IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,645

SONNY BOY OATS, JR.,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR MARION COUNTY, FLORIDA CRIMINAL DIVISION

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BRIEF OF APPELLEE

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INTRODUCTION

Appellee, the State of Florida, was the prosecution in the trial court and Appellant, Sonny Boy Oats, Jr., was the defendant. The parties will be referred to as the State and defendant, respectively. The thirty (30) volume record in the instant 3.850 proceeding will be referred to as "P.C.", the original trial record (Case No. 60,489) will be referred to as "T.T", and the one volume transcript of the 1984 resentencing will be referred to as "RS". (case no. 65,381). The page citations will correspond to the official clerk's page number for the records on appeal in these three cases. All emphasis is supplied unless otherwise specified.

STATEMENT OF THE CASE

The State accepts the defendant's procedural history as accurate.

STATEMENT OF THE FACTS

The State rejects the defendant's factual summary as wholly inadequate and misleading, and offers the following comprehensive summary of the 3.850 testimony and evidence, beginning with a brief chronology of events, all of which are more fully described in the summary of testimony below.

Chronological Overview

In 1975, at the age of 17 (D.O.B. 5/25/57), the defendant was placed on probation for burglary. In 1976 he was arrested and convicted of burglary and

violating probation, receiving a five year term of imprisonment. After serving over three years of this sentence, the defendant was paroled on July 2nd, 1979. (P.C. 5008). Six months later, on December 19, 1979, the defendant shot the clerk of an ABC liquor store (hereafter referred to as the ABC robbery) in the head during a robbery of that establishment, with the victim remaining in a coma since that date. The following night, December 20th, 1979, the defendant shot in the head and killed the female cashier of a convenience store in Martel, Florida, (hereafter referred to as the Martel robbery/murder case) during a robbery of that establishment. The defendant had a different accomplice in each crime, as described below.

On December 24th, 1979, the defendant was arrested for the ABC crime. He had been involved in a high speed chase the day before. The chase occurred when the defendant and his accomplice in the Martel case were spotted driving slowly back and forth in front of a convenience store. At this time he confessed to shooting the ABC clerk on the 19th, but was not questioned about the Martel case, which occurred in a different jurisdiction. After confessing the defendant repeatedly told Det. Furgeson that if his mother heard about his arrest through the media she would have a heart attack, and Det. Furgeson agreed to the defendant's request for a visit to his mother's home. The defendant used this visit to effectuate his first escape from custody, via the back door. The defendant was recaptured three days later. The next day, December 28th, 1979, the defendant gave a taped confession to both the ABC and Martel cases.

Sometime during the two week period following his recapture, the defendant wrote a letter to his sister Vernitta Gant, directing him to give the letter to the defendant's mother and sister Shirley. The first page of the letter explains

the alibi story which his mother and Shirley were to give the police for the ABC robbery on the 19th. The second page instructs them (along with sister Marvella) what to say concerning his whereabouts during the Martel murder (P.C. Vol. XIX, 3422). The letter closes with instructions to Shirley to burn his black stocking cap and the gloves in his bottom drawer.

During February and March of 1980, the defendant was examined by Drs. Carrera, Natal, and Gonzalez for competency to stand trial and insanity at the time of the offense. The defendant provided the doctors with a consistent personal history, however his description of the crimes varied widely, as did his description of his drug and alcohol use. All three read the defendant his Miranda rights prior to the examination, and the defendant professed to understand them and waive them. All three found the defendant competent to stand trial and sane during the offenses.

In early June, 1980, the defendant was tried and convicted in the ABC case. On June 14th, 1980, the defendant and several other inmates escaped from the Marion County Jail. The escape occurred on a day when only one guard was present rather than the usual two. While one inmate faked a seizure, the defendant and his partners were boosted over the wall by other inmates. During the planning for this breakout, the defendant told a fellow inmate that after escaping he would lay low in town until the heat was off, then make his way to Jacksonville, where he had "some people."

The defendant was eventually arrested by the FBI in Texas in December of 1980 and extradited back to Florida. During his six months at large, he spent six weeks with his aunt, Lorine Coger, in Gloversville, New York, arriving in

August, 1980. He told her he had shot and killed a woman in Florida because he had panicked, and he also said he had shot a man in a robbery here, who was now in a coma. He also told her he had stolen $200.00 from the man. In her guilt phase testimony Coger mentioned some unspecified trouble the defendant got into in Johnstown, New York, and that the police there gave her immunity to give a statement concerning the defendant. As set forth below, this "trouble" consisted of formal charges of attempted first degree for stabbing a female liquor store clerk in the head numerous times during a robbery.

The instant trial and sentencing occurred in February, 1981, two months after the defendant's second recapture. Prior to trial the defendant had smeared feces on his wall, and on another occasion had plugged the keyhole of his cell with soap and set his mattress on fire, and survived by breathing through an air hose. In December 1981 the Fifth District overturned the ABC conviction because the trial court had refused to instruct on the maximum and minimum penalties, Oats v. State, 407 So.2d 1004 (Fla. 5th DCA 1981). The defendant was retried in the ABC case in February 1982 and again convicted, with the conviction affirmed without opinion in June, 1983.

In February of 1984 this Court upheld the conviction and reversed the death sentence due to the trial court's erroneous reliance on several aggravating factors. On April 26, 1984, resentencing was held before the original trial court, Judge Swigert. Defense counsel asserted that based on the defendant's history, including the New York charges of stabbing a store clerk in the head numerous times, and counsel's recent discussions with the defendant, he (Mr. Fox) believed the defendant was currently insane and had been insane at the original trial as well. Counsel requested that experts be appointed to assess his current

sanity, but did not cite the rule which required such appointment upon request, but rather the rule which placed the decision within the discretion of the trial court. Judge Swigert declined the appointment based on his observations of the defendant then and at prior proceedings, the defendant's answers to counsel's question regarding the purpose of the present resentencing proceeding, the prior competency evaluations, and his conclusion that the defendant is "... smart when he wants to be smart and not so smart when he wants people to think he's not so smart" (RS. 1803).[1] On appeal following resentencing, this Court found no abuse of discretion in Judge Swigert's refusal to appoint mental health experts, Oats v. State, 472 So.2d 1143, 1144 (Fla. 1985).

PRELIMINARY STATEMENT

Regarding Defendant's Claim of Mental Retardation

The term mental retardation conjures up striking images within us all. The term tugs at our heart strings, and in terms of capital punishment the term takes on added meaning. But what is this thing called mental retardation? Is it Benny in L.A. Law? Is it Charlie in "Flowers for Algernon". Any layman familiar with these characters knows they are mentally retarded. All or most of us know or come into regular contact with persons we know are mentally retarded. We also come into contact with many we would classify as not too bright, but definitely not mentally retarded. How do these groups differ? To a layman, its a matter of the look in the eyes, the speech patterns and response time, the sophistication

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[1] The trial court had not merely observed the defendant at the first trial, rather the defendant had testified extensively at the motion to suppress and penalty phase, and offered final (and humorous) remarks after Judge Swigert sentenced him to death, as is described below.

of the vocabulary, and especially, the level of understanding, as reflected both in speech and the person's actions.

The mental health profession, on the other hand, could not possibly operate on any such haphazard "I know it when I see it" approach. Rather these professionals, and especially the body responsible for the DSM-III handbook, have developed the statistical approach, labeling as mentally retarded those whose intellectual level falls in the bottom one percent of the population. Thus the term mental retardation must be seen as the statistical entity that it is. Having said this, we come to the real heart of the matter, i.e., how does one identify the bottom one percent, i.e., how can intellectual ability, intelligence, be measured or indeed even defined? The brain cannot be plugged into a machine for measuring intelligence, even if a satisfactory definition of intelligence was devised.

The answer to this vexing problem, at least one satisfactory to many in the field, is one of agreement and consensus. That is what the DSM-III is all about, agreement and consensus. And the great linchpin of this consensus is the standardized intelligence tests, tests originally developed to help educators predict the probable academic performance of their students. These tests are the technician's dream, because they both define intelligence (intelligence is defined as one's ability to perform on the test) and measures it (your score on the test).

The problem with this approach of course, is that all that is empirically measured is the ability to perform well on the test. Sonny Boy Oats scored 57 on

the test by Dr. Krop and 61 on the test by Dr. Carbounel.[2] Therefore under the DSM-III criteria, that great edifice of consensus, the defendant is mentally retarded, "No doubt about that" (quoting State's counsel at 3.850 hearing, as quoted prodigiously in the defendant's brief).

There is another page to the story however, the one told by the State's experts, particularly Dr. Haber, and one read with approval by the trial court. The contents include the fact that performance on the standardized tests is skewed by a host of factors relating to the person's upbringing, environment,[3] education, motivation, store of knowledge, and indeed even the motivations of the test giver can affect the results. In other words, the standardized tests often are not and in this case definitely are not an accurate measure of the persons intellectual abilities, abilities best gauged by a thorough historical review of the defendant's recorded words and actions, as well as his present ability to respond appropriately and intelligently, reason abstractly, employ higher level words and phrases in the appropriate context, etc. When gauged in this manner, the record summarized below demonstrates that Sonny Boy Oats, Jr., is not mentally retarded in any fashion save that of the DSM-III criteria, criteria which rely on two faulty (and entirely consensus based) premises, i.e., that the test actually measures intelligence, and that the measurement is not affected by the person's life experiences.

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[2] In addition to a score below 70, the DSM-III also requires "deficits in adaptive functioning" prior to a finding of retardation. All the experts agree the defendant herein has such deficits, the most obvious being his propensity to kill or attempt to kill convenience store clerks in order to obtain money and avoid detection so he can enjoy same.

[3] For example, the defendant has been incarcerated since 1976, with the exception of the periods July - December 1979 and June - December 1980.

DEFENSE CASE

Dr. Robert Theodore Michael Phillips, M.D., Ph.D.

Dr. Phillips is a psychiatrist with a splendid array of credentials, including "scholar of the college, cum laude," a masters degree from Harvard University, and all manner of other impressive titles, degrees, etc. (P.C. I, 4). Dr. Phillips examined the defendant for six hours on January 11th, 1990, prior to which he reviewed numerous records, transcripts, etc. (Id., 11). He believes the defendant is a man of significantly substandard intellectual capacity due to a level of mental retardation that is "well documented" by prior evaluations and the records he reviewed (Id., 12). The defendant's long standing history of physical and emotional abuse as a child has had a great influence on his personality and behavioral dysfunction. Dr. Phillips then states:

> In addition, there is substantial clinical evidence at the time of examination, both from psychiatric inquiry and from physical examination and neurological review to indicate that Mr. Oats is brain damaged and in that context, I would submit that the extent of his brain damage is a reflection of a myriad of etiologic orders inclusive of a long-standing history of alcohol and drug abuse, a frequent exposure to an environmental toxin, trichloroethylene which is the chemical substance which is essentially found in liquid paper that would be used in most offices.
>
> Additionally there is historical evidence that he has -- he has withstood during the course of his developmental history periods of direct brain trauma. By that I mean open and/or closed head injuries that have in all likelihood contributed to the picture of organicity that we see, both on examination grossly and in what -- from a more specific detail, we are able to see from psychological testing, differences in the way in which his brain processes information that extends above and beyond simple retardation.
>
> (Id. at 13, 14).

The defendant's reported history of bedwetting into the early teens is also consistent with brain damage. The fact that the defendant was not told that his aunt and uncle, who raised him, were not his natural parents until his early teens, when he met his real parents for the first time, was a very traumatic event which also helped shape his personality (Id., 16). Dr. Phillips also saw reports of family members indicating the defendant did not receive proper nutrition at times, which along with the physical abuse could have had a negative effect neurologically as well as emotionally (Id. 18).

In terms of evidence of head injury, the defendant has a scar formation on the mid cranial area that is tender to deep palpation, indicating a significant head trauma. Dr. Phillips finds the head trauma is consistent with the psychological evidence of brain damage he uncovered in his evaluation of the defendant (Id., 20).

The defendant reported an extensive history of alcohol and drug abuse, with alcohol, hashish and finally liquid paper being his drugs of choice. According to Dr. Phillips, trichloroethylene, the mind altering ingredient in liquid paper, is a neurotoxin which can cause gross neurological dysfunction, headaches, tremors and vertigo (Id. 23). It can also intensify the effects of alcohol.

Dr. Phillips then defined retardation:

> Beyond that cutoff of seventy, there are varying scales in which to describe degrees of retardation, again all of which help the clinician determine to what extent someone is either trainable or educable in terms of the extent of their retardation but suffice it to say that anyone with an I.Q. score below seventy is classically retarded and the further below seventy you drift, the more substantial your retardation is.

(Id., 25).

The defendant's I.Q. tests scores which Dr. Phillips reviewed were, as he recalls, all in the neighborhood of 58, which place the defendant in the mentally retarded range (Id., 26). The designation of mental retardation also requires evidence of impaired adaptive functioning, which includes the inability to conform to expected standards of behavior. Retarded persons are easily dominated by others, and allow others to get them in trouble (Id., 27). They do not understand the standards of conduct that society expects of them.

Dr. Phillips found that the defendant's ability to reason abstractly is very poor. This is consistent with both brain damage and retardation. The defendant thinks in very concrete terms, i.e. when asked how a bee and fly are alike, he said they both have wings (rather than they are both insects). When asked how a table and chair are alike, he said they both have legs (rather than they are both pieces of furniture). And finally, when given the proverb "a stitch in time saves nine," the defendant had no idea what that meant (Id., 29), and responded "I think that's something a spy would say, it sounded like a code to me" (Id.). These answers are face-saving measures which the defendant uses to mask his mental retardation and inability to reason abstractly.

Dr. Phillips states he would need neurological testing to pinpoint the defendant's mental age, but it is potentially in single digits (Id., 31). He believes that "it's very clear that his retardation is something that is genetic in origin. It's one of the cards he was dealt. His environment compounded his genetic retardation, including his drug use and head injury.

All the factors Dr. Phillips cited above were in full force during the period 1979-1984 (crime and confession 12/79, trial 2/81, resentencing 4/84). As to the time of the offense and mitigating factors, the defendant "lacked the substantial capacity to conform his behavior to the requirements of the law," based on all the factors he previously cited, which "leave him in a (perpetual) state of diminished capacity" (Id., 34). The defendant also suffered from an extreme emotional disturbance, which is secondary to his mental retardation (Id). The fact that the defendant told the officers, during his confession, that he had a headache would be consistent with withdrawal from liquid paper and other drug and alcoholic use and "would be consistent with a clear indication that he was still impaired" (Id., 36). Dr. Phillips cannot tell if the defendant was acting under the substantial domination of another during the offense, although his mental condition places him in a high risk group for this factor (Id., 37).

When asked if the defendant could formulate specific intent to commit a crime, Dr. Phillips replied "... that Mr. Oats lacks the intellectual capacity to truly formulate with any degree of specificity well conceived and executed plans" (Id., 38). The defendant acts impulsively, with a "moment-to-moment" decision making process, and that although many of his acts, upon "superficial review" appear to result from premeditation, they are more likely the result of spontaneous action rather than deliberate plan (Id).

As for the defendant's successful escapes from custody, Dr. Phillips does not feel they are relevant, because confined persons have "an inherent desire not to be confined and they'll often do things, again impulsively, to satisfy that need but not necessarily with any degree of great premeditation (Id., 39). Dr. Phillips does not believe Dr. Carrera conducted an adequate competency

examination in 1980, based on his review of Dr. Carrera's report (Id., 56-58). Dr. Phillips believes the examinations and resulting reports of Drs. Natal and Gonzalez were also inadequate (Id., 59). Dr. Phillips disagrees with Dr. Natal's diagnosis of an antisocial personality (Id., 59-62). As to competency at the time of the 1981 trial:

> there is within a reasonable degree of medical certainty a high index of probability that his competency was in question in large measure in the area of the second prong of competency which is his ability to adequately cooperate in his defense and there is a reasonable degree of suspicion about his understanding of the charges and the gravity of those charges based on the inconsistencies in his own testimony in report and at examination.
>
> (Id at 64).

Although the defendant "might be able to be coached," he "would not be impressed" with the defendant's ability to fully appreciate the meaning of the various aggravating and mitigating circumstances. Although the defendant was able to read aloud a Sports Illustrated article on Michael Jordan, when asked what it was about the defendant's only response was that it was about basketball. (Id., 65, 67). Although the defendant could be coached concerning lesser included offenses, he could not "utilize it to the fullest extent that one would see in someone of normal mental capacity (Id., 68).

As to specific competency criteria, he believes the defendant was confused about the charges facing him, and had only a superficial understanding of the nature and range of possible penalties. The defendant does not have a full capacity to understand the adversarial nature of the proceedings. His ability to disclose to counsel facts about the offense is impaired by his confusion about the offenses, i.e., his record of giving conflicting accounts. The defendant would have adequate ability to relate to counsel (Id., 69, 70). The defendant

does not have the ability to assist counsel in preparing a defense, or in challenging prosecution witness. Because of his retardation, the defendant would not be interested in long range trial strategy but rather only his immediate needs, such as his preoccupation with getting a radio for his cell at the time of the 1984 resentencing (Id., 72).

The defendant would manifest appropriate courtroom behavior because his mental condition renders him passive and compliant, as long as his needs are met. Dr. Phillips has "concerns" about the defendant's ability to testify relevantly. The defendant's motivation to help himself in the proceeding was diminished by his lack of appreciation of what was at stake. (Id., 74). Dr. Phillips is not sure why the defendant set his mattress on fire prior to trial. Someone with his retardation would have difficulty coping with incarceration prior to trial. Based on the defendant's mental status and the representations of counsel (Mr. Fox) at the 1984 resentencing, the defendant should have been examined for competency at that time. (Id., 76). As for the defendant's ability to understand and waive his Miranda rights, he states it would be "extraordinarily presumptive" to believe the defendant had this ability, and the fact that the defendant had a headache during the interrogation was a warning signal that clinical evaluation was warranted. (Id., 76, 77). It is possible the defendant would have wanted to ingratiate himself with the officers when he confessed, so they would help him. (Id., 81). It is "possible" the defendant's mental condition deteriorated between the 1981 trial and 1984 resentencing. (Id., 82).

Cross-Examination of Dr. Phillips

The only three Florida competency evaluations for the time period 1980 which Dr. Phillips has reviewed are those of Drs. Carrera, Natal and Gonzalez in the

instant case (Id., 89). He does not know what information was provided to them by defense counsel. The defendant told Dr. Phillips that at the time of trial, he knew he was charged with murder and could get either the death penalty or life imprisonment (Id., 92). Dr. Phillips did not ask the defendant if he and counsel had discussed the defense strategy. Dr. Phillips has not personally spoke with trial counsel, Mr. Fox.

When asked if he agreed that the defendant's confession was an extremely detailed account, he responded that great detail does not mean it is consistent with what actually occurred. When given examples of facts in the confession borne out by the physical evidence, Dr. Phillips acknowledged that the defendant was able to accurately recall certain details (Id., 96, 97). When asked if such detailed recollection is inconsistent with significant alcohol and drug impairment, Dr. Phillips responded in the negative (Id., 98). The fact that the confession contains a detailed chronology of events prior to, during and after the offense is not inconsistent with either mental retardation or a significant level of alcohol and drug impairment (Id., 100).

As to the defendant's first escape (during the visit to his mother's house 12/24/79), the defendant told Dr. Phillips he did not know why he did it. Dr. Phillips believes it was an impulsive act, that the defendant was not planning ahead when he told the detective to take him home so he could break the news of his arrest to her personally (Id., 102, 103). When asked about the defendant's action in throwing the murder weapon behind an overpass during a 100 m.p.h. nighttime chase, and his ability to lead police to the exact location the following day, Dr. Phillips stated this indicated nothing but that the defendant remembered where he through the gun away (Id., 104). The fact that the defendant

knew his way around, and even told the officers a faster way back to the station after retrieving the gun, is also insignificant, although "It's certainly indicative of processing some degree of information" (Id., 105).

Dr. Phillips was then asked about the defendant's second escape, prior to which he told fellow inmate Willie Thomas that he planned to lay low in town, with a friend named Snuffy, until the heat dies down, then head to Jacksonville where he had "some people." Dr. Phillips was also asked about the escape itself, which occurred on a day when the jail staff was shorthanded, and which utilized numerous inmates to distract the lone guard and boost the escapees over the fence. Dr. Phillips drew no conclusions from the escape plan itself, as he has no information of the defendant's role in the planning (he did not ask the defendant about the escape). As for the defendant's post-escape plan, Dr. Phillips finally admitted, "It's certainly not an illogical one" (Id., 110). When pressed, he stated:

> It is -- it is demonstrative of an ability to think. It is demonstrative of an ability to think to some degree but the extent to which it is well organized and goal directed is open for interpretation." (Id. 112).

As for the defendant's charges in New York, he did not discuss them with the defendant, and whether he committed that crime by himself would not affect his evaluation of the defendant. It might be helpful to have looked at the police reports of that crime. When asked about the huge variance in the factual accounts the defendant has given of the murder and his drug use prior thereto, Dr. Phillips opined that the defendant does not have the ability to be deceitful or to tailor his responses based on his perceived best interest at the time (Id, 116, 117). The fact that the defendant travelled to New York and stayed there (for six weeks of the six months he was on the lamb) with his aunt is not

indicative of an ability to plan, because that would be a likely place for the police to look for him (Id., 117). Dr. Phillips does not consider it significant that the defendant could travel around the country for six months after his second escape as:

> "One can easily have a diminished mental capacity by virtue of a level of mental retardation and still be able to put the left shoe on the left foot and the right shoe on the right foot."
>
> Id. at 119.

Dr. Phillips was then asked about the guilt phase testimony of the defendant's aunt from New York, Lorine Coger (T.T. 927-933), with whom the defendant had stayed for six weeks during August and September of 1980, following his June 1980 escape from the Marion County Jail. The defendant had told her he had shot a man during a robbery. The defendant said he had gotten $200 from that robbery (the ABC robbery) and that the man was (and still is) in a coma. The defendant also told her he had shot a lady (Martel robbery/murder) who died, and when asked by his aunt why he shot her, the defendant replied "When you get in a situation like that, you panic." Dr. Phillips agreed that her testimony indicated that in August of 1980, the defendant was able to both recall the ABC and Martel crimes and to distinguish between them.[4] (Id., 120).

Dr. Phillips believes the defendant exhibits a flat, emotionless effect, know as the "Labelle Indifference." He found the defendant to be "absolutely indifferent to what goes on around him or extraordinarily callous and unconcerned" (Id, 124), and:

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[4] Earlier Dr. Phillips stated that one of the basis for his finding of incompetency was the confused accounts of the crimes the defendant provided to Drs. Natal, Gonzalez, and Carrera, including his inability to distinguish the facts of each crime. The three (3) doctors interviewed the defendant in February and March of 1980, several months before the defendant spoke with his aunt.

> "In my clinical opinion, the fact of the matter is that he's absolutely incapable of processing information, of understanding the subtle and not so subtle nuances of the circumstances in which he finds himself."

Id.

Someone with a "less discerning eye" might view the defendant's effect" rather sociopathically," however (quoting from his report):

> It is my clinical opinion that the latter characterization is totally without foundation and inconsistent with his diagnostic mental condition given his personality organization and it's propensity to cause significant impairment in social and occupational functioning in such a way that renders him less effective in meeting the standards accepted for him in such areas as social skills and responsibilities, daily living skills, personal independence and self sufficiency.
>
> It is my opinion within a reasonable degree of medical certainty that Mr. oats is predisposed to act under the domination of another person.

Id. at 126.

Dr. Phillips was then questioned about the defendant's level of interest and understanding at trial. He was asked to review an outburst by the defendant during his mother's penalty phase testimony, during which she was explaining why she believed the defendant was not the shooter in the ABC case. The excerpt reads as follows:

> Q. Do you think it was right that he shot that man in the head out at the ABC?
>
> A. He didn't shoot the man out there to the -- whatever you say, ABC Liquor Store, because Adell was with him, and he came to the house and told me out of his own mouth that he shot the man and that he dropped the gun 'cause he had on gloves and he got scared and run, and that Sonnie Boy picked up the gun. He come to my house and told me that out of his own mouth. I didn't ask him for it.
>
> Q. Sonnie Boy told the police that he shot him.
>
> A. Well, maybe he just telling them that, but Adell told me that.

Q. And the fingerprints show that Sonnie Boy was the one there.

A. Well, Adell was there with him too.

THE DEFENDANT: She just told you he had gloves on, didn't she?

THE WITNESS: He say -- he told me that he had gloves on and that he got scared and run, and Sonnie Boy picked up the gun.

(T.T. at 1203).

Dr. Phillips does not attach any significance to this outburst, other than that it shows the defendant was paying attention to his mother, and that he was "parroting exactly what she had just said." (Id., 132). Dr. Phillips stated that the outburst is indicative of an inability to conform his behavior to a courtroom setting. When asked if it was also indicative of the fact that the defendant was paying attention and concerned about what was going on, Dr. Phillips stated, "I can't comment on that" (Id., 135).

Dr. Phillips was then asked about the defendant's decision to overrule his counsel's advice and testify at the penalty phase, in view of his earlier testimony (regarding the voluntariness of the defendant's confession) that the defendant was easily led and dominated by authority figures. Dr. Phillips found no contradiction, as the defendant's insistence on testifying is equally consistent with an inability to collaborate appropriately with counsel (Id., 137).

Dr. Phillips was asked to comment on the defendant's final statement to the trial court, after receiving the death penalty:

THE COURT: Yeah. Did you have anything to say, Mr. Oats, before we finish this?

THE DEFENDANT: Yeah.

THE COURT: Go ahead. Now, wait. Mr. Oats?

THE DEFENDANT: What?

THE COURT: What are you going to do?

THE DEFENDANT: I'm going --

MR. BURKE: I don't have any -- I can't tell you what Mr. Oats is going to say.

THE DEFENDANT: Mr. Burke, is it all right?

THE COURT: What are you going to say to the Court; not a general statement.

THE DEFENDANT: Huh?

THE COURT: To the Court.

THE DEFENDANT: I just want to say something here. I mean, this is nothing disrespecting the Court.

THE COURT: Are you sure?

THE DEFENDANT: You know, this is about the charge, you know.

THE COURT: No, wait a minute.

THE DEFENDANT: This is about the charge and ---

THE COURT: Mr. Burke, ask him what he's going to say and find out what he's going to say before he says it. (Mr. Burke and the Defendant proceeded to confer.)

* * * * *

THE DEFENDANT: Can my mother come up here?

THE COURT: Pardon me?

THE DEFENDANT: Can my mother come up here?

MR. BURKE: Is his mother permitted to come up front?

THE DEFENDANT: I mean, you know --

MR. BURKE: Mr. Oats --

THE COURT: He wants to talk to his mother?

MR. BURKE: Yes, that's the gist of it.

THE COURT: Back in here before he goes back?

Yeah, I'll allow that. Sure, that's fine.

THE DEFENDANT: All of them?

THE COURT: No, no, not all of them; you said your mother.

THE DEFENDANT: The immediate family, you know. I mean, this is the last time.

THE COURT: No, it isn't the last time.

THE DEFENDANT: I mean, for now, you know.

* * * * *

THE COURT: Okay.

MR. BURKE: Do you want to say anything, Sonnie? Up here, do you want to say anything?

THE COURT: Do you want to say anything to the Court? No speeches for the audience; just to the Court right now.

THE DEFENDANT: I just want to say this was some ball game, you know, but I'll be back. That's all I can say: I'll be back.

(T.T. 1288-1291).

Dr. Phillips is asked if the defendant's analogy of his trial to a ball game is an example of abstract, as opposed to concrete thinking. He replied that he did not believe the defendant was making any such analogy, but rather the defendant's statement was "Totally out of context of what had gone on." (Id., 140). As for the defendant's "I'll be back, that's all I can say, I'll be back" final statement, Dr. Phillips does not believe it indicates the defendant's awareness of the appellate process, or that the defendant was predicting success on appeal, rather "I don't have a clue as to what it means." (Id., 143).

When asked if people who grow up in poverty and receive a substandard education tend to score lower than those in the higher income brackets with college education, he responded "Well, not invariably" (Id., 145). Dr. Phillips

was asked if someone with a deprived background, such as the defendant, could score poorly on standardized tests and yet possess intellectual abilities higher than his scores would indicate. Dr. Phillips admitted that I.Q. testing in and of itself doesn't tell the whole story of a person's "intelligence globally" (Id., 146, 147).

Dr. Phillips has no information that the defendant used drugs or alcohol while incarcerated following his arrest for the instant offense, including the time periods when he confessed, went through trial and then through resentencing (Id., 148).

The defendant told Dr. Phillips that he knew robbing the ABC and Martel stores was a wrong thing to do. He did not question the defendant about the New York robbery/attempted murder charges. When he asked the defendant if he had understood that he did not have to speak to the detectives (at the time of his confession), the defendant hesitated, and finally said he did not know why he confessed. The defendant gave the same truncated response when asked if he understood he had the right to talk with an attorney before talking to the police. These unresponsive answers are "consistent with his degree of retardation" (Id., 154). The defendant currently (at the time of the 1990 evaluation) understands he does not have to talk to the police, but due to his inability to think abstractly and process information, the defendant still cannot appreciate the long-term consequences.

At the pretrial motion to suppress his confession, the defendant testified that the reason he confessed was that the officers told him he would only receive a twenty-year sentence if he confessed (T.T. 1351-1377, see p. 1362), a claim

vehemently denied by the detectives. Dr. Phillips acknowledged that the defendant could have lied in order to help his case, or it could have been the truth, or something in between (Id., 160). Dr. Phillips is not certain why the defendant committed the ABC or Martel or New York crime, though "historically" all three episodes involved the taking of money. When asked if the three episodes showed a common plan and motive and (almost literally) execution, he responded "It depends on how and where you wish to interpret that. What I know is that he's done that." (Id., 161).

Assuming that the defendant used drugs in the three days after his initial escape, 12/24/79, and prior to his recapture, 12/27/79, these drugs could still be adversely affecting him the following day, 12/28/79, when he gave his confession in the instant case (Id., 164-167). Dr. Phillips assumes the defendant was on drugs during the three day period, including liquid paper and amphetamines, because the defendant said he used them every day (Id). The only information he can recall about the defendant's drug use during this critical period was the above statement from the defendant.

Dr. Phillips was then asked if the defendant's "bee and a fly are alike because they both have wings" response could indicate abstract reasoning, in that he was grouping them in terms of their ability to fly:

> A. Having wings and flying are two different things. Ducks have wings. Did you ever see one fly?
>
> Q. All right. Let me ask you then this question?
>
> No. I have not seen --
>
> A. All right.
>
> Q. -- a duck fly?

A. But the fact is that if you were to tell me that a duck could fly, I might keep you in the hospital a day or two.

Q. Okay.

A. -- longer trying to find out why you believe that.

Q. Well, possibly I was confusing ducks with geese.

Now, getting back to --

A. Perhaps.[5]

Id., at 175.

As for brain damage, the physiological testing done on the defendant has been inadequate, as "the testing was not sufficient in order to establish or exclude the diagnosis of brain damage" (Id., 180). He believes the defendant has "a diffuse cognitive impairment that would localize his brain dysfunction to the cerebral cortex," localized above the level of the mid brain, in the area responsible for "higher-cognitive thought which would impair his ability to process information in the way that is consistent with retardation." (Id., 181). If someone scores below seventy (70) on the test, they are mentally retarded.

The defendant did not tell Dr. Phillips that he was dominated by his accomplice during either the ABC or instant crimes, but such domination would be consistent with his diagnosis of the defendant (Id., 183). The defendant did tell him that he liked to do things that made people happy. When Dr. Phillips was asked why the defendant did things at trial that made his lawyer unhappy, he responded that that was consistent with his finding that the defendant was incompetent.

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5 One can only imagine the incredible strength and endurance of the mallards, waddling stoically along on their thousand mile migratory treks, a single hoarse sound escaping their near frozen beaks: "QUACK!!!"

Dr. Joyce Carbonell

Dr. Carbonell examined the defendant 5/5/89, 5/8/89, and 7/17/89. The defendant scored in the mildly retarded range on the WAIS-R intelligence test, with a full-scale I.Q. score of 61, with a 62 performance score and 64 verbal score (P.C. Vol. II, 245). This places the defendant in the bottom 1% of the general population. The diagnosis of mental retardation requires a score below 70 and deficits in adaptive functioning beginning at an early age. The defendant's family reports such deficits, as he was reportedly slow in learning to walk and talk, and did poorly in school as he got older. The defendant scored 70 on an intelligence test in second grade (Id., 247).

Currently, the defendant communicates at a "very low level." His reading and math skills are below 3rd grade levels, and he has a history of failing to maintain steady employment. The Canter Background Interference Procedure for the Bender Gestalt is a two part figure copying test, and the defendant scored in the "brain damaged range" (Id., 249). He scored in the retarded range on the "Categories Test," which shows that his performance abilities are poor, and are consistent with his low I.Q. (Id., 250).

On the MMPI personality test, the defendant took the test twice and the results were so bizarre (he scored in the blatantly psychotic range) that she essentially discounted the results as unreliable (Id., 251). The defendant is definitely not psychotic. The defendant appeared to be trying his best on all the tests. Her diagnosis is mild retardation with a low level of achievement even for his low I.Q., with neurological signs of brain damage on the tests she administered (Id., 255). The defendant had a very abused and deprived upbringing, and had his head split open with a cane an one occasion during

punishment by his aunt. He used a BB gun to herd the hogs back into the pen, so he wouldn't get punished for letting them out. He burnt a chicken because it kept getting him in trouble by escaping from its pen (Id., 262). He burnt the chicken in a fit of anger and frustration, and shot the pigs because it was the easiest way to get them back into the pen.

The defendant wet his bed until he was twelve years old, and suffered regular headaches after being hit with the cane. The defendant often acts out of frustration, which is consistent with mental retardation (Id., 264). The defendant had to repeat the second grade. The evidence to support possible brain damage is his performance on the Canter-Bender, history of head trauma and substance abuse, headaches, and an even lower performance on the achievement test than his I.Q. would indicate (Id., 265). The defendant also reported some dizzy spells.

The defendant's ability to conform his conduct to the requirements of law is substantially impaired due to his mental retardation, deprived environment, alcohol and drug use, brain damage, poor impulse control and frustration (Id., 267). The defendant also suffers from an extreme mental or emotional disturbance because of these same factors, especially his deprived and abusive upbringing. The defendant has never received any treatment for his mental and emotional problems. The defendant's mental condition leaves him susceptible to the domination of others, as retarded people tend to go along with others so they will be liked and accepted.

Dr. Carbonell does not believe the defendant has the ability to formulate specific intent, because he cannot plan ahead or appreciate the consequences of

his actions (Id., 45). As for his susceptibility to domination, she quotes an entry in the defendant's prison records, dated March 1, 1976, which reads "The subject gives the impression of being a dependent personality which will be greatly influenced by his peers (Id., 272). As for the defendant's brain damage, the source cannot be precisely pinpointed. Dr. Carbonell then made an important observation with which the State and indeed all the experts uniformly agree, i.e., the defendant's mental status and capacity have not fluctuated over time, as would be the case with mental illness:

> During the course of the original proceedings would Mr. Oats have been brain damaged? Was he brain damaged?
>
> A. Certainly. This is -- I mean this is --
>
> Q. Why do you say that?
>
> A. Because it's static. There's nothing that looks like it's sort of going in and out. There's been really no big change in his functioning across time.
>
> Q. Was he brain damaged at the time of the offense?
>
> A. Certainly. I mean, it's not -- it's not something that comes and goes. He's got some brain damage. It's fairly static. It's there. It's like being retarded. It doesn't come and go.

Id. at 273.

As for drug use at the time of the offense, she relied on reports of family members that he was abusing drugs during that time period, and that the day before the offense (ABC or Martel?) "he had been described as very agitated and that his girlfriend thought he was on something because he was not acting like himself (Id., 274). The defendant also reported sniffing liquid paper during this period, which alters consciousness and can cause brain damage.

The defendant does not meet the criteria for antisocial personality disorder under the DSM-III because his antisocial behavior started after the age of 15,

and mental retardation generally precludes a diagnosis of antisocial personality (Id., 277). Dr. Carrera's evaluation in 1980 was deficient because he relied primarily on self-reports from the defendant, rather than reports of family members, school records, etc. Dr. Carrera's findings on the limited testing he did (mental age of 12 on Kent Emergency Test, Bender Gestalt result suggesting perceptual motor disturbance) indicated further testing and evaluation was needed (Id., 56).

Based on the statements of defense counsel (Mr. Fox) at the 1984 resentencing, the defendant should have been evaluated for competency. The reports of headaches in particular indicated that evaluation was needed to determine the underlying cause (Id., 290). The defendant is reported to have smeared feces on the wall of his cell prior to trial, which is a very low-level and disturbed kind of behavior. The defendant also set his mattress on fire and plugged the keyhole with soap, such that they had to pass an air hose to the defendant so he could breathe because they could not get the door open. She characterized this as a suicide attempt (Id., 68). Mr. Fox has since told her that the defendant was no use whatsoever at the resentencing, as all the defendant cared about was getting an am/fm radio for his cell. Fox stated the defendant did not know what was going on.

Dr. Carbonell does not believe the defendant was competent at either the 1981 trial or 1984 resentencing. The defendant was poorly motivated, confused and had a poor understanding of the legal proceedings. About all he knew was that he was charged with murder (Id. 297-299). A person who is incompetent can be helped to become competent. As to specific competency criteria, the defendant understands he was charged with murder, and could receive the death penalty or 25

years (Id., 302). The defendant does not have the capacity to understand lesser included offenses, aggravating and mitigating factors, or Florida's bifurcated capital sentencing scheme. The defendant could not understand these because his level of comprehension and verbal recognition is too low, and he cannot handle abstract reasoning (Id., 304). The defendant has only a rudimentary understanding of the adversarial nature of the proceedings. As for I.Q. ranges, 85-100 is considered normal, 70-85 is borderline, and below 70 is in the retarded range. Below 85 used to be considered retarded, but now 70 is the cutoff, with a 5% margin of error such that scores of 65-75 are technically neither retarded nor borderline (Id., 307-309). I.Q. scores for adults are stable over time.

Returning to the competency criteria, the defendant's ability to disclose pertinent facts about the offense is impaired by the defendant's inability to keep the ABC and Martel crimes separate. The defendant could relate to his attorney, although Mr. Fox told her the defendant was no help to him. The defendant did not have an adequate ability to assist his attorney in preparing a defense. Indeed, the defendant did not even want to talk about the case with Mr. Fox at resentencing, rather all he kept talking about was obtaining a radio for his cell (Id., 315, 316). The defendant did not have the capacity to challenge prosecution witnesses because he felt that was his attorney's job, and the defendant did not care what the State's witnesses said. He does have the ability to behave in court. He does not have the ability to testify relevantly, as some of his answers during his testimony were not directly responsive to the questions, and he insisted on testifying (at the original sentencing phase) against his lawyers advice. The defendant had the motivation to assist in his defense but not the ability, and he had problems withstanding the stress of incarceration (as described above). The defendant has functioned pretty well at

Florida State Prison, because retarded persons do well in a structured setting (Id., 319). County jails are much more stressful than state prison.

Dr. Carbonell describes the defendant's two escapes as impulsive acts (and misstates the facts surrounding both).[6] Dr. Carbonell is certain that neither escape involved any planning on the defendant's part (Id., 322, 324). Like Dr. Phillips, Dr. Carbonell does not believe that persons from deprived economic and social backgrounds tend to score lower on intelligence tests, because the tests are designed to be valid for all groups in society (Id., 324-326).

The defendant does not have the ability to understand or knowingly waive his Miranda rights because of his retardation. He would say or do what he thought was expected of him, so he would be liked and accepted. (Id., 327, 328). A person can have "street sense" in terms of having low I.Q. scores together with a higher level of adaptive functioning, however the defendant has a low level of adaptive functioning. According to the defendant, he consumed a little pill, a "black beauty," and some alcohol the day prior to his confession (recapture 12/27/79, confession 12/28/79). (Id., 332).

CROSS-EXAMINATION OF DR. CARBONELL

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6 As for his first escape at his mother's house, she states he was found almost immediately in a shack nearby. As the defendant's suppression hearing testimony shows, he was rearrested three days later at a friend's home (T.T. 1356-1360). The defendant's rearrest occurred the day prior to his confession in the instant case, and the defendant's extremely detailed, coherent (though certainly not articulate) chronology of the events of his recapture is inconsistent (at least according to the State's experts) with any considerable degree of alcohol or drug impairment at that juncture, some 24 hours before his confession. Dr. Carbonell's misunderstanding of the facts of the defendant's second escape are discussed below, during cross-examination.

In regard to the defendant's escape from the Marion County Jail, Dr. Carbonell acknowledged that inmate Tim White reported that the defendant was assisted over the wall by other inmates, though she believes another inmate reported that the defendant made it over on his own. She was then shown the report of inmate Willie Thomas, wherein Thomas related the defendant's plan to hide out with "Snuffy" after the escape until the heat died down, then head to Jacksonville to stay with "his people" there. Dr. Carbonell does not believe this constituted a plan, as it was too simplistic to be called a real plan (Id., 344). She is aware that a plan was employed by the inmates, but there is no evidence the defendant planned it, and the defendant denied to her he planned it. Dr. Carbonell seems to suggest this escape occurred immediately after his arrest, "--especially the day after you, I mean, you turn yourself in and then you jump up to leave" (Id., 345), whereas the escape occurred 6/14/80, six months after his arrest and, more significantly, only five days after his conviction in the initial ABC trial. Dr. Carbonell believes it was ridiculous for the defendant to spend time with relatives in New York and then subsequently Texas, where the FBI managed to locate the defendant six months after his escape. A person with a:

> "higher level of intellect and better adaptive skills would have gone someplace else, found themselves some temporary work and fed themselves. People do that" (Id., at 346).

Dr. Carbonell was then asked a series of questions regarding responses that the defendant gave to the State's experts, Dr. Mutter and Dr. Haber, whose evaluations of the defendant were attended by Dr. Carbonell. (Id., 353-Vol. III, p. 435). These responses are chronicled in depth below, but suffice it to say that Dr. Carbonell did not find any of the defendant's answers to be inconsistent with her diagnosis of mental retardation and poor adaptive functioning. Dr. Carbonell acknowledges that the defendant's 12/28/79 confession (T.T. 845-922)

contains extensive detail, indicating adequate short-term memory (Id., 443). She does not believe that the defendant's decision to seek refuge with relatives in New York and then Texas after his escape was a very rationale thing to do (Id., 447). She stressed how stupid it was for the defendant to show up at the police station after the high speed chase (chase 12/23/79, defendant appeared at station and was arrested for ABC crime 12/24/79) attempting to claim the recorder he had left in the car: "It's just still one of the dumbest things you could do" (Id., 448-450).[7]

At trial there were times when the defendant payed attention, as when his mother testified, and times he did not, as when the prosecutor questioned Dr. Carrera. Dr. Carbonell then read the portion of the defendant's mother's penalty phase testimony where the defendant interrupted and said "She just told you he had gloves on, didn't she?" (T.T. 1203). Dr. Carbonell does not believe the defendant was trying to emphasize that Adell was the shooter, not him, which was the point his mother was trying to make (Id., 454). The defendant was just coming to his mother's defense because the prosecutor was trying to contradict her, and his words do not show he actually understood what his mother was saying (Id., 455-457).

The defendant is capable of being stubborn, as with his insistence on testifying over counsel's objection. This decision is an example of his impulsivity and poor judgment. Retarded people tend to follow the advice of the wrong people and not follow the advice of the right people. During one of the

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[7] Det. Ferguson subsequently testified that the defendant was at the station in an attempt to bond Williams (the driver of the car and co-defendant in the Martel case) out of jail, and the defendant told Dr. Haber he went there to see Williams. But certainly the defendant has done more than a few dumb things in his time, in New York as well as Florida.

ABC trials, when the Judge asked the defendant if he had something to say, the defendant had said "My Dad said Hi" (the defendant's father was and is serving a life sentence for first-degree murder imposed by Judge Swigert). Dr. Carbonell interprets this as an indication the defendant could not appreciate the gravity of the situation. When asked if it could have been a wisecrack, she replied no, because the defendant had told Dr. Haber to tell the judge "I said Hi, and God bless" (Id., 459).

Dr. Carbonell was then shown the defendant's final comments to the court after the initial sentencing (T.T. 1291, "I just want to say this was some ballgame, you know, but I'll be back. That's all I can say. I'll be back." She does not believe the defendant was abstracting, i.e., comparing his trial and sentencing to a ballgame. He may have been referring to his requests to see his mother and other family, made immediately before his final comments. The ballgame comment is "... a childlike thing to say, it's nothing else." When asked about the "I'll be back" comment, she states that it indicates "That he's frustrated. That he's angry. It's like a child. I'll be back. Maybe he means he'll be back to see his family. We don't know what he means." (Id., 464). When asked if the "I'll be back" comment might indicate the defendant's hope and or belief that he would succeed on appeal and be back again for another trial (extra innings, so to speak), she replied "No, Absolutely not."

Dr. Carbonell then reviewed the defendant's responses to his counsel's questioning at the 1984 resentencing. (Id., 465-471). In her opinion the defendant was hopelessly confused and did not even know his attorney's name. As for drug and alcohol use at the time of the offense, she does not believe that his detailed recollection of the crime is inconsistent with a significant level

of impairment (Id., 472). Since the defendant is brain damaged, only a small amount of alcohol would have affected him, "It was simply sort of an added problem he had at that point in time." The defendant did not tell her that he tried to commit suicide when he set his mattress on fire, rather it was characterized as a suicide attempt by a prison official in their report of the incident, and she does not know if this was based on what the defendant told the official.

In the New York case the defendant had a co-defendant named Timothy Bell, who was convicted of the crime. In all the defendant's crimes he has had a co-defendant, which is extremely significant because the defendant is easily dominated. The following insightful exchange then occurred:

> What did the defendant tell me? About what?
>
> Q. About the New York stabbing and his relationship with the co-defendant?
>
> A. I honestly don't remember. I don't have that down.
>
> Q. But that would be --
>
> A. I know he --
>
> Q. -- important --
>
> A. -- went there --
>
> Q. I'm sorry.
>
> A. -- and I know that they robbed her and I know that she was stabbed in the head.
>
> Q. 26 times?
>
> A. That's pretty bad. Yep. I mean, stabbing someone in the head is not very effective.
>
> Q. But if you're stabbing them in the head 26 times it's fairly certain that the knife didn't slip?
>
> A. No. The knife didn't -- I mean, I'm not sure what you mean. The knife didn't slip?

Q. Well, he said that the gun slipped in -- in this case. The knife didn't slip 26 times? He didn't tell you that, did he?

A. No, but I guess there's something if you're -- if -- it shows that he's not -- in hones -- in all honestly not very good at that. I mean, if you want to stab someone, stabbing them 26 times in the head doesn't get you very far, in all honesty. If he was trying to really do something, he could have stabbed the person some place else. Stabbing somebody 26 times in the head is just bizarre.

Q. But it shows that he was intending to kill the person, wouldn't you agree?

A. No, because if you were intending to kill the person, you could have slit their throats, stabbed them in the chest or had them -- stabbed them somewhere that would have killed them, don't you think?

Q. Well, I guess, isn't there a difference --

A. Yeah.

Q. -- between --

A. -- they --

Q. -- pursuing a -- the most cleanest path to doing something and actually trying to do it? I mean, what was -- isn't that grossly inconsistent with someone that's not trying to kill somebody?

A. I honestly don't know.

Q. And you didn't question him on what his relationship was with his co-defendant in New York?

A. No. I didn't

Id., at 481, 482.

The defendant's co-defendant in the ABC case was different from the Martel case. As to both crimes, the defendant said it wasn't something he wanted to do, ". . . it wasn't his style, that he hadn't hurt people ...," that "they came and got him" and he just went along (Id., 483). The defendant told her he confessed because he was threatened and promised a lighter sentence. (Id., 486). Dr. Carbonell acknowledged that the defendant said the same thing at the suppression

hearing, however she again states the defendant does not have the ability to testify in a relevant and useful manner (Id., 487-493).

Dr. Carbonell's information on the defendant's drug use the day of the instant crime is that he was drinking heavily during that period, and when he came home that night his girlfriend Sabrina thought he was on drugs because he acted strange (Id).[8] In response to questioning from the court, Dr. Carbonell opined that if two babies with identical native or biological abilities were placed in homes at the opposite ends of the socioeconomic spectrum, she would not expect to see differences in their I.Q. scores (Id., 500-509). She again stated that the defendant should actually be functioning at a higher level given his I.Q. of 61. A person can be mentally retarded and be competent to stand trial (Id., 510). Dr. Carbonell concluded by addressing the court's questions regarding brain damage (Id., 545-552), and she provides therein a good summary of her previous testimony in this regard.

Vincent O'Hara

O'Hara is an addictionologist who testified concerning the effects of various substances, both short and long term. The ingredient in liquid paper, trichloroethylene, acts initially as a central nervous system stimulant, giving a feeling of euphoria, as well as a loss of coordination. (P.C. Vol. IV, p. 600). This euphoria wears off extremely rapidly, as there is no retention or deposit of the substance in the body. The short term effect of chronic use is memory loss, both short and long term. (Id., 601). Other results are headaches and mood changes, including bouts of depression. These affects will usually wear off

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[8] In her affidavit (P.C. Vol. XXX. 5500). Sabrina states she stopped seeing the defendant in September of 1979, three months prior to the instant crime, when she moved to Tampa.

after use is discontinued, however these effects can be permanent. Liquid paper is almost in a category by itself, and there has been very little research on its long term effects and at present we just don't know its long term effects on the brain. (Id. 603). O'Hara has seen "huffers," clients who inhale solvents, with a particular speech pattern ("It's almost the lips, the tongue and the voice don't quite mesh"). (Id., 605). Mixing alcohol and amphetamines is the worst possible combination and can cause a violent reaction, with the user going totally berserk. O'Hara does not know what the combined effects of liquid paper and alcohol would be. Liquid paper has a very unpredictable high, which is regularly followed by a headache which can be quite violent (Id., 606).

There followed some interesting discussion centering around the reports of the defendant's drug use prior to the offense, and how long the defendant had been out of prison prior to the offense (Id., 613-628). It was finally agreed that the defendant was incarcerated in 1976 and released in June (actually July 2nd, P.C. 5008) of 1979, six months before the instant crime (Id., 628), with the defendant's date of birth 5/25/57. It was then clarified that the defendant's statements to Dr. Krop (see below) concerning daily ingestion of a fifth of liquor plus 12 beers every day, apparently referred to the period 1974-1976, prior to his 1976 incarceration (Id., 629-633). The defendant's description of "walking on jello" when using liquid paper is a typical description of the high from inhalants (Id., 636). The trial court asked defense counsel what the evidence of the defendant's drug and alcohol use was, and counsel stated it was documented by the defendant's self-reports to the three original doctors (Carrera, Natal, Gonzalez), the defendant's self-reports to Dr. Krop (whose report was relied on by Drs. Phillips and Carbonell), and the affidavits of the defendant's girlfriend in 1979, Sabrina, and his cousin Shirley (Id., 641, 42).

Shirley's affidavit (P.C. 3517) has no details, as she never saw him use drugs or alcohol. The same is true of Sabrina, who last saw the defendant in September 1979 (P.C. 5500).

In the six month period June 1979 - December 1979, it would be "unusual" if the defendant was able to build a tolerance to a daily consumption of a fifth of liquor plus two six packs, plus other drugs. Alcohol kills brain cells throughout the brain, i.e. it causes brain damage (Id., 649, 50). Alcohol affects memory differently in some people than others. A person can have a total memory blackout or partial memory loss. Liquid paper impairs both long and short term memory (Id., 659). The brain damage caused by alcoholism is permanent and does not recover over time (Id., 664). It takes 5 to 15 years for full scale alcoholism to develop. Even with the loss of billions of brain cells, an alcoholic can continue to function at a high intellectual level, though eventually the damage will literally age the brain (Id., 665, 66).

Freddie Lee Oats (defendant's brother)

He and the defendant were raised by their aunt and uncle on a small farm in Palatka, Florida, and while growing up they believed their aunt and uncle were their real parents (P.C. Vol. IV, 679). Freddie and the defendant ended up in the same class after the defendant repeated the second grade. The defendant did poorly in school and was a slow learner. When the defendant was given instructions to do chores, he wouldn't follow directions and would be punished by their aunt (Id., 682). Sometimes the defendant would sit in a chair rocking back and forth, talking to himself, then he would snap out of it. The rocking started in the fifth grade, after they were taken to the principle's office and introduced to their real parents. The defendant wanted to go live with his real

parents, but their aunt wouldn't let him go (Id., 686). The defendant was a good hunter and fisherman, but his aunt would keep him at home doing housework while Freddie and their uncle went hunting and fishing.

Freddie and the defendant began stealing beer from their uncle when the defendant was eight. One time they got extremely sick drinking their uncle's homemade brew, and he declared their vomiting to be sufficient punishment (Id., 688). This was when the defendant was thirteen. In 1972 when the defendant was fourteen or fifteen (D.O.B. 5/25/57), the defendant ate some cake he wasn't supposed to, and before his aunt could punish him the defendant escaped by removing the bathroom window. The defendant stayed in the woods for a couple days and then rode his bicycle from Palatka to Ocala, where he began living with his real mother (Id., 689). Freddie saw the defendant again in 1976, at their father's logging business, at which time he taught the defendant to operate the logging machine. He visited the defendant once during his initial 3 1/2/ year incarceration, and then spent a little time with the defendant after his (July 1979) release. At that time the defendant was very hyper, like he was on drugs, although he didn't actually see the defendant doing drugs. He spent three days with the defendant, during which the defendant would leave, and when he returned he would act like a different person. When they talked the defendant never seemed to finish what he was saying (Id., 693). When the defendant didn't do what he was told, their aunt would beat him with fanbelts, and sometimes the punishments would last 2-3 weeks (Id., 294).

During the three days Freddie and the defendant were together after the defendant's July 1979 release, he and the defendant drank beer and smoked some marijuana. On one occasion they drank two-three six packs in thirty minutes

(Id., 718), and the defendant didn't handle it very well, as "... he was really tore up when he drunk those beers." (Id., 723). According to Freddie, the only reason the defendant kept passing from one grade to the next was because Freddie helped the defendant with his school work (Id., 731). The teachers wanted to put him in a special class, but their aunt said no because she believed the defendant could do the work if he tried. During class the defendant would sometimes sit in the corner and rock (Id., 734). The defendant was pretty good at doing housework, and sometimes did it without being asked. When he was given instructions and didn't follow them, he would be severely punished, sometimes so bad he had to stay home from school (Id., 735). She hit him in the head with the back of a cord on one occasion and opened a big cut. Another time the defendant hurt his head when he fell out of their treehouse. The defendant was the only one of the children to get severe punishment. (Id., 737).

On cross-examination Freddie was asked about the assistance he gave the defendant in school. Freddie stated that he was in about half of the defendant's classes, but that he helped the defendant with his homework in all his classes. Freddie was asked about the defendant's seventh grade performance, and specifically the "B" in first semester English.[9] Freddie said they had all six classes together that year and the reason the defendant got some decent grades was that:

> Q. In other words, like when you were in there, did you give him the answers during the test, or did you like at home help him with his English?
>
> A. I gave him the answers in class. He would like to sit right behind me and he would look over my head and copy what I wrote down.

---

[9] The defendant's school records are at P.C. 3498.

Q. And he did that in Science, also?

A. We had one class together. We were in that same room and took six classes in that one room.

Id. at 741.

Freddie continued to make a mockery of Dr. Phillips and Dr. Carbonell's assessment that the defendant was incapable of deliberate deception:

Q. Well, so, in other words, when he got a "B" in the first semester, he got a "B" in English and a "C" in Math and a "B" in Science, are you saying that he didn't do -- when he took the tests he didn't do any of his own work?

He always copied everything from you?

A. If he didn't copy it from me, he copied from someone else. He did not do it. He copied. He would always sit by somebody. If he didn't sit by me, if he was in another class, he sat by somebody else. He knew what they were doing and copied it.

Q. And the teachers never suspected anything?

A. If I wasn't in the class there with him, I don't know that part. But in our class they never suspected anything because I would always sit in a certain position where he would see the paper.

Q. Now, you only were in about half of his classes until the tenth grade?

A. Probably more than half.

Q. And he was cheating in all of those classes and not doing any of his own work, and he never got caught?

A. That's right. If he didn't do his work, he wasn't at school that day or he cheated to do his work.

Id., at 743.

Freddie always did the defendant's homework even when he wasn't in the defendant's class. As with the cheating on the in-class tests, the defendant was never caught except on one occasion during a semester final exam (Id., 743-745). In the ninth and tenth grades (when the defendant was receiving D's and F's) the

defendant was still copying off Freddie, who apparently was not adverse to a good laugh at the defendant's expense:

> Q. Did you keep helping him in high school, or did you stop helping him?
>
> A. Yes. We helped him all through high school, all the way up to tenth grade.
>
> Q. So you had classes in tenth grade and in ninth grade together?
>
> A. Yes.
>
> Q. How did you do in ninth and tenth grade?
>
> A. That was C's.
>
> Q. Well, if he was copying off of you, how come he didn't get C's?
>
> A. Sometimes I would write the answers up and erase it and put something different down. You know -- sometimes you got to help yourself.
>
> Q. So you kind of were sabotaging him in the ninth and tenth --
>
> MR. NOLAS: Your Honor, objection to the word "sabotage."
>
> A. I wasn't sabotaging him. I would just sometimes pull a joke on him -- you know.
>
> MR. BARREIRA: Nothing further.
>
> Id., at 751.

Ronald Fox (Defendant's Trial Co-Counsel

Fox was the defendant's co-counsel at the instant trial and also represented the defendant at the ABC retrial in 1982 and the 1984 resentencing (P.C. Vol. V, 761). Fox has always had concerns about the defendant's competency. The defendant never wanted to talk about the case, but rather would talk about unrelated matters (2d. 764, 65). The defendant wasn't interested in lesser offenses, rather he always viewed it as an "all or nothing" thing. The defendant

knew he was on trial for murder and could get the death penalty and that's about it. The defendant was more interested in his personal life than the charges. (Id. 767). The defendant knew the prosecutors and police were the "bad guy" and that his attorneys were the "good guys," but he did not have the ability to contest the State's evidence or present his own. The defendant viewed the latter as the job of his lawyers. (Id., 768). The defendant just wasn't helpful in providing information, though Fox cannot tell if it was because he couldn't or just wouldn't. The defendant just wasn't interested in the things Fox thought were important, rather he would say "Well, you know, you guys are the lawyers, you know what to do, so take care of it." (Id., 769).

The defendant was always polite and friendly. Fox would however place him "at the very bottom" of his client list for level of competency. The defendant would not tell Fox anything about the crimes. The defendant did not see his own role as being an active one, rather it was to sit back, pat his lawyers on the back and say, "Now, go get them" (Id., at 771). The defendant was a total nonparticipant in planning trial strategy. It's just like he wasn't there. The defendant did not have the ability to challenge prosecution witnesses because he refused to tell his lawyers what happened (Id., 773). The defendant was more interested in talking to his family amongst the spectators than listening to the evidence, and he really didn't care how that would look to the jury:

> A. Well, yes, I think it registered to this extent. He would say -- we would say, "Well, Sonny, that may not look good to the jury, they don't know what you're doing; they may think you're laughing about this lady being killed or something."
>
> And he is like: "Oh, no, no, I'm just talking to my people back here, I'm just talking to them."
>
> And we're saying, well -- you know -- "Maybe you shouldn't do that because of the adverse effect."

> He is like: "Well, I appreciate that, but, no, I would rather talk to them."

Id. at 775.

Fox does not believe the defendant could testify relevantly, which is why he did not want him to testify at the initial sentencing phase, because he could not control what the defendant would say (Id., 776). The defendant wanted to help himself but couldn't. The defendant also did not withstand the stress of incarceration well, and Fox cited the mattress fire incident described by Dr. Carbonell above. Mr. Fox believes the defendant could compete intellectually with his eight month old daughter, but that his six year old son would blow the defendant away.[10] After sentence was imposed and Judge Swigert asked the defendant if he had anything to say, the defendant grabbed the microphone and turned to the audience as if to make a speech, and the judge had to jump up and tell the defendant not to make a speech to the audience. Mr. Fox, unlike the defense experts, knew what the defendant's "some ballgame, I'll be back" final comments were all about:

> It struck the Judge sort of in a funny way. We had told him that if he got convicted it was a long process and there would be other courts and things could change; that this Court's decision was not the final -- was not the final say.
>
> And that's what we took his expression to be, that this was not the end of it.

Id., at 787.

At the 1984 resentencing, when he told the judge the defendant was insane, he meant to say the defendant was not legally competent to proceed. All the defendant cared about was getting a certain model Sony am/fm radio.

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[10] Hopefully for Mr. Fox's son's sake, the Final Jeopardy question will not deal with how to escape from police custody or obtain money late at night from complete strangers.

> All he wanted to talk about was -- he was real happy to see me. Again, very friendly. Continued to be very cordial. He wanted to know if I could get him a Sony am/fm cassette player. He had the exact model down. He knew how much it was. It was a good radio and it was lots of money.
>
> I said, "Sure, Sonny, we'll get that taken care of. Now, let's talk about the case."
>
> Well, there was no talking about the case. He said, "You get me the radio and I'll see you in court." And that's it. "You go do what you do."
>
> Id., at 800.

The defendant's other big concerns were "Do I have any money in the canteen, can you get me some cigarettes, can I get some visitors" (Id, 801). Mr. Fox was then asked a series of questions concerning why he did or did not do certain things relating to the two penalty phases (Id., 801-818). This segment is liberally quoted in the defendant's brief, and suffice it to say that according to Mr. Fox, he did not have a tactical or strategic reason for doing or not doing anything.

Interestingly, Mr. Fox did not see any deterioration in the defendant's mental state between the 1981 trial and 1984 resentencing: "It was the same sort of thing -- not really responsive to -- he is not responsive to what I'm interested in, and maybe I was not responsive to what he was interested in (Id., 818, 819). This corresponds to his assertion to the court in 1984 that the defendant had been insane since the very beginning. (RS. 1797). When asked if the defendant could have knowingly and voluntarily waived his Miranda rights, Fox responded that he still believed the confession was improperly induced (Id. 821). Mr. Fox did not have time to work on the penalty phase during trial (P.C. Vol. VI, 1009), and relied on Dr. Carrera's report for mental health mitigation. His failure to make Caldwell or Booth based objections was due to his ignorance of the law. (Id., 1012, 1014).

On cross-examination defense counsel revealed an exchange which certainly sheds light on the defendant's mental state at the time of the offense:

> Q. So you don't remember him ever telling you that, that the gun simply misfired as opposed to him intentionally pulling the trigger?
>
> A. Yes, there was some discussion about a gun accidentally misfiring; you're absolutely correct.
>
> Q. And what else did he tell you?
>
> A. I'm not certain this is responsive to your question but it's something he told me about the incident, so I will throw it out for what it's worth. Had a discussion with him in this vein:
>
> > "Why would you want to shoot a Jiffy Store clerk and bring all of that added law enforcement down on you and all of this heat on you and get you in all this trouble when you're only going to get 50 or a hundred dollars? That doesn't make sense to me. Why would you do that?"
> >
> > And his response, which always sticks with me is: "Because that's what you're supposed to do, is shoot the mother fucker."

Id., at 1079.

As for the planning for the initial penalty phase, he is not sure if the defendant told Fox to call certain family members, but he did tell Fox what each family member could testify to and where they were located.[11]

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[11] During the defendant's penalty phase testimony, his answers on cross-examination are indicative of his interest in this regard:

> Q. Okay. Where is your aunt right now?
>
> A. I couldn't say. I'm --
>
> Q. Is she still over at Palatka?
>
> A. Oh, okay. I guess she is still there. I called her last night, the same phone number.
>
> Q. You talked to her last night?

At some point the defendant told Fox that he could not get a fair deal in Marion County, although Fox is not sure if the defendant was referring specifically to Judge Swigert (Id., 1084). Mr. Fox was then asked by the defendant's counsel about the defendant's above quoted "murder is part of the robbery" comment:

A. Yeah, I talked to her.

Q. Where is your uncle?

A. I guess -- I don't know. I haven't seen him since '73.

Q. But you talked to your aunt last night.

A. I talked to my aunt.

Q. Is that the one that beat you?

A. Yeah.

Q. Why isn't she over here today?

A. That was what I was trying to get her to do. I was asking her on the phone to come over here, but scared -- she probably scared that something probably would happen to her; and she asked me, how was I doing; and I told her, well, it looked pretty bad and stuff, but -- and she asked me why I didn't call her earlier to come; and she told me to call her. I was thinking about calling her last week when everything started, for her to be here, and I didn't think it was really, you know, no point in me calling her, due to the fact that she did the scar on my head.

Q. You didn't think it was important to have her over here?

A. No.

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A. Well, yes. That's one of the things that concerned me or peaked my interest about his mental state, because we were just asking the sort of logical kind of question "why get yourself in all this trouble for 50 bucks."

And his response, he was incredulous, like "what a silly question," and responded like: "Well, that's what you do." That's if you're doing this offense of armed robbery, it's almost as if -- he, of course, didn't use these words, but as if that were an essential element of the offense; that's what you're supposed to do by definition.

Q. And you were asking him about an armed robbery at the time?

A. Yes.

Q. Did he have the concept of murder, homicide, that type of thing, when you were talking to him?

A. Well, I interpreted his answer to mean that murder is just a part of the armed robbery; that's sort of what makes it armed robbery or that's how you do armed robbery or that was his understanding and definition of armed robbery.

Id at 1105, 06.

Fox concluded from the defendant's attitude that he did not really understand that the murder and robbery were separate crimes, and that it was "a very simplistic view of the whole process." (Id., 1108). At the time of trial the defendant definitely felt he would not be treated fairly (Id., 111).

Dr. Frank Carrera

Dr. Carrera evaluated the defendant 2/19/80 for competency and insanity in both the ABC and instant case (his original report is at P.C. Vol. XXVIII, 5252). In preparing for the initial penalty phase, at which he testified for the defense, he relied solely on the history provided by the defendant (Id., 851). Mr. Fox never asked him about the statutory mental health mitigating factors. Had he been asked, he would have found both factors applicable (Id., 853). Dr. Carrera cannot state if the defendant was competent at the 1984 resentencing because he did not examine him at that time (Id., 858).

Dr. Carrera was then questioned about the eleven point McGarry competency criteria. He states that he did not specifically question the defendant on each of the eleven criteria because the McGarry criteria were not adopted in Florida until after his examination. He cannot speculate on how the defendant would have responded if Carrera had questioned him as to the specific McGarry criteria (Id., 860). Dr. Carrera had performed 200-300 competency examinations prior to the instant one. Dr. Carrera is satisfied that he conducted a professionally competent examination, and he was satisfied that he reached the correct findings then and he is still satisfied that his opinions then were correct (Id., 874). After some back and forth questioning from the parties and court, it was finally settled that Dr. Carrera is confident, despite the wealth of new data provided by defendant's 3.850 counsel, that the defendant was competent in 1980 under the criteria he employed at the time. Since he did not specifically ask the defendant about all the areas contained in the McGarry 11-point test, he cannot say how the defendant would have done on them (Id., 876-79).

NOTE: DR. CARRERA IS AT THIS POINT CALLED AS A STATE'S WITNESS.

At the time of his original evaluation, the defendant told him of the defendant's history of physical abuse, bedwetting, head injury, and animal cruelty, and these self-reports are consistent with the reports recently provided by CCR. Dr. Carrera then summarized his professional experience, which included a twenty year practice in forensic psychology in Florida, 1964-1984 (Id., 883). In his opinion, the examinations of Drs. Natal and Gonzalez were professionally adequate. Turning to the 1980 interview of the defendant, Dr. Carrera employed his notes to reveal that the defendant unequivocally denied committing the murder, and unequivocally stated he only had one beer and no drugs the day the murder occurred. The defendant also had a reason for giving his statement to the

police (Id., 886). Dr. Carrera asked the defendant numerous questions relating to the defendant's competency under the Dusky standard (Id., 887):

> What do your notes reflect about your questioning concerning the Duskie standard?
>
> A. These were the questions -- well, this is the way I looked at it. First of all, Mr. Oats was able to give me a fairly close date as far as his arrest.
>
> He could identify what the charges were against him and identify the victim.
>
> MR. NOLAS: Doctor, I hate to interrupt. I don't -- could you give us the actual answers, if you have them?
>
> THE WITNESS: Okay. That he was arrested on December 28th, 1979, which is off, but it's the right month. The charges were aggravated battery and murder. The victim was a white woman in her early fifties. It occurred sometime early December, 1979, maybe around the 10th. It was on a Sunday night. It occurred at the Jiffy Store on the outskirts of Ocala, and the victim was a clerk at the store.
>
> The co-defendant was Adell Williams, a 22-year-old black male, and an 18-year-old black male whom he did not know. The weapon was a 22-caliber pistol. He denied any alcohol except for that beer.
>
> I went through with him on the day of the alleged offense. He was able to give me a fairly detailed report that he got up at 11:00 o'clock at his mother's house that day, and both his mother and two sisters were there -- Shirley, eighteen; and a 16-year-old.
>
> He had no breakfast. Drank one beer. Laid back down; got up and then sat on the front porch for about an hour. Then went to his girlfriend's house. Left there between 1:00 - 1:30. Walked there. Stayed there about thirty minutes. She wasn't there, so he walked back to his mother's house. He sat around and talked to his mother and sisters and watched T.V.
>
> He ate dinner around 6:00 p.m. Went back to the porch with a cassette player. Around 7:30, he came back into the house, watched television and played with niece and nephews.
>
> After supper, he said, "So much happened, I get asked about it every day, I get mixed up. I didn't shoot the woman. I told them I did. I had a reason. They hadn't caught the other guys and he threatened someone in my family. Who shot? It was Adell. Adell said he robbed the store. I told him I didn't want to go with him. Adell, he told me exactly what happened. I saw Adell in the car when I went to get the chick. He had an

may. I wasn't there when the woman got killed. I don't want to talk about it.

So he was able to give a story that was relatively detailed about what happened that day. He denied the crime.

BY MR. BARREIRA:

Q. Do you have any reason to think that he couldn't relate that to this attorney?

A. No. Then he was able to give me background history concerning his prior arrests. His personal history, including his history of reported abuses. His runaways. His schooling. His problems with his school. His problems with work. The reason he was rejected by the Military. A fairly detailed medical history, and a history of alcohol and drug abuse as well as psychiatric history.

Id. at 887-890.

As for the defendant's reports of his drug and alcohol history, the defendant told him that he begin drinking alcohol regularly when he was 17, and his pattern was a fifth of vodka per week. The defendant was in prison from 18 to 21, and when he was released (July 1979), he began drinking a fifth of vodka plus six or more beers per day, which he continued until the time of his arrest. During this period the alcohol would get him high but not drunk. He thought he got the D.T.'s once from drinking wine. The defendant also said that "... he would just get dizzy and see stars and nearly faint after drinking half a pint of vodka" (Id., 892). Dr. Carrera acknowledged that this latter statement is grossly inconsistent with the defendant's claims of drinking a fifth of vodka and six or more beers per day. The defendant did not tell Dr. Carrera anything about inhaling liquid paper or solvents. (Id., 895).

As to the specific competency criteria, Dr. Carrera offered the following critical testimony:

Q. Doctor, let's get to the part, the interview where you asked him about court.

A. Yes.

Q. He had numerous contacts with the criminal justice system before this, didn't he?

A. Yes.

Q. And that can be important because -- or can that be important to a defendant's understanding of the legal system?

A. Yes.

Q. Now, what specifically -- what kinds of questions and responses did you get when you questioned him about the legal system, and what he was facing?

A. All right. I asked him first whether he knew what a jury was. And he said that they are people who give an opinion.

I asked him what the judge did. And he said that the judge gives you time.

I asked him what the defense attorney did, and he said that "He helps me."

I asked him what the prosecutor or state attorney did. And he said, "He is against me."

I asked him what the maximum sentence may be if he were found guilty. And he said, "The chair or life."

I asked him what the name of his attorney --

Q. He definitely said "the chair or life"?

A. Yes.

Q. All right.

A. I asked him the name of his attorney. And he said that it was Mr. Fox, and that he was a public defender.

I asked him what "guilty" meant. And he said, "You are the one."

And I asked him what "not guilty" meant.

And he said, "You aren't the one."

I asked -- I said, "Who decides whether he is guilty or not guilty?" And he said that it was the judge and the jury.

Q. Did he appear to be, in your assessment, confused about what was going to happen to him?

A. No.

Id. at 895-897.

Dr. Carrera then made some interesting observations on mental retardation and I.Q. testing. The 70 cutoff score is an administratively selected point based on statistical data. A person's performance on the test is definitely affected by their motivation. If a person did not enjoy the mental exercise involved in the lengthy test-taking procedure, it would effect their performance (Id., 898). Based on his interactions with the defendant, he would calculate the defendant's actual intelligence level to fall in the 70's range. It is "not rare" for a person's native intelligence to be higher than test scores would indicate (Id., 899).

Returning to the defendant's drug and alcohol use, there is no independent evidence of his use the day of the offense. The defendant told him he had one beer and no drugs that day, and other than that it is impossible to speculate on his actual use (Id, 904, 05). Dr. Carrera's finding of the two statutory mitigating factors is based on the defendant's history of emotional and physical abuse, repeated failure in school and employment, poor family network, impulse disorder, and intellectual and cognitive deficiencies, and history of drug abuse, regardless of his level of intoxication at the time of the crime (Id. 907), which is unknown.

Dr. Carrera was then shown the defendant's "She just said he had gloves on, didn't she" outburst during his mother's penalty phase testimony. The words used by the defendant indicated he was alert and was trying to underscore the fact

that the presence of his fingerprints didn't mean he did the shooting, and the timing also suggested he was coming to his mother's defense. It is consistent with his finding of competence (Id., 918, 19). The level of detail in the defendant's confession is inconsistent with a significant level of intoxication during the offense (Id., 921). As for brain damage, his evaluation suggested that the defendant did have an organic component, but organicity does not equate with incompetency.

Dr. Carrera is aware of the defendant's stabbing attack on the store clerk in New York during a robbery. Assuming the charges are true, this shows a pattern, beginning in the winter of 1979, "... of aggressive violent attacks, assaults on persons for reasons of obtaining money when combined with his history of violence to animals and his prior criminal behavior, it is clear the defendant has antisocial traits." There is no question about that (Id., 924). Dr. Carrera was then asked about the DSM-III criteria for antisocial personality disorder, and specifically its requirement that a certain number of antisocial behaviors must occur before the cutoff age of 15 for the diagnosis to be made:

> A. The age of fifteen is similar to the I.Q. of seventy that creates a sort of cutoff, and it's based on either clinical experience or statistics. It represents a consensus of thought by the American Psychiatric Association at that time, the people who put it together.
>
> But it in no way represents a hundred percent unanimous belief from the psychiatric or mental health professions. So there are other --
>
> Id., at 930.

In Dr. Carrera's opinion, antisocial behavior does not have to begin in the childhood years, although it might, and he certainly would not characterize Dr. Natal's finding of antisocial personality as grossly inaccurate (as did the defendant's experts) (Id., 930, 31). As to the relationship between I.Q. test scores and environmental factors, he states:

A. What influences the test scores?

Q. Yes. You mentioned there are others in social economic standards. What other factors influence test scores, other than native intelligence?

A. A level of intelligence. Schooling. Classroom experience. Whether they have specific learning disabilities or not. Family attitudes toward learning. Indifferent, or lack of it in the learning -- in the child's home and in the community. Value systems of the community. And the subculture the person is in.

A number of different variables affect learning, and therefore, testimony.

Q. Is there a difference between one's fund of knowledge and one's ability to reason?

A. Yes.

Q. Would one's fund of knowledge affect one's scores on a standardized test?

A. Yes.

Id. at 932, 933.

As for the defendant's "It's been some ballgame, but I'll be back" final comment, Dr. Carrera believes the defendant was analogizing his trial to a ballgame, which is an example of abstract thinking (Id., 935). As for the "ill be back," Dr. Carrera's guess would be that the defendant intends to appeal what the judge has just done. During the interview he gave the defendant a make believe address, and his immediate recall of the address was somewhat impaired, and his short-term recall of the address after ten minutes was significantly impaired. As for the defendant's orientation and fund of knowledge:

> He was oriented in the sense that he knew the year, the month, the day of the week, the town he was in, the place he was in, and the person who was interviewing him.
>
> He missed the date only by four days. So he, in my opinion, it was -- well, he was well-oriented. His fund of information was fair. He knew the capital of Florida. He did not know the governor's name, but he did know where the capital of the United States was.

> He eventually got around to saying where the White House was located. He initially thought it may be Tampa or Tallahassee. But then decided that it was Washington. He was able to name four presidents: the current one, Carter, Ford, and Nixon -- going back in sequence. Then he missed Eisenhower. He knew Kennedy. Felt that Kennedy has been his brother -- but this is a common error in these types of examinations.
>
> He also appeared to remember the presidents such as George Washington, Abraham Lincoln, and Roosevelt. This information was fair and different from what the later exam showed. I asked him to multiply for me two times three, and then that product by two, and so forth. He was able to correctly go two times three is six, two times six is twelve. He missed two times twelve.

Id. at 940, 941.

Dr. Carrera then explained that his finding of a mental age of 12 on the Kent Emergency Test means that the defendant's educational level was that of an average 12 year old (Id, 943). The interview did reveal signs of possible organicity. Although further neurological testing would have been useful, it was not necessary for the purpose of determining competency (Id., 945). The results of I.Q. tests would also be useful, but again not necessary to his determination of competence (Id. 947). Although Dr. Carrera is not an expert on the WAIS-R I.Q. test given to the defendant, he reasserted that the environmental factors he listed do affect the results: "Yes, but that - all of those factors affects I.Q. test" (Id., 957). The defendant gave Dr. Carrera a coherent medical history.[12][13]

12

> Q. You indicated that Mr. Oats gave you a detailed medical history. What were the details of that?
>
> A. He said that he had asthma since he was twelve years old and was on no medication currently, at the time of the examination in 1980, for asthma.
>
> He thought he had had a little heart attack because he had pain in his chest like a needle sticking him, but he didn't tell nobody.

Dr. Carrera again stated he believes the defendant was competent in 1980 under the six point competency criteria then in effect. He simply cannot speculate how the defendant would have answered as to the additional criteria in the eleven point McGarry criteria (Id., 961, 62). As for the "new" criteria of 1) ability to relate to attorney, and 2) ability to assist attorney in preparing defense, the results of the interview are consistent with defendant having those abilities. Dr. Carrera cannot speculate on 3) capacity to realistically challenge prosecution witnesses, and 4) ability to manifest appropriate courtroom behavior, because these would require specific questioning. As to 5) capacity to testify relevantly, the defendant was able to give Dr. Carrera a coherent version of events for the day of the crime. Dr. Carrera cannot speculate on 6) The

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> A couple of times he fell out and fainted when he was with the family in Palatka. This occurred from working out in the sun.
>
> Then he had V. D., gonorrhea, on one occasion, which was treated. He had "crabs" while he was in jail. He denied unconsciousness, but he said he was close to it with the torture in Palatka, when he heard buzzing sounds and saw stars.
>
> He talked about headaches which he described as having pain primarily in the temple and radiating to the scar on his head. He said that lying down helped. He would try to relax his head and neck. He took Darvocet, which helped.
>
> He reported being enuretic -- that is bedwetting -- until thirteen years of age. he talked about fire-setting, setting fire to the woods one time when he was eleven years old and blowing up aerosol cans. He talked about animal cruelty and went into specifics about that.
>
> He gave me an alcohol and substance abuse history.
>
> Id., at 958, 59.[13]

13

defendant's motivation to help himself in the legal process. There were indications that the defendant had some problems with his ability to withstand stress prior to trial (Id., 966-970). The specific criteria listed in Fla.R.Crim.P. 3.211 (2) are important guideposts, but they are not the only relevant criteria, and in this case Dr. Carrera considered all the results of the interview in determining the defendant to be competent (Id., 971, 972).

Dr. Carrera again emphasized that the defendant's 12 year old range on the Kent Emergency Test did not mean the defendant acted or functioned like a 12-year- old, rather it meant that "In terms of school type information," his store of "information and knowledge" is consummate with an average 12 year old (Id., 973, 974). Under questioning by the Court, Dr. Carrera again stated his reasons for finding the two statutory mental health mitigators (Id, 984-1003).

STATE'S CASE

Luis Cajina

Cajina is a medical technician at Florida State Prison, who saw the defendant for the year and half prior to the hearing. Cajina would question the defendant about his health as he made his rounds on death row. Usually they would exchange greetings and the defendant would state he was okay. He has had several conversations with the defendant, and the defendant has always seemed to make sense: "He was a normal person to me. I mean he never answered me in an inappropriate manner" (Id., 838, 39). Cajina has dealt with inmates labeled mentally retarded, and when asked how the defendant compared to them, he stressed that he was not a specialist, "However, to me-- you know -- he behaved like a normal person" (Id. 841). The defendant was not a big talker, and did not have any disciplinary problems while Cajina has known him (Id., 844). The defendant had no specific health problems Cajina could recall. He usually exercised or

watched T.V. The defendant did ask for Tylenol for a headache on occasion (Id., 848).

Sgt. Craig Falkenburg

Sgt. Falkenburg has had regular contact with the defendant over the past five years at Florida State prison. The defendant would write letters, watch T.V., talk to other inmates (Id., 1126). In an event especially relevant to the defendant's competency, Falkenburg stated that a month ago he had passed by the defendant, who squinted to read Falkenburg's nameplate:

> BY MR. BARREIRA:
>
> Q. What came-up? What are you talking about?
>
> A. He mentioned my -- he identified my name tag and squinted and saw my name, and it seemed that something had clicked inside of him, and he mentioned the court proceedings here. He stated, "You really don't know anything about me," and I said, "I can't say anything to you at this point."

Id. at 1128

When he was asked about the defendant's attitude, he stated:

> Q. How did you find Mr. Oats' attitude?
>
> A. Ah -- the best way I can described it as being hostile with a lid on it. It seems that if it doesn't happen when he wants it to happen, than there's a little -- a little steam comes out. He get a little hotter. If things don't go his way, what he wants to do, then he does get very angry.

Id. at 1130.

On cross-examination he again described his recent encounter with the defendant:

> Q. What is it exactly that Mr. Oats told you on that occasion?
>
> A. That my name was Falkenberg.
>
> Q. And?

A. He said, "I know you. You have to go down to" -- something to the effect of, "You have to go down to Marion County," or "you're testifying against me."

Q. Do you remember specifically what he told you?

A. Not actually specifically, sir, no.

Q. You don't remember the actual words he used?

A. No, sir, I don't.

Q. But it was something to the effect of you're testifying against me or you have to go testify?

A. Something to that effect, sir.

Q. You had given a statement before that?

A. Yes, sir.

Id. at 1134.

The defendant's first reaction at this encounter was recognition, followed by concern and then agitation (Id., 136). Falkenburg had not seen the defendant for nine months prior to this chance encounter, one which took a nasty turn for the worse:

And you told him you can't talk about court at all?

A. Yes, sir.

Q. Did he try to say anything to you after that?

A. Yes, sir.

Q. What was it then?

A. He became agitated and started saying that I didn't know nothing. I couldn't go down there because I don't know nothing or I didn't know anything or something to that effect.

Q. Do you remember what his specific words were?

A. What do you know about me? You don't know anything about me, at which point I turned around and walked off.

Q. And so you're saying he was agitated because he said that you didn't know anything about him?

A. Right, as I was walking away, he was getting louder.

Q. Was he disrespectful?

A. No, sir.

Q. Was he upset?

A. Yes, sir.

Q. And during this time that he was upset, he said you didn't know anything about him?

A. Yes, sir.

Q. Do you know what that meant?

A. He continued it for approximately a minute and-a-half, repeating it. Even after I got back to the quarterdeck he was yelling out.

Id. at 1138, 39.

Dr. Charles Mutter

Dr. Mutter is a psychiatrist and current member of the Florida Board of Bar Examiners (P.C. Vol. VII, 1158), who has evaluated some 7,000 criminal defendant's for competency (Id, 1162). He examined the defendant July 17, 1989, after having reviewed various records, reports and transcripts provided by the State (Id., 1207-09). Dr. Mutter also reviewed the 3.850 testimony of Dr. Phillips, and as a result did research on the effects of trichloroethylene, the active ingredient in liquid paper. After reading the most current toxicological literature and consulting a toxicologist, Dr. Mutter stated that there is no evidence that this chemical, which is an organic solvent, produces brain damage, though it can cause severe liver damage and gastrointestinal disorders (Id. 1210, 11).

Doctor Mutter described the purpose and scope of a competency exam and the eleven specific criteria, which recently was reduced to 6. He described his interview of the defendant and summarized his findings (Id., 1215-1218). The

defendant was able to respond rationally and reasonably to questions concerning the specific competency criteria, and "in general he was able to understand the questions and answer them in a pretty rational and reasonable way so that he appeared to be on point." There were some concrete responses and others that were more abstract. There were no signs of a major mental disorder or significant organic disfunction, although he does have intellectual limits and language deficiencies (Id).

Dr. Mutter then explained the various types of brain damage and their symptoms. A person with brain damage can certainly be competent, depending upon the area damaged and its extent (Id., 1220). As to the defendant, there appears to be an organic component, as evidenced by his learning disorder and language deficits, "But he does understand what's going on. And in terms of competency to know a legal proceeding, this is intact" (Id., at 1221, 22), despite his intellectual impairments. Assuming that the defendant was not under the influence of drugs or alcohol during the trial proceedings, the defendant's capacities in terms of competency would be the same today as in 1981, because brain damage is a static condition (Id., 1223, 24), unlike major mental illnesses where the patient's condition fluctuates dramatically over time. There is nothing in the records or during the evaluation to indicate the defendant has such an illness (Id., 1226-1230).

Dr. Mutter was then asked if I.Q. scores are related to competency:

> A. Well, it's not. It really deals with the individual's intellectual potential, his capacity to understand and process information in terms of school settings, in some areas social settings, and certain educational levels and potentials. But a person can have a low score and still be competent.

Id. at 1233.

Dr. Mutter explained that although the defendant scored 57 and 61 on the WAIS-R conducted by Drs. Krop and Carbonell, a person can score lower than his actual abilities due to a host of factors, including motivation, and the defendant is one such person:

> Clinically though, he is -- he knows language, he knows vocabulary, and he is able to process material that in a clinical basis would indicate that he is smarter than what he was showing on the tests.

Id. at 1236.

In terms of actual ability, he would "... put him in a borderline to very mild retarded at worst." (Id). Dr. Mutter then discussed each of the eleven competency criteria (formally listed in Rule 3.211, now reduced to six) and found that at the time of trial the defendant had adequate capacity and/or ability on each one. He relied in part on the transcript of the defendant's suppression hearing and penalty phase testimony as well as his clinical evaluation and the defendant's responses therein (Id., 1237-1246). Dr. Mutter also believes the defendant was competent to be resentenced in 1984, and that he had the capacity to knowingly and intelligently waive his Miranda rights (id., 1248). Dr. Mutter does not believe the defendant was suffering from an extreme emotional or mental disturbance during the offense (id., 1249). He believes the report of Dr. Carrera reflects a professionally competent evaluation for competency and insanity (Id., 1250). Neither the defendant's capacity to appreciate the criminality of his conduct nor his capacity to conform his conduct to the requirements of law was substantially impaired at the time of the offense (Id., 1252).

As for the defendant's drug use at the time of the offense, there is absolutely no way he can determine this because there is no independent evidence to confirm or refute it (Id., 1256, 57). The defendant definitely knows the

difference between right and wrong (Id., 1263). The defendant's highly conflicting accounts of his drug use to the original three doctors could well be the result of evasiveness and/or lying, and during the evaluation the defendant engaged in these behaviors, which is inconsistent with any real degree of mental retardation (Id., 1264). A person's fund of knowledge affects their I.Q. test score.

Cross-Examination of Dr. Mutter

Dr. Mutter was asked why he did not perform or ask another expert to perform a whole myriad of tests, and his response was "Because none of those tests you're asking about has anything to do with this man's competence or his capacity to aid counsel," and "If I thought they would give me additional information that I could not get from clinical evaluation, I would have ordered them" (Id., 1292). Dr. Mutter then explained his conclusion that the defendant has some organic impairment:

> A. I think he has -- the answer is "yes" with certain stipulations. I believe that he has a disturbance organically in expressing himself in terms of words and certain types of vocabulary. In that area I think he has what we call an expressive aphasia.
>
> Or it's not really aphasia because he does express, but dysphasia, which means a disturbance in the way he can verbalize ideas versus his thoughts. In that area I think that there is some minimal organic disturbance. I do not find any organic disturbance in any other area.
>
> Q. When you say "aphasia," what do you mean by that?
>
> A. Aphasia has to do with a disturbance of -- well, there are different forms of aphasia. It has to do with brain process. There can be a receptive aphasia which means in hearing and being able to process, or an expressive aphasia which means speaking and expressing in words or language that which reflects his true thoughts.
>
> Id., at 1300, 01.

He summarized by stating "I think he has some disturbance of a minimal nature." (Id). The defendant's aphasia did not require further testing because "... he was able to express himself in other language that we were able to hear and process" (Id., 1303), and:

> He understood what we asked him; his answers were responsive, they were appropriate, they made sense. And his psychomotor activity, his other body language, the other things that we look at psychiatrically and neurologically, were in context with an individual who did not show any kind of frank organic impairment.
>
> Id., at 1308.

The cutoff numbers for I.Q. scores, as to mental retardation, have varied from the DSM-I, II and III and Dr. Mutter does not strictly adhere to the current DSM-III criteria (Id., 1318). The defendant is in the "borderline to very minimal retardation" range (Id., 1322). Dr. Mutter views the DSM-III categories as too inflexible and does not follow them.[14] Dr. Mutter was then cross-examined as to how he could have the audacity to disagree with the great and powerful DSM-III criteria (Id., 1327-1338). He was then asked why he did not perform another list of a dozen of so tests, and he again responded that they have nothing to do

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> Q. Okay. According to Dr. Mutter's opinion to a reasonable degree of psychiatric certainty is Mr. Oats mentally retarded; "yes" or "no?"
>
> A. My answer is the same as the other. In some areas of intellectual functioning he will probably fall in a mild mentally retarded range. In other areas of function, he is not.
>
> Q. Okay. And as I -- as I think we've got through now for the third time, there is not such thing according to the DSM-III; you are either mentally retarded or you're not?
>
> A. Well, this is why I disagree with the book.
>
> Id. at 1326.

with the defendant's competency or his ability to understand and waive his Miranda rights (Id. 1346).

Dr. Mutter explained at length why he is able to extrapolate the results of his examination back to the 1981 trial and 1984 resentencing. The records of the defendant's behavior, including his prior testimony, jail records etc., show no variance in his mental status as it relates to the competency criteria. He does not have a fluctuating mental condition, rather his abilities and performance are static over time (Id. 1346-1350). In rejecting the two statutory mental health factors, Dr. Mutter relied heavily on the facts of the offense.[15]

Officer William Hatcher

He has been in contact with the defendant in his duties as a Corrections Officer at Florida State Prison. Hatcher delivered meals to the defendant and picked up and delivered mail. He never had any trouble understanding or

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> A. If he did this and assaulted a person without provocation, using that circumstance, for no reason whatsoever, because he was in a frensy or a panic state, yes.
>
> But if he does organize and go direct to that goal, like robbery or trying to flee or concealing his tracks or doing other things that are totally antisocial, coupled with causing harm to another individual, I don't look at that as mitigating --
>
> Q. Okay.
>
> A. -- because that's organized, goal-directed behavior and that tells me something else. It means he's got to know what he's doing. It may not be the best of judgment, but there is a motive and there is a reason.
>
> Id. at 1413.

communicating with the defendant. (P.C. Vol. I, 1552). On one occasion the defendant became extremely upset when he was not allowed to withdraw money from his account, due to the fact the was on disciplinary confinement. Hatcher tried to explain the rule but the defendant either did not understand or did not want to understand. (Id., 1556, 57). On another occasion Mr. Oats had left several outgoing letters for Hatcher to pick up, but Hatcher had accidently dropped one back into the cell. The next morning when the defendant found the letter still in his cell he accused Hatcher of singling him out for no reason, became very hostile and told Hatcher to stay away from his cell (Id. 1558-61).

William Cook

Cook is a Psychological Specialist at Florida State Prison, with a Masters Degree in Psychology. He basically screens the inmates to determine if they need a "callout", i.e. full scale evaluation. He has called on the defendant once a month for the past nineteen months. The defendant has usually said little or nothing, as the inmates are not required to interact with Cook. The defendant has never exhibited any unusual behavior, nor has he had any difficulties understanding Cook or vice-versa (Id. 1569-1575).

Tommie James Turner (Defense Witness)

Turner was in prison with the defendant in 1976 and 1977, at Hillsborough C.I. They worked in the kitchen together, lifted weights, played ball. The defendant started "huffing" liquid paper soon after they met (Id, 1602), which he stole from the office supplies in the prison warehouse, and also obtained from inmates who worked in D.O.T. offices. He and the defendant would have D.O.T. work detail, fixing fences, mowing grass, etc., and the defendant would huff from a bread bag. He huffed in the kitchen and other places as well, as long as he

had a supply (Id. 1605). The defendant reported hallucinations, and would "get frustrated all the time, talking about his problems and stuff." The defendant could hardly read or write, and never wrote letters (Id, 1608, 08). Hatcher tried to get the defendant to enroll in vocational training, but the defendant refused (Id. 1610). The defendant was thrown off the D.O.T. squad because they had gotten some wine and huffed liquid paper one day, and on the bus ride back the defendant was drunk and threw up (Id, 1613). The defendant had snuck off to the store and bought the wine with money from other inmates, which he had done on four or five prior occasions as well. (Id., 1627). Hatcher was with the defendant 1/77-12/77, and the defendant used liquid paper throughout (Id., 1622), usually about three days a week (Id, 1624).

The defendant and Hatcher would play straight whist together, a card game where each would get 13 cards (if it was just the two of them) and they then cut the deck to determine the trump suit (Id., 1628, 29). The defendant was really fond of the ladies and indeed the defendant liked to talk about "Nothing but woman" (Id., 1630). There was no alcohol at the prison, only marijuana and liquid paper. When they played whist the defendant always tried to win. When the defendant huffed he would get really happy and laugh a lot (sometimes he laughed so hard they had to stop playing cards), then he would get depressed (Id., 1635). The defendant never got caught using liquid paper except the time he got sick on the bus (Id, 1638). Hatcher never had any problems understanding the defendant and vice-versa. The high from liquid paper only lasted two or three minutes, and in five minutes the defendant would be back to normal. The 1/2 dozen times he saw the defendant drink on the D.O.T. squad, he got loud and happy (Id., 1639).

Idealla Russ (Defense Witness)

Russ is the defendant's older (adopted) sister, with whom he grew up in Palatka. They were raised there by their aunt (Arethra Mae Adams) and uncle (Cleveland Adams). She is a year older than the defendant. The defendant was a slow learner. Instead of doing his homework he would go to sleep. He would read the short verses in bible class because he couldn't memorize the long ones (Id. 1654). The defendant was suspended from school several times for not doing his work, disobeying the teachers and making smart remarks, and when their aunt would find out he would get a beating. The defendant would try and intercept the mail so his aunt wouldn't find out, and then pretend to go to school, returning to the house after she left for work (Id. 1655).

The defendant liked his ROTC class, as he was around guns and it was like being in the army (Id. 1657). She never helped the defendant in school because he never asked for it, and would not even talk about his school problems. Their aunt beat all three of them as punishment (Id. 1658). Their home was poor, and both the aunt and uncle had to work. They had a small farm with some animals. Their aunt was very strict. She beat them all with cords after they began stealing money from her (Id. 1663). She would also take the guilty hand and put it on the stove, then beat the back of it. Russ has a scar on her face from a reel her mother hit her with. She also has hearing loss from a beating. The beating would last five to fifteen minutes.

At one point their aunt got frustrated with their eating before she got home, so she locked the food up in her room. The boys (Sonny and Freddie) would pick the lock and take the food out in the woods to cook and eat it (Id. 1667, 68). The defendant did not like the way his aunt treated his uncle, especially

her having a boyfriend on the side, and one day while his aunt and uncle were on the porch, the defendant told his aunt she shouldn't be out messing around while his uncle was out there working hard every day. Their uncle tossed the defendant against the side of the house, and told their aunt if he caught her messing around he would kill her. After that their aunt was just looking for a reason to beat the defendant (Id. 1669). For his part, the defendant would follow his aunt around spying on her to see if she cheated on their uncle, and would skip school to do it (Id. 1670). They got to the point where the defendant finally threatened to beat his aunt if she tried to beat him again (Id. 1675).

On cross-examination Idealla stated that Freddie refused to help the defendant do his school work (Id. 1681). Their aunt did not start beating them until she was eight or nine years old. She beat them with a peach limb for not doing their chores and homework: "She always just said that when she beat us she beat us because she loves us, and she wanted us to be the best that, you know, we could be" (Id. 1682). The defendant never wanted to do his homework, and their aunt would have to force him to do it. The defendant did not like studying. Up until the time that Delores Jerry came to live with them, when Adealla was eleven or twelve, the only beatings were for not doing chores and homework (Id. 1684). The defendant got in trouble twelve to fifteen times at school for talking back to his teachers and refusing to do as they told him.

Prior to the arrival of Delores Jerry, they always had plenty to eat and the only problem was beatings with a switch for not doing chores and homework. Delores was a pretty wild high school girl. She talked the kids into stealing money from their aunt and giving some to her. The kids would take the rap and get severe beatings for it, much worse than they had gotten before Delores

arrived (Id. 1687). Their aunt had to lock up the phone to keep it away from Delores. She locked up the food because when she cam home she wanted it to cook for dinner. The defendant liked to go fishing, and their uncle used to take him hunting (Id. 1689). The defendant did cheat quite a bit in school. He used to say "Well, I got to get by somehow." The reason their aunt tied them up for the beatings was that otherwise they would run away. She took off their clothes so they couldn't run outside.

The defendant ran away for good when he was 16, and less than a year later she heard he had got arrested. The defendant has written her letters saying that he wished he could change a lot of things that had happened, and that he cared a lot about her (Id. 1692): "Yes, they was nice letters until it got to the point where he needed money and I couldn't send it" (Id. 1693). The defendant never liked to work. She would get stuck finishing his farm work and they would have fights over it (Id. 1694). All in all, she had a good relationship with the defendant and Freddie and a great relationship with her uncle, who "very seldom" beat the children. The defendant and Freddie had a good relationship. Their uncle had a good relationship with the defendant and Freddie except he was frustrated that the defendant would not make an effort to learn his woodcutting business and follow in his footsteps (Id. 1695). The big problem was the aunt's beatings, and that they went hungry until she got home from work, at least until they learned to pick her bedroom lock.

She never saw the defendant use drugs or alcohol or heard him talking about using them. He just smoked cigarettes. As for the beatings, Adealla got the most because she was the oldest. Freddie got the least (Id. 1700). In the year before he ran away, the one thing the defendant kept talking about was going to

live with his real parents (Id. 1702). The defendant has a great sense of humor and loves to laugh and tell jokes, and the kids all joked and played around a lot together (Id. 1704). Their aunt worked two jobs, including driving a school bus, and when she came home after a rough ride, it was "You better get out of my face," and she meant it. The kids on her bus often behaved "very badly" (Id. 1705).

Donald Williams

As will be seen, Williams was a friend of the defendant's who was in the Marion County Jail with the defendant immediately after the defendant's arrest. On January 10th, 1980, Williams was taken to a doctor's appointment and escaped. He hid in the attic of a woman's house and was talked into surrendering by Det. Vance Ferguson. Williams denied hiding a letter, given him by the defendant, in the attic of that house, and he does not remember what he told Det. Ferguson after his arrest, and does not know how his fingerprint got on the letter (found by Det. Ferguson in the attic, see below). (Id. 1731-1739).

Dr. Leonard Haber

Dr. Haber is a psychologist who examined the defendant in July of 1979, prior to which he reviewed the same records as Dr. Mutter. Dr. Haber concluded that the defendant was competent to stand trial in February of 1981 (P.C. Vol. X, p. 1829), and in April of 1984. At the time of the crime, neither of the two statutory mental health mitigators applied to the defendant. The defendant has below average intelligence and verbal expressive deficits, but he is not mentally retarded nor is he significantly brain damaged (Id. 1834).

There is no way to determine what alcohol or drugs, if any, the defendant was under the influence of during the offense, because there is no independent evidence and the defendant's self-reports are totally unreliable because he has given widely conflicting accounts, which varied even within Dr. Haber's interview of the defendant (Id., 1834). The competency evaluations of Drs. Carrera, Natal and Gonzalez were all within the normal accepted standards of practice in the forensic field (Id., 1835). The defendant has the ability to make a knowing and intelligent waiver of his Miranda rights. Dr. Haber then explained the purpose and scope of a competency exam (Id., 1837, 38).

Dr. Haber then reviewed his notes of the evaluation, which contained the following assessment.

> The defendant was pleasant, cooperative, soft spoken, responsive speech and comprehension. Full language skills; understands more than he can say, good range of effect, sense of humor, native intelligence, much higher than would appear through structured test, probably native intelligence between borderline and low average.
>
> Id. at 1841.

There was a bit of tug-of-war between them, but in the main the defendant was directly responsive to questions. His language and comprehension were below average but adequate, with his comprehensive higher than his expression. The defendant did not show a flat affect but rather was expressive, showing both humor and concern (Id., 1843). Dr. Haber then explained the concept of native intelligence:

> A. Native intelligence is the intelligence that we are born with, presumably some God-given intelligence that we bring into this world carried through genetic transmission, which is the kind of unpolished, rough potential that we have for doing things that human beings need to do in order to survive in this world, which includes learning and remembering and adjusting and accommodating and thinking forward and projecting and reaching back in memory.

> Native intelligence is that which we are brought into the world with that enables us to cope, adjust and learn, as opposed to that which we are directly taught. That would be the polish on whatever potential we have, so another word for native intelligence might be potential ability.

Id. 1844.

Dr. Haber does not agree with the findings of Dr. Krop concerning the defendant's mental abilities. The WAIS-R test is affected by a wide range of variables, especially the motivation of the subject:

> The same intelligence is assessable through many other techniques. One of the primary techniques is language; language skills. One of the high correlations between intelligence and any particular function that humans acquire is that of language. So there is a high correlation between language and intelligence.
>
> Also, the ability of an individual to understand and respond and to create solutions to problems is the essence of what reflects intellectual ability.
>
> So in looking at this record I found, first, that there was a reported I.Q. score in 1970, on a Slosson I.Q. test, with a score of 70; 70 being reasonably far removed from 54.
>
> I think of greater importance than that test score was the demonstration of the defendant's ability to use certain words and language and language constructs and to see through, past, and beyond certain questions; to understand and appreciate their nuances and implications, and to create thoughts and strategies to deal with them, which are far beyond the ability of an individual with a full scale I.Q. of 57, which would indicate mild mental retardation.
>
> The functioning of this defendant verbally, personally, effectively, and historically, speaks against that finding. It does not add up. It does not ring true.

Id. at 1845, 46.

Dr. Haber next explained how I.Q. scores are broken into categories. Test scores are predictors of ability. If the defendant's observed abilities to learn, adjust, react, and deal with the environment are beyond those that would be forecast by his test score, the score is meaningless and invalid (Id. 1849).

Dr. Haber sees this often in screening applicants for the police department. When asked if education affects the WAIS-R results, he states:

> A. Well, with the WAIS-R, certainly, it's not supposed to have an effect, but it has to have an effect. It doesn't have to. It likely does have an effect, because there are 11 specific sub-tests used in the Wechsler Adult Intelligence Scale, and some of those have to do with the ability to recall direct information having to do with things that are taught in school.
>
> So people who go to school and pay attention have a definite advantage. They would know such things as Washington's birth date, or the date of the civil war, or directions, or geographic questions, or religious questions having to do with Koran or other Biblical works or literary works; things that might tend to be discussed in school which -- for which you would say the individual was trained to know these things; to be alert to them.
>
> Individuals who do not go to school, who are not educated, would likely get lower scores on those and generally not have the familiarity with the kinds of test questions.
>
> Arithmetic is something that is normally taught in school. There are some few people who are self-educated, but by and large, arithmetic is one of the sub-tests specifically used in the WAIS, and if you're un-educated, or educated but haven't really gotten the education, you're going to have to get a lower score. There would be very few ways to achieve up to your potential if you haven't been trained.
>
> Id. at 1851.

For optimum performance the test requires a calm setting where the subject can devote full concentration, and it requires a subject who is willing to concentrate on mental exercises which are of no extrinsic interest. A deprived socioeconomic upbringing effects the test results in much the same way as lack of education. A person who views the test as a challenge will score higher than someone who views it as a chore. (Id., 1854). Based on the defendant's history and his evaluation, the defendant falls between the borderline and low average range, somewhere is the 70-90 statistical range.

Dr. Haber then went through the notes of his interview. When asked at the outset about the murder charge, the defendant stated, "I forgot a lot. It slipped away ... I was just living day by day," which Haber said was the initial indication of a language grasp far exceeding the 57 I.Q. score reported by Dr. Krop (Id., 1856). The defendant said his current lawyer, Miss Leslie, was trying "to keep me out of the electric chair" for the murder charge. The defendant knew the alternative was a twenty-five year sentence. He said his lawyer tried to help him, and the state attorney, "they try to find me guilty." When asked how they do that, he said "I guess by gathering up information against me." In addition to showing his appreciation of the legal process, this latter language is inconsistent with what you would expect from a mentally retarded person (Id. 1860).

The defendant understood that the jury were "People that gives a verdict," and they sit and listen. They try to figure out "did you do it or did you not do it." When asked about his trials, he said "I just leave it up to my lawyers" (Id, 1861). When asked what a verdict is he stated, "You come to a conclusion as to - I cannot get it in words, but I know what it is." This response is indicative of his expressive disorder, whereby the understanding is there, but the words sometimes are not (Id. 1863). The defendant stated that if you're found not guilty you're set free, and if guilty, "You could get some time." The defendant knew murder and robbery are against the law and you're not supposed to do it, and he knew this while he was on the street, before going to prison. The defendant knew if he heard a lie at trial, you are "supposed to" tell your lawyer. At his trial his attorneys did most everything on their own, as "He felt I could not do much for him."

When asked if he disagreed with his attorney, "He did a few things, but its too late now," and "I wanted him to subpoena a few people, but he didn't." A subpoena is "You have to have people brought to your trial." He doesn't recall who it was he wanted (Id. 1869). The defendant said he dropped out of school in 10th grade, and that "I really did not like it. I did not like all those hard questions and stuff." He states "I was pretty good in Science and English," and his worst subject was math. He said he repeated the second grade. He dropped out when he was sixteen because of family problems with his aunt, and moved in with his mother in Ocala. He did not know the address, so when he rode his bike the 37 miles to Ocala he kept asking people until he found them, "I knew they stayed in Ocala. I took it from - took it from there" (Id. 1876). Dr. Haber states that this use of language is significant:

> A. It's similar to those expressions used by Mr. Oats which are -- which have some meaning that go beyond the actual question that you're asking in there. It's the language style that would be used by a person that has considerably or significantly more intellectual ability than that reflected by the WAIS score.
>
> Id. 1877.

When asked why he left his aunt, the defendant said "You have that information. I don't want to talk about that." Dr. Haber states this is a telling response:

> A. Yes, sir. That's --that is a telling response in the sense that, "A," it shows that there is no difficulty whatsoever in processing information quickly, clearly, concisely, targeting exactly what it means; having one's own reaction; having one's own opinion; acting on one's own opinion so this speaks to the issue of verbal ability.
>
> It speaks to the issue of intelligence and it also speaks to the issue of personality, meaning that this response says, I have my own ideas and I'll do what I want to do. I don't have to do what you tell me to do, and I'm not going to what I don't want to do.

> It shows an independence and ability to formulate an idea, a thought or a feeling, and to act on it in an appropriate manner.
>
> Id. at 1879.

The defendant stated he was arrested for burglary when he was sixteen, and when asked to define burglary, "something, breaking into a company or a private home after twelve o'clock" (Id. 1881). The burglary involved "a western store -- wait, a fashion store," and the defendant got five years, and he served close to four. The pattern of the defendant's responses indicate "the capacity is intact for remote memory and appreciation of past events," and are consistent with borderline to low average intelligence, not mental retardation, as "This is not the interaction, the response style of a person who is mentally defective in any sense." The defendant understood the concept of parole and remembered the rules he was supposed to obey. When asked if one of the rules was that you could not commit a new crime, he responded "That goes without saying," which again is "well beyond" a response expected of a mentally retarded person, and which fits in with the overall pattern of the defendant's responses (Id. 1886).

The defendant stated that when he was sixteen he had been put on probation for the "Boot and Saddle Shop burglary." He was also sixteen when arrested for "auto theft, breaking into it." When asked what happened to that charge, he said, "they threw it out." When asked about the fashion shop burglary, for which he went to prison, the defendant said he stole some clothes because "I didn't have money to get clothes I like. I work, but my income was very small. I like real nice clothes." The defendant said he would "rather not say who he did it with, because he didn't want to get him in trouble (Id. 1890). This is again indicative of a person who is not easily led, who has a mind of his own and does what he wants (Id. 1891).

The defendant said he had stolen a suit from the Boot and Saddle Shop, acting alone, because "my grandfather passed away. It's no excuse, but I wanted to get a nice suit" (Id. 1892). He didn't return it afterwards because he knew he would get in trouble. The defendant then described his medical history, including the headaches and the sore spot on his head where the scar is. The defendant does not get medicine in prison because "I'd rather not go through the hassle with them." When asked if he wet his bed as a kid, he said, "Every kid did" (Id. 1900). When asked how he felt about burning a chicken (because it kept escaping and getting him a beating), he responded "I have a guilty conscience about it. I do not like what I did, but I did it" (Id. 1902). The defendant said he had taken home remedies, which he defined as "What your mom knows, what her mom taught her."

The defendant said he started drinking beer at sixteen, then went to vodka and rum. He said he drank "at least two six packs and about two fifths of Smirnoff Vodka in a day," which would get him "pretty high and relaxed." He would drink like this every day he had the money. Dr. Haber then stated that the extensive detail the defendant provided in his confession is inconsistent with this much alcohol ingestion, and indeed such large consumption would likely cause memory lapses if not outright amnesia (Id. 1906). Dr. Haber then commented on the huge inconsistencies in the defendant's various statements, as to his drug use and the facts of the offense, to Drs. Natal, Gonzalez and Carrera, all made within a month of each other:

> Q. Why did that interest you?
>
> A. Because there appeared to be a pattern developing of different responses at different times to different persons which seemed to suggest that the defendant was attempting to achieve something by taking one position or another, and while

the goal or object may have remained the same, the concept or the idea behind it may have differed from time to time as to what would be helpful.

In other words, what I'm saying is that I believe the defendant did not initially begin with a clear idea as to what statement would be in his best interest, and that the reports may not have corresponded to actual recollections but rather to what the defendant may have felt would serve him best at any given time.

Q. In that type of approach, is that consistent with someone who has an I.Q. of 57?

A. No, sir.

Id. at 1908.

The reason it is inconsistent is that retarded persons "have difficulty being devious." The defendant stated that he heard voices and saw "all kinds of creatures" while huffing liquid paper, which "was just something I got hooked on." (Id. 1910). If someone gave him a pill, he took it, but, "I do not know nothing about pills." He snorted cocaine once when he was 16 and once when he got out of prison in 1979. He took pills because "It's the hip thing". He took "Darkies", and when asked the effect, stated "I could not tell the effect because I was also doing alcohol. But the touch it had, it was an uppie mood. Felt kind of real good". (Id. at 1912). The defendant's response, including his appreciation of the contaminating effects of one drug over another, is on a higher level than a mentally retarded person is capable of. The defendant said "The effect was real nice. It did not have me tearing up my clothes or nothing". He knew that acid (LSD) was "the stuff on a piece of paper?", and said he tried a little piece but was afraid and decided to stick with liquid paper. (Id. at 1913).

The defendant began using hashish at 16 "to cut down the real harsh taste of marijuana. It did not give you a quick rush but a mellow high". The defendant

knew Bush is president, before him Reagan, before him Carter, and before him Nixon:

> Q: Do you know what happened to Nixon?
> A: He quit.
> Q: Do you know why?
> A: He did something wrong.
> Q: Did you hear about Watergate?
> A: Yes, that's it.

Id. at 1917.

The defendant knew his case was back in the trial court, to check on some "errors or something". When asked what errors, he stated "About I was supposed to get you guys to come and see me", to check out his head to see if he was crazy. (Id. at 1923). The defendant was then asked about the murder charge. He said when the police questioned him he asked to make a phone call but they wouldn't let him. They read him a piece of paper "I did not quite understand." Since they wouldn't let him make a phone call, he signed the piece of paper. He thinks the paper was a Miranda sheet. He then states that the officers never read him his Miranda rights:

> Wait, you signed your name and talked to them?
>
> When I went in there there was no arrest and they talked to me. I asked, why do you want to talk to me? I guess, from my past record, they probably ran a check on me. I asked to make a phone call. There was no Miranda read. They were asking questions that I felt could harm me.

Id. at 1925.

The officers asked him if he knew about the murder and "I felt I should have a lawyer there. They refused me a phone call. They tricked me." The defendant said he drank alot that day and smoked a whole nickel bag of marijuana in one joint. (The defendant is referring to the confession in the ABC case, on 12/24/79). The defendant then referred to the high speed chase (the 23rd) which resulted when he and Donnie Williams were spotted casing ANOTHER store. After

the chase he went to the police station to look for Donnie, because he didn't know if Donnie had gotten caught after the chase. At another point he said he went there to get his tape recorder. (Id. 1928). Once at the station a detective came up and asked him about the murder. The Detective said he had questioned Donnie, who blamed the shooting (ABC) on the defendant:

> It may have been my past criminal record that got them to talk to me at first. My dad was not liked around there. That could have triggered it right there.

Id. at 1929.

This language and the ideas it expresses are just "not compatible" with mental retardation. The defendant stated that he wanted to call his sister, and "they said if I sign I could do that". He thought he needed a lawyer because they were asking about a robbery and murder. The detectives threatened and then induced him into confessing:

> Q: So why need an attorney?
>
> A: Because they asked about that stuff. They were going from what somebody told them. They were not sure, but my past criminal record could have something to do with it.
>
> Q: Did you want an attorney? Did you want to talk?
>
> A: Because the way they were talking to me, the door was shut. The sergeant gets up; gives me mean looks as if he was going to hit me. One thing on the side yelling or one on this side yelling and one on this side threatening me the time I will get it; they had a witness saying I did it.
>
> The other detective came in, takes me to this room to the back. There's nobody around. The door is shut. He's really threatening me, threatening my mom. He could have her in jail as well. I don't know. He made -- he promised me before I had told them what was what, off the tape, before they made the tape, I tried to get them to put it on the tape.
>
> Q: What did they promise you?
>
> A: A light sentence.

Id. at 1930.

Dr. Haber then noted that in his 1981 suppression hearing testimony, the defendant also reported the promise of a lighter sentence, but denied that the officers threatened or mistreated him. Dr. Haber states that this major inconsistency is another example of the defendant changing his tune to fit his perceived best interest at the time." ... that if one thing didn't work, the defendant is trying another tact". (Id. 1935). The defendant initially told the police he was the one who did it, because they promised him a lighter sentence. Dr. Haber was then asked to assume hypothetically (these are actual facts, see below) that during this initial interrogation he told them a man named Cheese participated, and that during his second interrogation the defendant exonerated Cheese, and said he had implicated him as revenge for Cheese snitching on him on a prior occasion. Dr. Haber stated that this information was consistent with a pattern of "inconsistencies; of misstatements, false statements, purposely so, in an attempt to gain something or avoid something. This is not the pattern of a mentally retarded person". (Id. 1937). The defendant then denied to Dr. Haber that he committed either the ABC or Martel crimes. This is again significant:

> A. Because it fell into the pattern of inconsistencies; of changing testimony; now tied in with an explanation that these things were done consciously and purposefully in order to achieve a certain effect or to avoid a certain effect, and it added to the impression of a lack of credibility and lack of believability of testimony, and of the defendant's easy capacity to change his responses and his recollections on a voluntary basis.

Id. at 1938.

The defendant said he was in the store "...but it was a surprise to me to see what happened". He could do a burglary but not a murder, because "I ain't up to nothing like this", and "A burglary could get you 15 years at most. Your life is not on the line". (Id at 1939(. Dr. Haber again states that the language and understanding behind it are beyond the capacity of a mentally retarded person. The defendant knew that the right to remain silent meant he didn't have to say

anything. As to "Anything you say may be used against you", he states, "You could say something, they could use it in court on you" (Id. 1946), that "it could hurt you". That is the reason he asked the cops to get him a lawyer. That was good thinking on his part. Dr. Haber then noted that at the suppression hearing the defendant said nothing about asking for a lawyer, and this inconsistency is another example of the defendant changing his tune to suit his perceived best interest. (Id. 1978).

When asked what the right to have a lawyer present during questioning meant, he stated "I could still talk, but I got to have a lawyer there with me". The defendant was asked about the right to appointed counsel, which meant "You would have to go to court. The judge would give you one" (Id. at 1949). The defendant again said he was at the store but didn't shoot anybody. He took the blame to protect his friends, "I took the responsibility for it", because "I did not understand the level of the crime" (Id. 1950). The defendant always took the blame when growing up. He stated "I had a gun in my pocket. I kept it away from him. I had no bullets in it. I never needed it for anything". (Id. 1952). Dr. Haber then stated that he is aware that the defendant stabbed a store clerk in the head in New York after his second escape. That episode along with the defendant's escape is part of his overall picture:

> all of this mental activity is incompatible with mental deficiency. His conduct is incompatible with mental deficiency. The cleverness, the deviousness and the ability to implement the plans, to recall them, to discuss them, to change the testimony, to take into consideration what might happen, to attempt to negotiate, are all incompatible with mental deficiency.
>
> Id. at 1954, 55.

The defendant said he had not intended to escape at his mother's house, but "She started crying. I lost it", meaning "I lost control of myself" (Id. 1956). He was also afraid the police were going to beat him. He knows that by running

"I didn't keep my end of the bargain". The second escape was apparently not such a spontaneous affair:

> A: The guys brought me to my senses. They said you are a damn fool taking a rap for it alone. The pressure, these guys, knowing about time and everything, scar you real bad.

Id. at 1957.

When he told the police he did it "I knew I was telling a lie but I did not realize how serious it would be. I thought I may get 20 years or something." (Id. 1959). When asked if anybody had made him do the crimes, he said "Your friends turn out to be your worst enemies" which is a very abstract phrase. The following statements by the defendant and assessment by Dr. Haber are critical:

> Q: Did you say different things to the doctors?
>
> A: Not that I could remember.
>
> Q: Do you know that different things were said?
>
> A: I have a strange way. Maybe I don't mention that. That's the way it is.
>
> Q: What do you mean?
>
> A: I forget and go to something else; not that I want to tell a lie.
>
> Q: Okay. What -- how did you interpret that, I mean, that explanation of how he would come to tell the doctors different stories?
>
> A: It's exactly that; it's another explanation. it's a strange way. Maybe he mentions it; maybe he doesn't mention it; maybe he remembers it; maybe he forgets it; maybe he was promised something; maybe he wasn't promised something; maybe he was threatened; maybe he wasn't threatened.
>
> It's another reason for doing what he wants to do, but the message seems to be that the defendant does what he wants to do, whatever that might be.

Id. at 1961, 62.

The defendant then said exactly why he kept changing his story:

> Q: You talked to the police. You confessed, and two months later said you did not do it. The next month you said you did

it; he made you do it. Next you said you remembered more and you were forced. Why?

A: The way I think, now it's definitely for real. My hand is on the Bible. If I'm lying, I would not say it. To the police, because they promised me 20 years and not to make my parents look bad.

With the doctor, the guys said, say you didn't do it. The other doctors, my cousin was in jail. He wrote me a letter. He said confess; get a good lawyer. You cannot get the electric chair.

Id. at 1963.

Dr. Haber found the defendant satisfied all eleven of the competency criteria. As to the ability to withstand incarceration, relative to the cell fire and feces smearing, Dr. Haber had the following interesting comments:

A: About this defendant, based upon available information and the examination results, it would tell me that he may have learned that that was one way to either defer or deflect or derail a trial proceeding, and indeed it is, in some instances.

Id. at 1969.

The defendant's "She said he had gloves on, didn't she" outburst provides a wealth of evidence pointing to the defendant's competence (Id. 1971, 1972). The same is true of the defendant's "some ballgame, I'll be back" final comment. At the conclusion of the interview the defendant said something that was both impressive, in terms of sincerity, and totally inconsistent with mental retardation. The defendant began by stating that he was different now, and gave a cogent explanation of how he had cleaned up his act, stayed off drugs, changed his whole outlook. Dr. Haber asked the defendant whether he could hold a steady job if released:

Q: Could you hold a job now?

A: If I was shoved in a sewer.

Q: What do you mean?

A: That's how low I would go to get a job.

Id. at 1977.

Dr. Haber then gave a delightfully clear definition of diffuse brain damage:

> A: Diffuse brain damage is an expression coined to attempt to explain why certain behavioral functions or manifestations may be significantly below average.
>
> It's a technical term which is used basically in conjunction with persons who may have learning disabilities, with children, or with persons who may, on certain sophisticated psychological tests, show a seeming dysfunction in their performance in specific highly selective test performance which is not necessarily reflected in their overall behavior, or not necessarily reflected in their ability to do things, and not necessarily reflected by medical or neurological examinations or EEG's or EKG;s.
>
> It is an attempt to explain how and why some people may have difficulty doing some discreet psychologically measured functions. It's an attempt to explain that.
>
> That's what diffuse organic brain damage means. Diffuse means it's around somewhere. We don't know where; we don't know how much, we don't know what, and we don't know why, but it's a way to explain why a person cannot do a particular function of a measurable psychological type or cannot do it to a certain standard.

Id. at 1979, 80.

Det. Vance Ferguson

Det. Ferguson obtained the defendant's confession in the ABC case on 12/24/79. The defendant escaped from his custody that day at his mother's house. Also Det. Ferguson discovered the alibi letter the defendant wrote to family members, and he questioned Donnie Williams as to how Williams came to be in possession of the letter on 1/10/80.

Det. Ferguson explained how the defendant came to be in police custody on 12/24/79. Donnie Williams (the defendant's accomplice in the Martel case) had been arrested for the high speed chase, and Ferguson was told he had information on the ABC crime. When Ferguson went to the station he learned that the

defendant had come there to bond Williams out of jail, so Ferguson questioned the defendant as well.[16] He definitely began by advising him of his Miranda rights, and the defendant said he understood each of his rights (P.C. Vol XIII, 2229). The defendant did not appear to be under the influence of alcohol and/or drugs. "His speech was clear, he was quite responsive and direct to the questions that I asked him". He and the defendant talked constantly back and forth, and the defendant helped him draw a diagram of the store. (Id. 2230).

The defendant was a definite suspect in ABC case because Donnie Williams (who was not involved in the ABC crime) had told the police (when he was arrested after the chase) that the defendant admitted to him that he was involved in that crime. Ferguson first asked the defendant about the gun he threw from Williams car. The defendant said the gun belonged to him. Eventually the defendant said he was in the ABC store, and his partner, Cheese, shot the man but wasn't supposed to. The defendant gave a detailed and totally accurate description of the layout of the store, and he knew how many shots were fired and where they impacted. (Id, 2233, 34). During the interim:

> A. He appeared to be cooperative to me, and he was calm, very aware, attentive, answering my questions, giving facts without questions.
>
> Q. Now, did he appear to have any trouble understanding your questions?
>
> A. No Sir.
>
> Q. Did you have any trouble understanding his answers?
>
> A. No, sir.
>
> Q. Did he give any answers to you that were -- that seemed out of place, not responsive to the question that you asked?

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16 Ferguson never heard anything about the defendant wanting to get his tape recorder from Williams' car, which had been impounded after the chase (Id, 2332).

A. No, sir. He was very believable. (Id. at 2236).

Ferguson never made any promises to the defendant, and the defendant never indicated he wanted to stop the interview or that he wanted a lawyer. Because the defendant appeared truthful, and had shown them the location of the gun and where "Cheese" lived, Ferguson agreed to let the defendant visit his mother. When they got there the defendant specifically asked Ferguson to park on the North Side of the house. After the alotted 5 minutes Ferguson went in and the defendant's mother said he had fled through the back door on the South side of the house. (Id. 2239). The defendant had told Ferguson to park on the north side because "if his mother saw him get [out] of the police car it would cause her to have a heart attack". (Id. 2240). At the time of the initial interview 12/24/79, the defendant did not complain of a headache and did not appear fatigued.

On 12/28/79 the defendant called Ferguson and requested another interview. In the meantime the defendant's gun had been matched to the Martel (instant) crime, so Det. Latorre from the Sheriff's Department was also present. Prior to the formal interview Ferguson and the defendant chatted about various unrelated topics. All the discussions about the case occurred on the tape (the transcript was read into evidence at trial, T.T. 845-922). The interview occurred at 5:30 p.m., 12/28/79 (T.T. 845). The defendant complained of a headache so they had the nurse from the jail give him some Tylanol. The defendant had no trouble understanding the Detectives and vice-versa.

The defendant told Ferguson on the 28th that the reason he needed to talk to him was to exonerate "Cheese", who the defendant had falsely named as his partner to get back at Cheese for snitching on the defendant in an earlier case. His

real partner was "Trick". The defendant also told Ferguson he hoped Ferguson didn't get fired because of his escape. The defendant's confession was extremely detailed, and he again helped Ferguson prepare an accurate diagram of the store, with the only dispute between the defendant's version and the known facts being the location of the getaway car. (Id. 2252). The defendant said "Trick" was the shooter.

After Ferguson left and then returned with some cigarettes for the defendant, the defendant became emotional:

> A. After I had come back into the room with Mr. Oats' cigarettes, he was emotional. He was -- as I remember, he was crying, maybe; not sobbing and openly, but he was -- he had tears on his face.
>
> I turned my tape recorder on, and he later on in there told me that he was actually the person that shot the man and he shot him with his gun.
>
> Q. You're referring to the ABC crime?
>
> A. Yes, sir.
>
> Q. What about Trick?
>
> A. He told me that Trick was his cousin, Adel Williams, and he lived in Dunnellon, and he started telling me about if I would take him out of the jail he would show me. I said we would have to talk about that and he said, you can handcuff me to the car or whatever.

Id. at 2253, 54.

Det. Ferguson never used any deception with the defendant. As to his headaches, the defendant said his aunt hit him with a cane, and that this caused his headaches and his trouble with the law. (Id. 2256). The defendant had a good memory of the events at the Martel store, and his descriptions were corroborated by the known facts. At no time did the defendant ever say anything about using drugs or alcohol or liquid paper during the period of the crimes.

The defendant never brought the subject up at all.[17] (Id. 2257, 58). The defendant never suggested or intimated that he wanted to stop the interview because of his headache. (Id. 2260, 61).

Det. Ferguson was then questioned as to how he came to possess the defendant's alibi letter, on 1/10/80. Inmate Donald Williams overpowered his escorting officer at a doctor's office, took his gun and held a woman hostage in her house. Ferguson found the letter (P.C. Vol. XIX, 3422) in the attic of the house. Williams told Ferguson the defendant gave him the letter the day before at a line-up, and the defendant said to give it to his mother. (Id. 2274, 75). Williams told Ferguson he hid the letter in the woman's attic. As to the names in the letter, "Vern" corresponds to Vernitta Oats Grant, the defendant's sister. "Shirley" is the name of another sister. "Adel" corresponds to his co-defendant in the ABC case, Adelle Williams. "Marvella" is the name of another sister of the defendant. (Id. 2281, and see 4496).

Det. Fred Latorre

Latorre questioned the defendant about the Martel case on 12/28/79, in the presence of Det. Ferguson. The defendant "did not appear to be under the influence of anything." (Id. 2375). The defendant had no problem understanding the detectives, and although the defendant has a type of accent, they could understand him. The defendant complained of a headache so they called the jail nurse over. The defendant never indicated he wanted to stop because of the

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17 The defendant's statement makes a reference to his being high, "I was high and everything," when he decided to rob the ABC store to get money for Christmas presents (Id, 2318).

headache. (Id. 2376). The defendant never gave any indication that he did not understand his Miranda rights, and:

> A. He was able to respond to the questions that we posed to him and gave specific responses to specific questions where we were looking for specific things that would have been known to us as a result of doing our investigation.

Id. 2378

The defendant gave very specific information about the crime which was accurate, and which was not released in the press. (Id. 2380). The defendant never indicated he wanted the questioning to cease. During the time Det. Ferguson was getting the defendant cigarettes, the defendant said he was sorry for what happened, that he was attempting to straighten things out, and that he wanted to see his mother. (id. 2381). Det. Latorre emphatically denied offering the defendant an inducement or promise to get him to confess. In his confession he said he shot the lady at the Martel store accidentally, because the gun slipped. (Id. 2397). The defendant appeared remorseful and was emotional when talking about the actual shooting.

Phil Williams

To make a long story short, Williams sent some jail records with the defendant's handwriting to the FDLE handwriting analyst, for comparison to the alibi letter.

Janis Busby

Busby sent the alibi letter from the Sheriff's Department to the FDLE handwriting expert.

Det. Fred Latorre

Was present when the defendant wrote out his signature on the rights waiver form, which was also used by the FDLE analyst for comparison purposes.

Det. Vance Ferguson

Det. Ferguson identified the original letter he found in the attic 1/10/80. The letter is in the same condition (P.C. Vol. XIX, 3422) as when he found it in 1980, except it has yellowed somewhat.

Randall J. Hagge

Hagge is a "questioned-documents examiner" with FDLE. He found that the author of the "known" documents (known to have been written by the defendant) is the same person who authored state's exhibit #15, the alibi letter. (Id. 2556, see 3422). In other words, the defendant wrote the alibi letter.

Dr. Raphael Gonzalez

Dr. Gonzalez was called as a rebuttal witness by the defense. He was one of the three doctors who examined the defendant for competency and sanity in 1980 (his original report is at P.C. Vol XXVIII, 5257). The defendant talked about both the ABC and Martel cases. He had a better memory of the ABC incident, and was confused about which one happened first (P.C. Vol. XV, 2644). Dr. Gonzalez then reaffirmed the contents of his affadivit to defendant's 3.850 counsel. The defendant told him he used drugs and alcohol and that might be why he was confused about the crimes. The only source of information Gonzalez had was the defendant himself.

Dr. Gonzalez has recently reviewed numerous documents from defendant's 3.850 counsel. The defendant never told Gonzalez about using inhalants, only marijuana, alcohol and cocaine. (Id. 2655). In his initial report he found the defendant had "significant intellectual impairments". Mr. Fox never requested that Gonzalez consider the mental health mitigating factors, which he would have been willing to do. He would have found that, based on the defendant's deficits,

he had a substantially impaired capacity to conform his conduct to the requirements of law (Id. 2661), that he was acting under the substantial domination of his co-defendant, and that his mental age was well below his chronological age. (Id. 2665). He would have reached these conclusions at the time had he been asked.

Based on Mr. Fox's statements to the Court in 1984, that the defendant was insane, Gonzalez has doubts about whether the defendant was competent at that time (Id. 2668, 69), and a new evaluation was needed. Given all the new information he has received, he has "questions" about the defendant's competency in 1980 as well. (Id. 2671). The defendant's low IQ is probably a reflection of an organic condition. (Ed. 2675).

Cross Examination

When Gonzalez read the defendant his Miranda rights the defendant said he understood them. The defendant did not have any difficulty understanding his questions, and his responses were appropriate. (Id, 2678). In 1980 Gonzalez concluded that the defendant was "competent to assist his attorney in his own defense". The defendant knew what he was charged with and the possible penalties, and told Gonzalez he was able to communicate well with his attorney. The defendant had no problems communicating with Dr. Gonzalez. He was well oriented in all three spheres, his speech was clear and relevant and his reality testing was not impaired. (Id. 2680). The defendant was concerned about getting the chair, and knew he could also get life. (Id. 2683).

As to drug use, the defendant did not specifically say he was using drugs or alcohol at the time of the offense, rather that he used cocaine, marijuanna and

alcohol on a regular basis. (Id. 2685). Gonzalez states that active intoxication creates "memory clouds" and "jeopardizes memory". He is not familiar with the defendant's confession, but assuming it contains extensive and accurate detail, that would be inconsistent with a significant level of intoxication at the time of the offense. (Id. 2688). The defendant told Gonzalez he drank two six packs of beer plus two fifths of vodka daily. (Id. 2692). Dr. Gonzalez does not know if the defendant drank these copious amounts between his July 1979 release and the 12/20/79 crime, "I just took his word and we didn't go into detail about the amount". (Id. 2698).

As for IQ tests, the subject's motivation to concentrate and do well definitely affects the score, "NO DOUBT ABOUT IT" (Id. 2900), as does the subject's fund of knowledge:

> Q. Your fund of knowledge and someone from a very -- that -- that hasn't done well in school, dropped out in the 10th grade, comes from a very restricted economic background, very deprived social background, they're not going to have the -- the fund of knowledge that a middle class kid out in the burbs is going to have, is he?
>
> A. That's true.
>
> Q. Okay. And that can affect his IQ, can't it?
>
> A. No doubt about it.

Id. at 2900.

Dr. Gonzalez has experience with persons from deprived socioeconomic backgrounds who score poorly on IQ tests but whose actual functioning is higher than the scores would predict. (Id. 2702).

As to the mitigating factors of extreme mental or emotional disturbance and substantial domination, Gonzalez relies heavily on the defendant's intoxication. When asked "Do you know how intoxicated he was", Gonzalez replied "No. I don't

know". (Id. 2703). When asked if the defendant had the same co-defendant in the ABC and Martel case, Gonzalez stated he thought it was the same. (Id. 2704). The defendant knows right from wrong. The defendant did not specify how he was dominated or what role his co-defendant played, but he indicated he acted the way he did "because others exercised this pressure upon him." (Id. 2712). The family members also reported that the defendant was led astray by his less honorable friends.

Gonzalez has definitely had cases where the lawyer says his client is crazy, and upon examination Gonzalez has found the client to be competent. (Id. 2718). He has also seen defendants who had the ability to participate in their defense but decided to leave it completely up to their lawyer. (Id. 2719). Dr. Gonzalez is not aware that the defendant has given numerous different descriptions of how the murder occurred. He estimates the defendant's mental age at 15 or 16. (Id. 2722, 23).

When asked flat out if the defendant was competent in 1980, Gonzales stated "Yeah. I think he was not competent to stand trial because of the mitigating factors also in existence". (Id. 2741). He has "reasonable doubts" about the defendant's competency in 1980. Gonzalez states he was not asked to determine competency in 1980, rather only if the defendant could relate to his attorney. He doesn't think the defendant would have been much help to his attorney because of his "mental illness, you know, that I mentioned to you, the personality disorder, probably the questionable drug abuse --". (Id. 2743). It is fairly clear from his testimony at this point that Dr. Gonzalez is confused about competency to stand trial and the criteria attendant thereto.

A final interesting point is that in all the extensive materials he has reviewed, from the defendant's childhood up to the time of the instant hearing, the defendant's mental status has not changed. "I didn't see anything -- anything that has changed. (Id. 2748).

Dr. Fausto Natal, M.D.

Dr. Natal was the third and final expert who examined the defendant for competency in 1980. (His initial report is at P.C. Vol. XXXVIII, 5259). He could not testify at the hearing because of a heart condition, and over the State's objection the affidavit he gave defendant's 3.850 counsel was admitted into evidence (P.C. Vol. XXX, 5575). The affidavit states he would have found the same four mitigating factors as Dr. Gonzalez. He cannot offer an opinion as to competency in 1981 or 1984, though based on Mr. Fox's 1984 "the defendant is crazy" statements, he would have requested a new evaluation.

STATEMENT OF THE ISSUES

I.

WHETHER THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF MENTAL HEALTH EXPERTS DUE TO TRIAL COUNSEL'S INEFFECTIVENESS.

II.

WHETHER TRIAL COUNSEL WAS INEFFECTIVE AT THE GUILT AND PENALTY PHASE IN 1981 AND THE RESENTENCING IN 1984.

III.

WHETHER TRIAL COUNSEL WAS INEFFECTIVE AT THE 1984 RESENTENCING FOR FAILING TO PROPERLY REQUEST A COMPETENCY EVALUATION.

IV.

WHETHER THE DEFENDANT'S CALDWELL CLAIM IS PROCEDURALLY BARRED.

V.

WHETHER THE DEFENDANT'S CLAIMS REGARDING IMPROPER PROSECUTORIAL ARGUMENT AND IMPROPER APPLICATION OF AGGRAVATING FACTORS BY THE TRIAL COURT ARE PROCEDURALLY BARRED.

VI.

WHETHER THE CUMMULATIVE EFFECT OF VARIOUS ALLEGED ERRORS RENDERED THE TRIAL AND SENTENCING FUNDAMENTALLY UNFAIR.

SUMMARY OF ARGUMENT

The State submits there is no independent claim of ineffective assistance of mental health experts at the penalty phase. There is of course the right to counsel being effective at the penalty phase, which is really what claim I entails, and for purposes of analysis the State assumes counsel's penalty phase investigation and presentation were deficient. There is no question that the defendant's experts would have testified that all manner of statutory and nonstatutory mitigating evidence existed, and there is no question that the State's experts would have contradicted them as to all the statutory and most of the nonstatutory mitigation. The problem with the defense experts is that, as found by the trial court, "the factual bases upon which these experts posit their opinion are not believable and are not supported by such objective evidence ..." (P.C. Vol. XIX, 3320). The trial court recognized that the opinions of the defense experts "appear compelling on their face," as indeed they do, but that "these assertions and opinions simply do not fit the facts of this case" (Id). The record in this cause does not merely support the trial court's conclusion, it mandates it. Trial counsel was not prejudiced by counsel's failure to properly advise or utilize or obtain mental health experts at the penalty phase, because there is no reasonable probability that the jurors would have credited their opinions and recommended life. Indeed, the State's rebuttal would have included not only contrary expert opinion, but extremely damaging evidence about the defendant as well.

Counsel was not ineffective in failing to pursue an intoxication defense because there is no evidence the defendant was intoxicated. Counsel was not ineffective at the suppression hearing for pursuing an inducement theory rather

than an "I did not understand my rights" theory, because there is no credible evidence to support the latter theory. The issue of the defendant being shackled could and should have been raised on direct appeal, and given the defendant's history trial counsel's objection would most certainly have fallen on deaf ears.

The claims regarding counsel's failure to request a competency evaluation in 1981 and failure to properly request one in 1984 fail because there is no reasonable probability that the defendant was incompetent during either period, and indeed the trial court's findings on competency are overwhelmingly supported by the record. The defendant's other three claims are procedurally barred.

For a more comprehensive yet nevertheless succinct summary of the State's position, see its post hearing memorandum at P.C. 3239-3253.

ARGUMENT

I.

THE DEFENDANT WAS NOT PREJUDICED BY COUNSEL'S DEFICIENT PERFORMANCE AT THE PENALTY PHASE.

The State will treat claims I and II(C) and (D) as a single penalty phase ineffectiveness claim, and will assume counsel was deficient in his investigation for and presentation at the penalty phase. Logically, in assessing the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984), the first step is a review of what counsel did present at the penalty phase. The defense called six witnesses at the penalty phase: Dr. Carrera (T.T. 1149-1174), Vernitta Gant (sister, T.T. 1174-1180), Edith Johnson (aunt, T.T. 1187-1195), Willie May Oats (mother, T.T. 1195-1204), and the defendant himself (against counsel's advice, T.T. 1221-1233).

Dr. Carrera described the defendant's disturbed family history and the pattern of abuse, and problems in school. He described the same reports of substance abuse as at the 3.850 hearing (since his July 1979 release defendant reported drinking a fifth of vodka plus six or more beers a day plus marijuana, eight or nine joints a day, right up until the day of his arrest). Dr. Carrera reported the history of bedwetting, pyromania, and cruelty to animals, which can be the result of "Psychological disturbances" or "impulse disorder." He then explained what an impulse disorder is, and that many of the causes (poverty with deprivation, parental rejection, childhood abuse) were present in the defendant's upbringing. The defendant's pyromania and cruelty to animals is consistent with an impulse disorder. The defendant has borderline to very low average intelligence with a mental age of 12 for school achievement, which would pretty much restrict him to manual labor. The defendant's impulse disorder will cause him to act impulsively when under stress.

The defendant's sister Vernitta Gant described how the defendant's natural mother and father gave the defendant to his aunt in Palatka to raise when the defendant was very young, and that the aunt refused to give the defendant back to his natural parents. When the defendant came to live with Vernitta and their parents in 1973, after running away from his aunt, the defendant had scars on his head from a beating.

Edith Johnson, the defendant's aunt (not the aunt who raised the defendant) testified to the poverty the defendant lived through while growing up in Palatka, and she saw the aunt beat the defendant with an extension cord for not collecting the wood correctly. It was not the paddling you would give a child but rather a real beating. The aunt would lock up the food and the kids would go hungry until she returned. One time she hit the defendant on the head with a stick, causing a big gash, and the defendant's grandmother almost went to the welfare people to have the kids taken away from her. Ms. Johnson then told the jurors that the cruelty the defendant went through changed him, made him abnormal, screwed up his head, that's why he did what he did.

Freddie Oats, the defendant's brother, explained that he and the defendant were given to their aunt and uncle (the Adams) because their parents couldn't afford to raise then in Ocala. Their aunt beat the defendant regularly, and she busted a hole in the corner of his head, which is still visible, during a beating with a stick. The defendant suffered headaches after that and acted strangly. The defendant finally got sick of the beatings and ran away to Ocala. The punishments created alot of pressure for them. When their real father came to Palatka to try and claim then, when he and the defendant were in sixth grade, they didn't know who he was.

Willie Mae Oats, the defendant's natural mother, related how the defendant's father took Freddie and the defendant to live with his brother's family (the Adams), even though she wanted to keep them. He finally agreed to getting them back, but the Adams, specifically the defendant's aunt Aretha, asked for $500.00 for their return and she didn't have it. She finally got the defendant back when he ran away from his aunt and came to live with her when he was sixteen. The defendant had headaches and he acted strangely, and loud noises would drive him crazy. The defendant tried all different kinds of painkillers but his head still hurt, and the doctors couldn't get rid of the headaches either. The defendant was always nice and respectful to her and would help her around the house. He didn't get into any trouble until he started being with Donnie. Up until then he never was in any trouble. Adelle was also a bad influence on the defendant.

The defendant testified that his mother told him he was two or three when he went to live with his aunt in Palatka. He didn't find out about his real parents until he was eight. He ran away from his aunt for good around June, 1973, and rode his bike to his mother's house in Ocala. He had run away quite a few times before that because his aunt was constantly beating and whipping him as punishment for small things, using fan belts and sticks. When the defendant was around thirteen his aunt hit him on the head with a stick and there was blood everywhere, and he still has a scar from it. He didn't go to the doctor, and his aunt gave him four dollars not to tell his uncle what happened. One time he and his brother were called to the principle's office and that is the first time they ever met their father.

The above factual summation demonstrates that the jury was well aware of the defendant's deprived and abusive upbringing, family turmoil, low intelligence, self-reported history of drug and alcohol abuse, and that his upbringing and childhood behavior were consistent with an impulse disorder which becomes aggravated in stressful situations. The jury did not hear that, in the opinion of Dr. Carbonell and Dr. Phillips, the defendant is mentally retarded and significantly brain damaged. They did not hear that in the opinion of Drs. Carbonell, Phillips, Carrera, Gonzalez and Natal, three statutory mitigating factors apply. If that was the end of the story, the State would pack up and head home. Indeed, if the defendant's brief was this Court's only source of information that would be the end of the story, because nowhere therein is mentioned the testimony of the State's experts or the extremely damaging evidence the jury would absolutely have heard in the course of the examination of all the experts, which includes not merely additional criminal acts but a whole pattern of behavior that is absolutely inconsistent with the defense experts' opinions.

Initially the State takes exception to the legal standard propounded by the defendant as to the prejudice prong of penalty phase ineffectiveness claims. The defendant asserts that the standard is whether, had the jury heard this evidence and returned a life recommendation, would a reasonable basis exist for the life recommendation. That is most certainly not the issue, rather the issue is whether had the jury heard the evidence (all the evidence), is there a reasonable probability they would have returned a life recommendation. The trial court below found that there was no reasonable probability they would done so, because although the defense experts' opinions appear compelling on their face:

> "The factual bases upon which these experts posit their opinion are not believable and are not supported by such objective evidence as to suggest a reasonable probability that [sic] the jury's recommendation and therefore the sentence would have

> been different. Moreover, the ultimate conclusions of the experts are positively refuted by the record, including the defendant's conduct prior to, during, and subsequent to the criminal episodes and throughout the judicial proceedings.
>
> All of defendant's assertions and the opinions of his experts appear compelling on their face. These assertions and opinions simply do not fit the facts of this case."
>
> P.C. Vol. XIX, 3320.

In order to understand the stark reasonableness of the trial court's findings it is necessary to review the entire record of the 3.850 proceeding, which paints a portrait of the defendant that is completely and grossly at odds with the defense experts' factual assertions regarding mental retardation, significant brain damage, and the statutory mitigating factors. The above Statement of Facts will hopefully be of benefit in placing this Court in the shoes of the trial court, because when this Court walks a mile (a very long mile) in the lower court's shoes, the propriety of its ruling will become evident. As in Bertolotti v. State, 534 So.2d 386 (Fla. 1988), and Francis v. State, 529 So.2d 670 (Fla. 1988), the trial court had to choose between conflicting evidence, as trier of fact, and as in those cases the trial court's findings are amply supported by the evidence.

As to mental retardation, the defendant presented evidence that he scored 57 and 61 on the WAIS-R test, which is in the mildly mentally retarded range under the DSM-III psychologists handbook. Dr. Phillips and Carbonell found that the defendant's abilities are consistent with his low I.Q. scores, because the defendant has a flat emotionless affect, is incapable of planning ahead, incapable of being deceitful, incapable of manipulating other people, easily led and weak willed, unable to think for himself, and all in all an extremely intellectually deficient individual. Indeed, Dr. Carbonell stated that defendant's abilities are actually lower than his I.Q. scores would indicate.

Due to space limitations the State cannot at this juncture recount all of the facts in the record that prove their assessment is a complete farce, all of which are related above. These include the alibi letter, the defendant's discussions with Dr. Carrera in 1980, his two escapes and his ability to elude the police and FBI for six months (during which he found another partner, with whom he robbed a liquor store in New York and stabbed the female clerk in the head), his ability to accurately recount in his two confessions virtually every detail of the crimes, his ability to testify rationally at the suppression hearing and penalty phase, his comments to the court, and especially his lengthy discourse with Dr. Haber showing language and intellectual abilities far exceeding the mentally retarded range. The defendant has consistently shown the ability to plan, manipulate, evade, cheat, and lie. The defendant's I.Q. scores do not accurately reflect his real abilities[18] because of a host of factors that would skew the results downward in his case. In reviewing the entire record, this Court will surely agree with the trial court that the defendant's experts' opinions on retardation and his mental abilities truly do not square with the facts.

As to brain damage, Dr. Carbonell and Dr. Phillips assert that there seems to be diffuse damage, which they attribute to a head injury and long term drug and alcohol abuse, especially the defendant's use of liquid paper. However the record simply does not support a long term history of drug and alcohol abuse. The defendant was in prison all of 1976, 1977, 1978, and the first six months of 1979, having been released July 2nd, 1979, 5 1/2 months before the crime. The

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[18] Dr. Haber; borderline to low average, Dr. Carrera; borderline to very low average, Dr. Mutter; borderline and in some areas possibly the very mild retarded range, but nowhere near 57.

only evidence of the defendant's drug use during his incarceration was a fellow inmate who testified that in 1977 the defendant used liquid paper on a regular basis. As for liquid paper, Dr. Mutter and the defendant's own addictionologist testified there is no evidence that liquid paper causes permanent brain damage. The evidence of the defendant's use after his release is his own ridiculous assertion of drinking two fifths of vodka plus two six packs a day up until the time of his arrest, which he claimed did not even get him drunk, only "relaxed". That is what the trial court is talking about when he states that the "factual bases upon which these experts posit their opinion are not believable and not supported by such objective facts." This occurs time and again in relation to their opinions.

Dr. Haber and Dr. Mutter both explained that the defendant had an expressive disorder, which Dr. Mutter described as an "expressive dysphasia," whereby the defendant formulates the idea and understanding properly but sometimes has difficulty formulating the words to express the idea. This difficulty may be organic, in that the brain process responsible for expression may be disturbed, however the disturbance is minimal and does not effect his cognitive functioning, which is intact. Dr. Haber explained that the term brain damage doesn't tell you anything, because even if there is cell damage or a disturbance in some distinct brain function, that does not mean the person's higher cognitive functions and abilities are impaired, and that's what really matters. This defendant's higher functions are not impaired, and the defendant's responses to Dr. Haber are a testament to that fact.

Turning to the statutory mitigating factor of "substantial domination," the first salient fact is that the jury heard the evidence of both the ABC and Martel

case, and knew that the defendant had a different co-defendant in each. The common denominator in both was the presence of the defendant and the defendant's gun, and that the defendant shot the only witness in the head. Had the defendant attempted to use experts to argue this factor, the State would have presented evidence that the defendant committed the same type of crime in New York with yet another different partner. The defense experts rely for this factor on the defendant's retardation and weak-willed, compliant, easily influenced mental make-up, and his supposed inability to formulate plans. The State rebuttal to this would include all the facts which go into rebutting the defendant's claim of retardation, and in so doing the jury would again see that, far from being a helpless sheep led to slaughter by dominating cohorts, the defendant is a schemer, a prodigious liar, someone who will do or say whatever he wants to suit his needs. In short, attempted reliance on this factor would have backfired in a very big way.

As for whether the defendant's "ability to conform his conduct to the requirements of the law is substantially impaired," the analysis is similar. The defense experts rely on intoxication at the time of the offense, and not only is there no credible evidence of that, the defendant's accurate, detailed account of the crimes is grossly inconsistent with any significant degree of intoxication. They again rely on his mental retardation and his supposed inability to appreciate the consequences of his actions. They employ the kitchen sink approach, but it fails miserably because all the factual underpinnings have no basis in established fact. The defendant had a perfect ability to conform his conduct to the law when he wanted to, and on these two nights and again eight months later in New York he chose not to, picking an easy, unguarded isolated target to get some quick cash. That is the reality of this case.

As for "extreme mental or emotional disturbance," the analysis is again the same. The only mental or emotional disturbance established by this record is the defendant's need to pick up some easy cash.

In summation, there is no reasonable probability that had the jurors heard the full picture, that presented by both sides at the 3.850 hearing, they would have returned a life recommendation. To the contrary, whatever sympathy was generated by the evidence they heard of the defendant's upbringing would have been lost. Jurors are reasonable, common sense people, and they know a tainted bill of goods when they see one.

II.

COUNSEL WAS NOT INEFFECTIVE AT EITHER THE GUILT OR PENALTY PHASES.

Suppression Hearing

The essence of this claim is that rather than employing an improper inducement theory, counsel should have relied on expert opinion that the defendant did not have the mental capacity to understand or knowingly waive his miranda rights. The trial court found that the defendant was essentially trying to reargue the voluntariness issue using a different tact, and that trial counsel had "presented a forceful and factual argument well within the standards for competent counsel" (P.C. Vol. XIX, 3321).

Even assuming counsel was deficient for not presenting Dr. Phillips and Carbonnel at the suppression hearing, there exists no reasonable probability that the outcome of that proceeding would have been different. Their opinion that the

defendant is too feeble minded to understand his rights is directly contradicted by the defendant's responses to Dr. Haber concerning his miranda rights, as well as by all the other facts that contradict Dr. Carbonell's and Dr. Phillips' findings concerning the defendant's intellectual abilities. It is interesting that at the suppression hearing, the defendant never said he did not understand his rights. When Dr. Phillips asked the defendant whether he understood each specific right, the defendant refused to give a straight answer, saying only that he did not know why he confessed. When Mr. Fox was asked if the defendant understood his rights, Fox responded that he still thought they had a valid inducement challenge to the confession. The defendant told Dr. Haber the police never gave him miranda, that he wanted a lawyer but they tricked him, threatened him, made him promises, and wouldn't let him make a phone call.

In sum, there is no reasonable probability or remote possibility that the "I didn't understand" approach would have been successful. Additionally, the trial court correctly found that Mr. Fox did a competent job at the hearing.

Failure to Use Intoxication Defense

The defendant told Dr. Carrera he had one beer the day of the offense and that he did not participate in the crimes (P.C. Vol. XXXVIII, 5252, 53).[19] He told Dr. Gonzalez that he did the shootings, but his friends made him do it. He said nothing to Gonzalez about drug use on the day of the crimes. He did tell Gonzalez he had used cocaine and used marijuana regularly, which he mixed with alcohol, and that his memory of the crimes might be affected by his drug use (Id,

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19 He also told Carrera that since his July release he had been drinking a fifth of vodka plus six or more beers per day, whenever he could get the money. He also stated he got dizzy and almost fainted when he drank a 1/2 pint of vodka (P.C. 892). That's almost four faints a day, not including the beer. By the time he spoke with Dr. Haber, he was up to seven plus faints a day (P.C. 1904).

5257, 58). He told Dr. Natal that on the day of the ABC crime Adell picked him up, then gave him a pill which he took. He also used liquid paper, and the liquid paper made him see things and gave him a headache. He shot the man accidently when he made a sudden move (Id., 5259-62). The defendant told Dr. Haber he gave these different versions because he was getting different advice on what to say (Id, 1963).

There is no independent evidence of the defendant's drug or alcohol use on either 12/19/79 or 12/20/79. The defendant's two confessions contain extensive, accurate, detailed information about the crimes, and aside from a single reference to "being high or something" on the 19th, the defendant does not describe any alcohol or drug use.

In sum, this claim is completely devoid of merit. There is insufficient evidence to have warranted an instruction, and even if one had been given there is no reasonable probability that the jurors' verdict would have been different. See White v. State, 559 So.2d 1097 (Fla. 1990), Bertolotti v. State, 534 So.2d 386 (Fla. 1988), Robinson v. State, 520 So.2d 1 (Fla. 1988) and Edwards v. State, 556 So.2d 1193 (Fla. 1st DCA 1990).

Failure to Object To Shackling

This issue could and should have been raised on direct appeal, and there is no reasonable probability that, had counsel objected, the result of the proceeding would have been different.

Competency At Trial And Resentencing

The State will address both competency issues at this juncture, given the interrelationship between the two.

Judge Angel, who presided over the 3.850 proceeding below, did not conduct the 1981 trial or 1984 resentencing in the instant case, however he did preside over the June 1980 ABC trial and the February 1982 retrial of that case. Prior to the instant February 1981 trial, the defendant had been through one full blown trial in the ABC case, and had been a part of the criminal justice system since 1975 when he was arrested for auto theft, then burglary, for which he received probation, then burglary again for which his probation was violated. He was incarcerated in various institutions from January 1976 - July 2nd, 1979, when he was paroled, and was on parole at the time of the offense.[20] The State's experts noted the relevance of this experience to the competency issues herein.

In assessing the defendant's 1981 competency, Judge Angel had access to the most direct evidence possible: the defendant's 1981 suppression hearing testimony (the defendant had also testified before Judge Angel at the suppression hearing in the ABC case, held June 9th, 1980) just prior to trial, his penalty phase testimony, his outburst during his mother's penalty phase testimony, and his final discussions with the court. Judge Angel also had the benefit of Dr. Carrera's detailed account of his March 1980 competency evaluation, as well as the alibi letter the defendant wrote in early January 1980. He also had the benefit of hearing a verbatim account of the defendant's responses to Dr. Haber.

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[20] See parole violation warrant at P.C. Vol. XXVII, 5023. The "under sentence of imprisonment" aggravating factor definitely applied to the defendant, but for some unknown reason was overlooked by the trial court.

He knew the facts and circumstances of the defendant's escapes. And finally, he knew that Dr. Carbonell's and Dr. Phillips' diagnosis of mental retardation was positively refuted by every word and deed of the defendant contained in the record, as well as the opinions of Drs. Carrera, Haber and Mutter, all three of whom found the defendant to be competent at the time of the 1981 trial.[21]

The trial court's findings below in regards to competency at the 1981 trial are as follows:

> The Court rejects the Defendant's assertion that "... Mr. Oats' competency to stand trial was never properly evaluated at the time of the original trial proceedings." The experts who originally evaluated the Defendant have not changed their opinions. The new facts and opinions which cause the original experts to equivocate about their original opinions have not been established by substantial, material evidence. Moreover, the Court has heard overwhelming evidence that the Defendant met the criteria for competency in 1981, the best evidence of which is the Defendant's testimony and statements during the suppression hearing and trial. Even assuming that the Defendant is mentally retarded under the DSM-III criteria, because he scored 61 and 57 (there is evidence in the DOC records that he scored as high as 93) on the intelligence tests and has deficits in adaptive functioning, that does not mean the Defendant was incompetent.
>
> The test for competency is whether the Defendant had a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he had a rational as well as factual understanding of the proceedings against him. The Court finds that the Defendant knew the charges against him and possible penalties; that he testified rationally and relevantly at the suppression hearing; that he was able to follow and understand the testimony of witnesses at trial; and that he understood his subpoena power

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21 In his brief the defendant makes the remarkable assertion that all three of the experts who examined the defendant in 1980 now have serious doubts about his competency to stand trial in 1981. In actual fact, Dr. Carrera stands 100% behind his 1980 finding of competence, as the summary of his testimony above (p.47-57) reveals. Dr. Natal states by way of affidavit that he cannot offer any opinion on this issue (P.C. 5578). Dr. Gonzalez does state he has "reasonable doubt" about the defendant's competency in 1981, but the source of these doubts, and his conceptions of the criteria for competency, are rather ill defined (see p. 92, 93 above).

to call witnesses and the roles of the judge, jury, prosecutor and defense counsel.

P.C. Vol. XIX, 3318, 19.

If there was one thing that all the experts agreed on, it was that the defendant's mental condition has been completely static over time, with the exception of periods of drug or alcohol impairment, which most definitely would not include the 1981 trial or 1984 resentencing. The final witness at the hearing, Dr. Gonzalez, had examined the defendant in 1980 and had reviewed both the 3.850 appendix and transcripts of the 3.850 hearing itself. When asked if he saw any fluctuations, he stated "I didn't see anything - anything that has changed" (P.C. 2748). There is absolutely no testimony or evidence that the defendant has any type of mental illness, such as schizophrenia or psychosis or manic depression or any type of condition that would cause vacillations in his intellectual abilities or grasp of realty. This is most definitely not a case, such as Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991), where after the fact evaluations are useless because there is no way restrospectively to tell if the defendant was listening to the testimony or plotting the overthrow of the Lilliputian Parliament.

The point is that the defendant's abilities and capabilities and grasp of reality are the same today as they were in 1990 (Dr. Phillips' evaluation), 1989 (Drs. Mutter, Haber, and Carbonell), 1987 (Dr. Krop) 1984 (resentencing), 1981 (trial) and 1980 (Drs. Carrera, Natal, Gonzalez). There is absolutely no evidence to the contrary, and indeed the defendant's responses to Dr. Carrera in 1980 concerning the specific competency criteria are extremely similar to the answers he gave to Dr. Haber in 1989. It is certainly true that the defendant

set fire to his mattress while in solitary confinement in January 1981, a month after being extradited from Texas and a month prior to the instant trial (see P.C. XXVIII, 5160, a newspaper account of the fire). Whether the defendant did it because he was upset at being in solitary confinement (as the article suggests) or because he was attempting to delay the trial by acting crazy (a possibility suggested by Dr. Haber), or because he was trying to commit suicide (as hypothesized by Dr. Carbonell), the incident in no way suggests the defendant was incompetent the following month.

The other incident during incarceration occurred, if at all, sometime prior to the 2/19/80 exam by Dr. Carrera. (See his report, P.C. 5252). During the initial penalty phase Dr. Carrera testified that the defendant told him he had smeared feces on the wall of his cell (T.T. 1152). There is no time frame given as to when the defendant supposedly did this, and there is no corroborating evidence that it ever occurred. This could have been another of the defendant's lies arising from his perceived best interest at the time of the Carrera evaluation, or the defendant may have actually done it for some unknown reason, but in either case it has nothing to do with the defendant's competency to stand trial in February 1981.

In sum, as to the 1981 trial, there is no reasonable probability that the defendant was incompetent at that time and indeed the evidence to the contrary is overwhelming.

Turning to the 1984 resentencing, the defendant in his brief makes repeated claims concerning a drastic deterioration in his mental state between 1981 and 1984. He relies exclusively on Mr. Fox's recitation to the Court in 1984 and

Fox's testimony at the 3.850 hearing. Those will be dealt with shortly, however the first noteworthy point is that the defendant testified at that proceeding in 1984, as to his understanding of the nature of the proceeding (R.S. 1805-1809):

> Q. State your name, please.
>
> A. Sonnie Boy Oats. Sonnie Boy Oats, Junior.
>
> Q. Junior? Okay. Sonnie, I want you to tell Judge Swigert why it is you're here today. What do you understand to be going on here today, why we've got this hearing, we've got all the people here.
>
> A. All I know is that I had a -- something about overturned death sentence, and supposed to come back and get a re-trial and try to get -- get another trial or something. I don't know, you know.
>
> Q. Okay. Did you remember the trial before, back in 1981, we had in this courtroom? We had a trial, had the jury up there?
>
> A. Yeah, I remember.
>
> Q. Do you remember that?
>
> A. Yes.
>
> Q. Is that what you thought was going to happen when you came back here?
>
> A. Yes, sir. Yes, sir.
>
> Q. You thought the jury was going to decide whether you were guilty or not guilty again?
>
> A. Yes, sir.
>
> Q. You still think that that's what's going to happen here today?
>
> A. That's what I was -- you know, I was going to go through here, the picking the jury and all that, you know.
>
> Q. You and I talked about what's going to happen, though?
>
> A. You talked about, you know, what's going to be, just what it is now, you know.
>
> Q. Okay. I told you that it was going to be what it is now?
>
> A. Yeah.

Q. What it is now? What's going to happen today?

A. I don't know. I'm just, you know, trying to find out what's going on, because I really don't know. All I know is I'm just here and looking for -- for a new trial.

Q. You think you might be found -- you could be found not guilty today?

A. Well, you know, I don't know what's going to happen but --

Q. Do you know what the judge has to do with what's going on here today? Do you know what his job will be today?

A. As far as from what I had in the past, it was just, you know, pass sentence down, and give me a -- sentence me to death or, you know, or lighter sentence, or something like that.

MR. FOX: Okay. Okay. I don't have any other questions.

R.S. 1806-1808.

On cross-examination the defendant was asked what town he was in, and he responded "I guess it better be Ocala." When the prosecutor pointed to Mr. Fox and asked the defendant who he was, the defendant replied "That's my attorney."

In evaluating the defendant's responses, it must be remembered that the last time he had been returned from prison to circuit court in Ocala was in 1982, when he underwent a complete retrial in the ABC case. It should also be noted that the defendant's hope for a new jury was shared by Mr. Fox, who demanded one, and the defendant's appellate counsel, who claimed error in the trial court's refusal to seat a new jury. See Oats v. State, 472 So.2d 1143 at 1145 (Fla. 1985). The defendant's responses were rational and coherent, and the fact that he was unsure of the scope of the proceeding is hardly indicative of incompetence.

The trial court at resentencing first noted that the defendant appeared exactly as he did in 1981, and that "I think he's smart when he wants to be smart and not so smart when he wants people to think he's not so smart" (R.S. 1803).

After the defendant testified, the trial court stated that based on the defendant's demeanor and answers during his testimony, and his previous experience with the defendant, there was no basis to appoint experts (R.S. 1812, 13).

The defendant's reliance on the testimony of Mr. Fox is misplaced. Fox began his 1984 dissertation by going through the defendant's history and the results of the three 1980 examinations. Fox relies entirely on events prior to the 1981 trial (R.S. 1791-1797). Fox is not claiming a deterioration, rather he states that, in reference to the 1981 trial herein and 1982 ABC retrial, the defendant was insane at the time of those proceedings, in addition to being currently insane in 1984 (Id, 1797). He closes by stating that he had just had some conversations with the defendant, and although he couldn't say what they were, "I can tell you that if the conversations I had with him are the conversations of a sane man facing execution, then all the rest of us must be insane." (Id).

At the 3.850 hearing Fox disclosed what the conversation was (P.C. 800), i.e., the defendant told Fox he needed a particular model sony AM/FM cassette player, and when Fox said he would get it but first they had to talk about the case, the defendant said, get me the recorder and ill see you in Court. When asked if the defendant had changed since trial, Fox said no, it was same the thing, the defendant did not want to talk about the case, rather only his personal matters (P.C. 818, 819). The defendant basically patted his lawyers on the back and said go get 'em.

There is nothing in Fox's 1984 comments or his 3.850 testimony to support the assertion that the defendant's condition deteriorated between the 1981 trial and 1984 resentencing. What his testimony shows is that according to him the defendant simply did not care about his case. The record however shows that the defendant certainly cared enough in 1981 to testify relevantly at the suppression hearing and penalty phase (the latter against Fox's advice). Even if Fox's testimony is taken at face value it does not support a finding of incompetence because the competency criteria focus on abilities and capacities, and the record overwhelming demonstrates that the defendant had the necessary abilities and capacities at every juncture in these proceedings.

The standard for competency in Florida is the standard announced in Dusky v. United States, 362 U.S. 402 (1960), see Pridgen v. State, 531 So.2d 951 (Fla. 1988). The issue herein is whether, had counsel challenged the defendant's competency in 1980 and cited the proper rule in 1984, there is a reasonable probability the defendant would have been found incompetent. Futch v. Dugger, 874 F.2d 1483 (11th Cir. 1983). The evidence presented at the 3.850 hearing must "sufficiently raise a valid question as to Bush's competency to stand trial," Bush v. Wainwright, 505 So.2d 409 (Fla. 1987). In the instant case the record simply does not support the defendant's assertions of incompetency at either the 1981 trial or 1984 resentencing.

Penalty Phase Ineffectiveness

At page 83 of his brief the defendant alleges that Fox should have presented to Judge Swigert in 1984 the same evidence he should have presented at the 1981 trial. There is no reasonable probability it would have changed Judge Swigert's decision, for the same reason it would not have affected the jury's recommendation in 1981.

III.

THE DEFENDANT WAS NOT INCOMPETENT AT THE TIME OF THE 1984 RESENTENCING.

This issue is treated under claim II immediately above.

IV.

THE DEFENDANT'S CALDWELL CLAIM IS PROCEDURALLY BARRED.

This issue could and should have been raised on direct appeal, and is thus procedurally barred.

V.

THE ISSUES RELATING TO PROSECUTORIAL ARGUMENT AND THE TRIAL COURT'S ANALYSIS OF AGGRAVATING FACTORS ARE PROCEDURALLY BARRED.

These issues could and should have been raised on direct appeal, and hence are procedurally barred.

VI.

THE DEFENDANT'S CUMULATIVE ERROR CLAIM.

Whatever errors the defendant is referring to are dealt with above or are not cognizable in this proceeding.

CONCLUSION

The trial court's order is proper and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to MARTIN McCLAIN, C.C.R., 1533 South Monroe Street, Tallahassee, Florida 32301 on this 12 day of March, 1992.

RALPH BARREIRA
Assistant Attorney General

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