators continually told Michael that the homicide was considered an

accident. They continually told Michael that the perpetrator would not be prosecuted if he admitted the killing, but instead, he would receive counselling and mental health treatment. (R **1278)** (see, also, transcript of the taped statement appearing at R **1479-1514** and **1566-1666)** The trial judge's written order suppressing the confession as involuntary stated,

> The defendant is of less than average intelligence and is emotionally handicapped. Promises were strongly implied to the defendant that confessing to involvement in the killing would result only in his receiving treatment and counseling, whereas denial of such involvement would result in much harsher consequences. It is evident that such promises induced the defendant to make the statements sought to be suppressed. Under these circumstances, statements were not voluntary.

(R 1272) Michael was incarcerated in the jail infirmary that Saturday afternoon, and within three or four days, he allegedly made the incriminating statements to the inmates. (R **642, 700, 854)**

The State asserted that sufficient intervening events occurred between the illegal activity and the statements to break the causal link. (R **1372-1386)** However, the State presented no evidence to support the claim. (R **1372-1386)** Defense counsel agreed that Michael had had a first appearance hearing and had counsel appointed at that time. (R **1372-1373)** The State also claimed that Michael's parents visited him during this time. (R **1382)** Consequently, the question is whether a first appearance hearing, the passage of three or four days, a visit from relatives and appointment of counsel

vitiates the taint of the involuntary confession and illegal arrest. The answer is no. First, there is no evidence concerning the nature of any consultation Michael may have had with his parents or counsel. Merely being apprised of his rights under Miranda does not vitiate the taint. Brown v. Illinois. Likewise, a visit from friends or relatives does not break the chain of events. Taylor v. Alabama. The psychological influences of the technique used to secure the involuntary confession lingered. In fact, Michael was incarcerated in the jail infirmary which may have reinforced the false promise that he would receive treatment and not be prosecuted. Indeed, even one of the inmates testified that Michael approached him and asked to talk. (R 646) This could have been Michael's way of seeking a therapeutic forum. The State failed to meet its burden of establishing an attenuation of the taint of the prior illegal confession and arrest.

Michael's alleged statements to the three inmates were admitted in violation of his rights guaranteed under the Fourth, Fifth, and Fourteenth Amendments. This Court must reverse his convictions for a new trial.

ISSUE V

THE TRIAL COURT ERRED IN REFUSING TO DISMISS TWO OF THE THREE FIRST DEGREE MURDER COUNTS ALLEGED IN THE INDICTMENT BECAUSE ONLY ONE DEATH OCCURRED AND THE INDICTMENT MERELY CHARGED AS SEPARATE COUNTS THE THREE THEORIES FOR PROVING FIRST DEGREE MURDER.

Although only one death occurred, the indictment charged three separate counts of first degree murder. (R **1208)** Count one alleged a premeditated murder, count two alleged a felony murder during the commission of a sexual battery and count three alleged a felony murder during the commission of an aggravated child abuse. (R **1208)** Reilly moved to dismiss two of the three murder counts because only one death occurred. (R **1239, 1720-1722)** The trial court denied the motion. (R **1273, 1722)** The jury found Reilly guilty of all three murder counts as charged. (R 1419-1420)[2] The court adjudicated Reilly guilty and sentenced him to death on each of the three murder counts. (R **1447-1477)**

The State has the right to prove first degree murder under a premeditation and felony murder theories. Knight v. State,

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[2] Although all three murder counts were submitted to the jury, the court's instructions did not specifically advise the jury that felony murder could be proven with aggravated child abuse as the underlying felony. (R **1072-1073)** The felony murder instruction only mentioned the sexual battery. (R **1072-1073)** The court did mention felony murder during an aggravated child abuse when stating the primary charges and the lesser included ones to be considered. (R **1068-1069)** Aggravated child abuse was defined when the court instructed on that separate offense. (R **1076-1077)**

338 So.2d 201 (Fla. 1976). However, with only one death, the State is constitutionally prohibited from prosecuting more than one murder charge. Amends. V, XIV U.S. Const.; Art. I, Sec. 9 Fla. Const.; Houser v. State, 474 So.2d 1193 (Fla. 1985). Holding that a defendant may not be convicted for both DWI manslaughter and vehicular homicide for a single death, this Court in Houser said,

> Florida courts have repeatedly recognized that the legislature did not intend to punish a single homicide under two different statutes. Vela [450 So.2d 305 (Fla. 5th DCA 1984)]; Goss v. State, 398 So.2d 998 (Fla. 5th DCA 1981) (premeditated and felony murder); Muszynski v. State, 392 So.2d 63 (Fla. 5th DCA 1981) (first degree felony murder and second degree murder). The principle has been applied in the case of dual charges of DWI manslaughter and manslaughter. Thomas v. State, 380 So.2d 1299 (Fla. 4th DCA), review denied, 389 So.2d 1116 (Fla. 1980); Miller v. State, 339 So.2d 1129 (Fla. 2d DCA 1976); Carr v. State, 338 So.2d 267 (Fla. 1st DCA 1976); Stricklen v. State, 332 So.2d 119 (Fla. 1st DCA 1976); Phillips v. State, 289 So.2d 769 (Fla. 2d DCA 1974). And the rule has been utilized in the express situation now before us. Ubelis v. State, 384 So.2d 1294 (Fla. 2d DCA 1980); Brown v. State, 371 So.2d 161 (Fla. 2d DCA 1979), affirmed, 386 So.2d 549 (Fla. 1980).

474 So.2d at 1197. This Court must vacate two of Reilly's murder convictions and sentences.

Reilly's death sentence imposed on the remaining murder count must also be vacated. The jury was given the false impression that Reilly was guilty of three counts of first degree murder. This was tantamount to the introduction of invalid convictions for violent felonies during the penalty

phase of the trial which constitutes nonstatutory aggravating circumstances. See, Long v. State, 529 So.2d 286, 293 (Fla. 1988); Oats v. State, 446 So.2d 90 (Fla. 1984). The court did not consider these separate convictions as prior violent felonies for sentencing purposes. (R 1466) However, during his penalty phase argument, the prosecutor told the jury to consider the fact that Reilly had been convicted of both felony murder and premeditated murder. (R 1183-1184) This tainted the jury's recommendation and Reilly's death sentence was imposed in violation of the Eighth and Fourteenth Amendments.

ISSUE VI

THE TRIAL COURT ERRED IN SENTENCING REILLY TO DEATH BECAUSE THE MITIGATING CIRCUMSTANCES CONCERNING REILLY'S MENTAL IMPAIRMENTS OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES MAKING LIFE THE ONLY APPROPRIATE SENTENCE.

In support of his imposition of a death sentence, the trial judge found three aggravating circumstances -- Reilly had a previous conviction for a violent felony, a sexual battery; the homicide occurred during the commission of a sexual battery; and the homicide was especially heinous, atrocious or cruel. (R 1466-1467) The court found in mitigation that Reilly's capacity to appreciate the criminality of his conduct was "somewhat, but not substantially, impaired." (R 1466-1467) Reilly contests the weight given the respective circumstances and the judge's conclusion that the aggravating factors outweighed the mitigating. When properly weighted, the mitigating outweigh the aggravating, and life is the only legal sentence. The jury's recommendation of death was incorrect, and the court erred in following it. Reilly's death sentence violates Sections 921.141 Florida Statutes, see, State v. Dixon, 283 So.2d 1 (Fla. 1973), and the Eighth and Fourteenth Amendments.

The Constitution of the United States requires the sentencing authority in a capital case to properly weigh the mental condition of the defendant in deciding the appropriate punishment. See, Penry v. Lynaugh, ___ U.S. ___ (Case No. 87-6177, June 26, 1989); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98

S.Ct. 2954, 57 L.Ed.2d 793 (1978). Recently, in Penry, the United States Supreme Court reversed the death sentence in a Texas case because the defendant's mental condition was not weighed in the sentencing decision. In Eddings, the Court has specifically recognized the importance of properly weighing a defendant's mental impairments. 455 U.S. at 115-117. This Court has particularly acknowledged the mitigating quality of a defendant's mental impairments when there is a causal relationship between them and the crime. E.g., Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Amazon v. State, 487 So.2d 8 (Fla. 1986); Miller v. State, 373 So.2d 882 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976). Although finding that Reilly's mental condition was a mitigating factor, the trial judge failed to give it the weight it deserved. There was a causal relationship between the crime and the aggravating circumstances and Michael's mental and emotional impairments.

As revealed in the testimony of Michael's parents and the mental health professional who examined him, Michael had a long history of emotional disabilities. (R 1117, 1151, 1164) Dr. Gilgun found Michael to be suffering from a low I.Q., one placing him in the bottom 16 percent of the population (R 1168-1169), and an array of personality disorders and learning disabilities. (R 1168-1174) Michael's antisocial personality disorder rendered him impulsive and unable to conform his conduct to societal standards. (R 1171-1174) This impairment

would also affect Michael's ability to understand and be aware of what actions constitute criminal behavior. (R **1171)** The statements Michael allegedly gave to jail inmates, if true, show the impulsive nature of the offense. (R 642, 700, 854) Compounding Michael's mental problems is the fact that he may have been using drugs at the time of the crime. (R 713, 1149) The crime was a product of Michael's mental disorders, and consequently, it does not warrant the ultimate sanction.

The trial judge should not have sentenced Michael to death. This Court must reverse the death sentence.

CONCLUSION

For the reasons presented in Issues I through V, Michael Reilly asks this Court asks this Court to reverse his convictions with directions to grant him a new trial. In Issue V, he also asks this Court to vacate for discharge two of the three murder convictions and sentences. Alternatively, in Issue VI, he asks this Court to reduce his death sentences to life imprisonment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have hand delivered a copy of the foregoing to the Attorney General's Office, The Capitol, Tallahassee, Florida, and a copy has been mailed to Michael Reilly, **#092729,** Florida State Prison, Post Office Box **747**, Starke, Florida, **32091**, on this 29th day of June, **1989**.

W. C. MCLAIN