IN THE SUPREME COURT OF FLORIDA

TONY RANDALL WATTS,

Appellant,

v.

CASE NO. 74976

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The Appellee accepts the statement of the case at pages (3) and (4) of Mr. Watts' brief.

The relevant facts are set forth, in order, as follows:

Facts: Point I

The issue of whether a psychologist from the Department of Health and Rehabilitative Services ("HRS") should have been appointed was never preserved for appellate review by motion or by objection.

The trial court appointed Dr. Miller, a psychiatrist, to examine Mr. Watts and provide a confidential report to the defense. (R 331). Dr. Miller examined Watts and later re-examined him (and performed an EEG). (R 478).

The defense filed a suggestion of incompetence and request for continuance, alleging that Watts was uncooperative, illiterate and retarded. The defense also requested the appointment of qualified experts per Fla.R.Crim.P. 3.210. (R 517). At no time was HRS mentioned (R 517) as the appropriate or solely qualified examiner.

Dr. Barnard, another psychiatrist, and Dr. Fennel, a psychologist, subsequently examined Watts. (R 527).

Dr. Barnard's vita (R 578) shows that he was the author of at least one study on the "intelligence of rapists". His sensitivity to the problems of the condemned was also reflected in an article (also listed in the vita and appended hereto) co-authored with Michael Radelet, entitled **Treating Those Found Incompetent For Execution, Ethical Chaos With Only One Solution,**

Bulletin of the American Academy of Psychiatry and the Law, Vol. 16, No. 4 (November 4, 1988). The article stated that psychiatrists must ethically refuse to treat any condemned but mentally ill person unless or until the State commutes his sentence to "life".

Despite his defense bias, Dr. Barnard found Watts to be competent (R 204), and "of borderline intelligence" but **not retarded**. (R 204).

On its own, the defense hired Dr. Joyce Carbonell, an FSU associate professor and regular defense-witness (in capital cases) to reevaluate Watts. Again, HRS was not mentioned, requested or consulted as the appropriate evaluator.

After being convicted and sentenced, Watts filed a motion for new trial which did not mention the "failure" to use HRS as "error".

Facts: Point II

The trial court had to weigh the credibility of Drs. Barnard and Fennel against that of Joyce Carbonell.

Dr. Carbonell only consulted the defense team for information and limited her research. (R 137). Dr. Carbonell never testifies for the State in capital cases.[1]

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[1] Carbonell, at trial, attempted to represent that she had testified "for the State" in a capital case. On cross, the truth came out. What Carbonell **really** did was testify that her client was competent to plea bargain for a lesser sentence. (R 1109). Also, she was hired by the defense, not the State, in that case. (R 1109).

Carbonell said that Watts had a full scale of IQ of 104 when he was seven years old because he performed, then and now, at that level. (R 140). Other bizarre representations included:

> (1) The defendant did not "appreciate" the charges, despite being able to articulate them, because he doubted the strength of the State's evidence and did not feel he could be charged. (R 141).
>
> (2) The defendant "short sightedly" wanted to be acquitted rather than institutionalized. (R 148).
>
> (3) That her evaluation would not change even if Watts could fully state every charge facing him. (R 161).
>
> (4) Although Watts told Carbonell he was pleading not guilty, he was going to trial, the State would present evidence against him, he would put on his own evidence, the jury would render a verdict and he could receive a death sentence, he did not "appreciate" his possible fate. (R 167). Especially since he thought he might be acquitted. (R 169).
>
> (5) Carbonell was unwilling to admit that Watts understood the adversary nature of the proceedings. (R 169).
>
> (6) Carbonell found Watts' capacity to disclose facts "unacceptable", but due to his distrust of counsel and not any mental defect. (R 172-173). Carbonell also equated "capacity" with "information" thus she would deem someone "mentally incompetent" if they spoke a foreign language. (R 173).
>
> (7) Carbonell said, sarcastically, that Watts could manifest appropriate courtroom behavior "if sitting there is what you call appropriate". (R 176).
>
> (8) Carbonell also criticized Watts' "adaptive" behavior due to his loss of jobs, having to be reminded to call in sick, etc.

Dr. Carbonell confessed that the old standard for "retarded", that is an IQ of 80 or less, is no longer used. (R

156). A new category, "borderline" is used to describe people in Watts' IQ range (71+) and that people with IQ's as low as 50 can function well in unsupervised homes as well as in group homes. (R 185).

Dr. Barnard, a psychiatrist, testified to examining over 4,000 competency referrals including a "significant percentage" of retarded people. (R 193). Unlike Carbonell, Barnard sought information from both sides. (R 196).

Dr. Barnard noted that Watts knew what he was charged with (R 197), when and where the crimes occurred (R 197), the State's evidence and its deficiencies (R 199). Dr. Barnard noted that Watts came with his lawyer and consulted with counsel prior to answering questions. (R 200).

Dr. Barnard found Watts "borderline" but "not retarded", as well as competent. (R 204). For example, Watts could not do "math" yet he could make change. (R 204).

Dr. Fennel, a psychologist, tested Watts but only after Watts spoke to his lawyer. (R 216). Watts was unwilling to answer any questions unless counsel advised him to do so. (R 218).

Dr. Fennel found Dr. Carbonell's IQ test results odd because Watts' score went down, rather than up even though Carbonell gave the test less than six weeks after Fennel did. (R 225). Since subjects **can** lower their own scores, (R 226) it was possible Watts did not try as hard if Carbonell "gave the test the same way". (R 225).

Carbonell, however, used questionable tests and reached dubious conclusions. (R 226). For example:

> (1) Carbonell used one test (the Ritan Test) that is not to be used on the retarded. (R 226).
>
> (2) Carbonell used the "Stroup" test, which the subject must read, even though Watts is allegedly illiterate. (R 227).
>
> (3) Carbonell used the Canter-Bender Test - a test for comparing schizophrenics - even though the test is **not** to be used for non-schizophrenics with known lesions due to its tendency to give "false positives" (i.e., finding brain damage where none exists). (R 227).
>
> (4) Carbonell used highly subjective criteria for judging Watts' "adaptive ability" in rejecting data that Watts could function, could find his way around town and both obtain and hold "better than minimum wage" jobs. (R 231). Carbonell also relied upon Watts' limited vocabulary to say he "lacked capacity". (R 235).

Again, Dr. Fennel said Watts is not retarded. (R 237).

Judge Haddock found Drs. Barnard and Fennel more credible than Dr. Carbonell and ruled that Watts was competent. (R 251-254).

Facts: Point III

Watts never asked for leave to represent himself. His brief complaint against counsel voiced at (R 394) was settled by Watts and his lawyers. (R 398).

Facts: Point IV

A key issue in the Watts trial was the reliability of the identification of Watts by Mrs. Jurado.

During closing argument, counsel for the State argued that the date of the crime was one which changed Mrs. Jurado's life. The defense immediately objected (R 869) and counsel for the State, in turn, replied that he was merely arguing the significance of the day and its events as enhancing. Mrs. Jurado's ability to identify Watts months later. (R 869-870).

Based on the State's response, defense counsel said that "If they had argued that I might not have objected." (R 870). The prosecutor responded that he had not finished his comment (R 870), and that "the last statement" he would make was a comment on mental anguish. (R 871).

Facts: Point V

Mr. Jurado was forced to endure the anguish and humiliation of seeing his wife sexually battered. (R 1328).

Mr. Jurado lived for five to ten minutes after being shot. (R 786). Mr. Jurado let out a scream (R 527), staggered to a telephone (R 559) and apparently tried to use it while bleeding (R 560). He left a blood trial that encircled the kitchen table (R 560) and the phone was apparently disabled by someone. Jurado staggered into his front yard, spitting up blood, and slowly died.

Facts: Point VI

The issue of proportionality will be discussed in the argument section of this brief.

Facts: Point VII

The issue of "executing the retarded", if even applicable here since Watts is "borderline" but not retarded, will be discussed below.

SUMMARY OF ARGUMENT

Mr. Watts has raised seven issues on appeal, none of which warrant relief.

First, Watts complains that the "wrong" mental health experts examined him. Watts did not raise or preserve this issue below and, in fact, induced any error by his own motion. He is not entitled to an appeal.

Second, Watts asks this Court to reweigh the expert testimony in the record and substitute its own competency determination for that of the trial judge. This is not a proper basis for an appeal.

Third, Watts contends he did not receive a **Faretta** hearing although he never asked to represent himself and he would not have been able to do so (given his IQ) in any event.

Fourth, any "error" relating to the prosecutor's arguments was harmless. Of course, Watts was also on trial for non-capital crimes relevant to Mrs. Jurado for which his argument was proper.

The death penalty was properly and proportionately imposed.

ARGUMENT

POINT I

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS "HRS" ARGUMENT GIVEN HIS FAILURE TO PRESERVE THIS ISSUE OR TO ESTABLISH ERROR OR PREJUDICE

The Appellant failed to preserve this issue by appropriate objection or argument in the lower court and cannot, therefore, raise it on appeal. **Jacobs v. Wainwright**, 450 So.2d 200 (Fla. 1984); **White v. State**, 446 So.2d 1031 (Fla. 1984); **Steinhorst v. State**, 412 So.2d 1031 (Fla. 1982); **Clark v. State**, 363 So.2d 331 (Fla. 1978). Aware of his predicament, Watts tries to argue that he "did not have to" preserve the issue under **Pate v. Robinson**, 383 U.S. 375 (1966); **Drope v. Missouri**, 420 U.S. 162 (1975), and **Lane v. State**, 388 So.2d 1022 (Fla. 1980). None of these cases stand for that proposition.

In **Lane**, the issue was the need for a competency evaluation and hearing when the defendant "made himself incompetent by not taking medicine. The issues of "who" should perform the evaluation or the impact of his IQ of "56" were not discussed, nor was the issue of "preservation". **Pate** and **Drope** create an affirmative duty of inquiry when the trial court is confronted with an incompetent litigant, but the issue of "who" is, again, not discussed. Nothing in **Pate** or **Drope** addresses the issue of preservation as it relates to the appointment of particular doctors.[2]

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[2] We would also submit that Watts, by requesting experts under Rule 3.210 rather than the statute and then by hiring Dr. Carbonell as his expert of choice, induced error by the court.

Therefore, Watts is not entitled to appeal this issue.

Without waiving this defense, we would nevertheless note that Watts has not shown any basis for reversal.

Mr. Watts failed to establish either retardation or incompetence to stand trial (the terms are not synonymous) in the lower court. Now, on appeal, he has raised the "HRS" issue in a bald attempt at winning another roll of the dice, to see if he can avoid prosecution by lowering his scores.

There is ample record support for this theory. First, Watts has been very cautious about possibly hurting his defense while dealing with his doctors, especially Dr. Barnard. Second, Watts defied medical science by getting a **lower** IQ score (of 65) despite being tested much too soon after his first test (scored at 71). This simply does not happen. Third, now that Watts knows he can be convicted, future malingering may be presumed. **Mims v. United States**, 375 F.2d 135 (5th Cir. 1967); **United States v. Mota**, 598 F.2d 995 (5th Cir. 1979); **United States v. Makris**, 535 F.2d 899 (5th Cir. 1976).

While this Honorable Court cannot deny relief just on the prospect of future malingering or misconduct, **Lane v. State, supra**, it is also true that the court cannot grant relief on speculation that Watts might "fail better" next time.

Watts' only credible IQ score was the 71 recorded by Drs. Fennel and Barnard.[3] To establish "retardation" under the

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[3] Aside from the obvious bias of Dr. Carbonell, we note that all facts (and all inferences therefrom) must be taken in favor of the State. **Shapiro v. State**, 390 So.2d 344 (Fla. 1980). Thus, Watts' operative IQ is 71, not 65.

operative statute, §393.063(41), Fla.Stat., Watts would have to show that "71" was more than two standard deviations from the mean score on an HRS approved test (see Fla. HRS Rules 10F-3.11, 3.12), and an appropriate "adaptive behavior" score. Since Watts did not raise the issue of HRS testing **sub judice**, he has no record basis on which to establish either factor.

Thus, even if §916.11(1)(d), Fla.Stat., was violated, Watts cannot show that "but for" this violation he would not have been tried, convicted or sentenced. In fact, the presumption is that an HRS survey would have produced the same results as those obtained by Dr. Barnard, Dr. Fennel, and, apparently, Dr. Miller (since the defense kept his report secret).

Although Watts lacks standing to appeal this issue, it is clear that any error was harmless.

POINT II

THE TRIAL COURT DID NOT ERR IN WEIGHING THE EVIDENCE REGARDING THE APPELLANT'S COMPETENCE

Mr. Watts' second point on appeal is nothing more than a request for this Court to reweigh the evidence surrounding the issue of competence and then substitute its own judgment for that of the trial court. As this Honorable Court has repeatedly reminded defense counsel, appellate courts do not weigh evidence, nor do they resolve issues such as credibility. **Tibbs v. State**, 397 So.2d 1120 (Fla. 1981); **Heiney v. State**, 447 So.2d 210 (Fla. 1984); **Toole v. State**, 472 So.2d 1174 (Fla. 1985).

Neutral and detached experts, including a psychiatrist, concluded that Watts was in the borderline range of intelligence,

was not "retarded" and was competent to stand trial. A defense hireling (notorious for her anti-death penalty bias) reported that Watts was mentally retarded and incompetent.

Judge Haddock was not bound by the testimony of any particular expert, **Thompson v. State**, 14 F.L.W. 527 (Fla. 1989); **Bertolotti v. Dugger**, 883 F.2d 1503 (11th Cir. 1989), but rather, was free to resolve this conflict on the basis of credibility and the known facts. His decision to accept the testimony of Drs. Fennel and Barnard was not so arbitrary or irrational as to compel reversal. Indeed, given the totality of the case, Judge Haddock was correct in accepting those expert opinions which most closely fit with the known facts. **Bundy v. Dugger**, 850 F.2d 1402 (11th Cir. 1989).[4]

Dr. Carbonell was proven to have done incomplete research, to have used the wrong tests and to have been very subjective in her evaluations. These facts, taken in light of her "hired gun" reputation, clearly cast doubt on her credibility as a witness.

It is given that psychology is an extremely inexact discipline which lacks the clear and verifiable standards of legitimate scientific disciplines. See **Frye v. United States**, 293 F. 1013 (D.C. Cir. 1923), cited in **Bundy v. State**, 471 So.2d 9 (Fla. 1985) (regarding scientific evidence and admissibility).[5]

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[4] Pursuant to **Carter v. State**, 14 F.L.W. 525 (Fla. 1989), the trial judge, as finder of fact in a competency proceeding, is not subject to reversal absent an abuse of discretion.

[5] **Frye** holds that expert testimony is admissible only if based upon well recognized and accepted scientific principles. Psychology is noted for its lack of and ever-changing principles. In fact, the DSM III R, relied upon by Carbonell in her analysis, specifically states it is **not** relevant to **legal** determinations. (See "Cautionary Statement" at XXVI).

Dr. Fennel's testimony illustrated just how unreliable and manipulable this pseudo-scientific evidence can be. Under the circumstances, Judge Haddock should not be reversed for taking the word of Drs. Barnard and Fennel.

Relief should be denied.

POINT III

THE TRIAL COURT DID NOT "FAIL" TO ADVISE THE APPELLATE OF HIS **FARETTA** RIGHTS

Mr. Watts briefly complained about the number of times he was visited by counsel and requested new counsel during voir dire. After conferring with counsel, Watts' complaint was apparently satisfied (R 398) and no further court action was requested or required.

The Appellant **now** contends that the court was required to advise him of the option of self-representation recognized in **Faretta v. California**, 422 U.S. 806 (1975). The problem with this allegation is that Watts never asked - directly or indirectly - to act as his own attorney.

In **Hardwick v. State**, 521 So.2d 1071, 1074 (Fla. 1988), this Court held:

> We note that the courts have long required that a request for self representation be stated unequivocally. **Chapman v. United States**, 553 F.2d 886 (5th Cir. 1977), see **Faretta**, 422 U.S. at 835-836, 95 S.Ct. at 2541.

Since Watts never had any desire to act as his own lawyer, the entire "**Faretta**" issue seems somewhat foolish. Apparently, Watts, seeking a triumph of form over substance, wants a new trial because the trial court "failed" to provide some talismanic

hearing to verify that he did not want to represent himself. This argument would grossly overextend the scope of **Nelson v. State**, 274 So.2d 256 (Fla. 4th DCA 1974), by requiring hearings when even the defendant does not want them.[6]

In **Bundy v. Dugger**, 850 F.2d 1402 (11th Cir. 1989), the court noted that the failure to strictly comply with the requirements of a "**Faretta**" hearing may be harmless error depending upon the facts of the case. Even if, by some arcane extension of **Nelson**, Judge Haddock's first response should have been to conduct a **Faretta** hearing, we submit that any error was harmless because:

> (1) The record shows that counsel and Mr. Watts spoke and resolved their misunderstanding. No subsequent demands for new counsel were made. (R 398).
>
> (2) Although competent for trial, Watts' low IQ and his illiteracy would clearly have precluded self-representation even if a **Faretta** hearing had been held.
>
> (3) **Nelson** requires a "reasonable inquiry", not a formal trial. Mr. Watts clearly set forth his precise complaint and enabled Judge Haddock to respond. Thus, despite the absence of a formal hearing, **Nelson** seems to have been satisfied.

Mr. Watts is not entitled to relief.

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[6] Although trial had not formally commenced, we question nonetheless the timeliness of Watts' mid-voir dire request for new counsel.

POINT IV

THE TRIAL COURT DID NOT ERR IN OVERRULING THE DEFENDANT'S OBJECTION TO THE PROSECUTOR'S GUILT PHASE ARGUMENTS

The Appellant confesses that the State's case was strong, if not overwhelming, against him. The Appellant must concede that the jury saw and heard the live testimony of Mrs. Jurado. The Appellant has **not** alleged that the jurors were twelve "lumps of lead" who were totally unaffected by the trial. Thus, it utterly defies logic for Watts to suggest that his conviction was based on nothing more than the phrase "Glenda Jurado's life will never be the same". We submit that the jury was fully capable of drawing that conclusion on its own. Thus, even if the comment was improper, there is no **reasonable** probability that the alleged error provoked the verdict. **State v. DiGuilio**, 491 So.2d 1129 (Fla. 1986).

The Appellant's reference to **Johnson v. State**, 442 So.2d 185 (Fla. 1983), is welcomed because it clearly supports the State's position. In **Johnson**, an otherwise acceptable closing argument was tainted by a single comment about "one less person" being at the Thanksgiving table at the victim's home. In finding harmless error, this Court held that one brief, improper comment would not provoke reversal when it did not influence the jury. See **Darden v. State**, 329 So.2d 287 (Fla. 1976). Since Watts concedes this was not a "close" case, he must lose just as Johnson did.

The defendant, of course, was charged with other, non-capital crimes for which a comment on the non-capital victim (Mrs. Jurado) would not necessarily be improper. **Booth v.**

Maryland, 482 U.S. 496 (1987) [at n.12]. The prosecutor's argument makes separate reference to the murder victim (Mr. Jurado) and the "other" victim, Mrs. Jurado. As to Mrs. Jurado, the comments were not inappropriate (no matter what various interpretations of the remark were argued to the trial judge). If we accept Watts' proposition that jurors indulge in the arcane parsing of words (as lawyers do), then clearly the jury could have just as reasonably have presumed that Mrs. Jurado's "life changed" due to the rape and robbery.

In the absence of any hint that the prosecutor's comment was the deciding factor at trial, the conviction should not be reversed.

POINT V

THE MURDER WAS CORRECTLY DEEMED TO BE HEINOUS, ATROCIOUS AND CRUEL

The sentencer found that the murder of Simon Jurado was especially heinous, atrocious and cruel. In support of this finding, the trial judge noted that Jurado suffered the incredible mental anguish of watching Watts sexually batter Glenda Jurado. The judge, who should be affirmed if correct for any reason, could also have relied upon the slow, lingering and painful death suffered by Mr. Jurado as he staggered about, spitting up blood, trying to get help, for some ten agonizing minutes.

Watts seeks to trivialize this murder by contending that watching one's wife being raped is not as bad as anticipating one's own death. (Brief at pg. 33). That is Watts' personal

opinion and it certainly does not express normal human values. Perhaps Watts would care more about himself, but Mr. Jurado gave his life to save Glenda, whom he loved.

In **Johnson v. State**, 393 So.2d 1069 (Fla. 1981), the victim, Woodrow Moulton, opened fire on a defendant who was robbing Moulton's store. When Moulton ran out of bullets, Johnson shot him. The trial court found that this execution style slaying was heinous, atrocious and cruel, noting that Mr. Moulton was lawfully defending his property.

Assuming human life is as worthy of protection as property, Simon Jurado's attempt to save his wife would easily surpass **Johnson** in justifying a finding of "H.A.C."

Overlooked, but clearly available from the record, is the additional factor of the slow, lingering death suffered by Simon. The victim was spitting up blood. The victim was obviously aware of impending death. The victim tried to use a phone. The victim staggered outside. A tracheotomy was attempted (which would have been painful).

Slow, bleeding deaths qualify under the H.A.C. standard even where the actual "killing" resulted from just a single shot or stab wound. **Blanco v. State**, 452 So.2d 520 (Fla. ____); **Lusk v. State**, 446 So.2d 1038 (Fla. ____); **Breedlove v. State**, 413 So.2d 1 (Fla. 1982); **Hardwick v. State**, 457 So.2d 1012 (Fla. 1984); **Jackson v. State**, 522 So.2d 802 (Fla. 1988).

The trial judge, as the only sentencer, weighed this evidence and found "H.A.C." The evidence cannot be reweighed on

appeal. **Tibbs, supra.** Since the evidence is legally sufficient under the caselaw, the finding should be affirmed.[7]

POINT VI

THE DEATH PENALTY IS PROPER IN THIS CASE

Mr. Watts contends that the death penalty is not justified in this case. We disagree.

Four valid aggravating factors are present:

> (1) Watts had prior convictions for aggravated assault and aggravated battery.
>
> (2) Watts committed this murder during a sexual battery or an escape from one.
>
> (3) Watts committed the murder for financial gain.
>
> (4) The murder was heinous, atrocious and cruel.

The court considered Watts' age (22), and his **borderline (not retarded)** IQ as mitigating, but still sentenced Watts to death in keeping with the recommendation of the jury.

Watts contends that his sentence is disproportionate.

In **Cochran v. State,** 547 So.2d 928 (Fla. 1989), the jury returned a life recommendation, thus binding the judge with adherence to **Tedder.** Cochran was only 18, his "IQ" was 70, he could not hold the simplest job due to emotional problems, and family and police officers testified in mitigation.

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[7] "H.A.C." does not require the defendant to "enjoy" the torture or pain felt by the victim so the arguments regarding Watts' low intellect and lack of appreciation are meritless. Watts knew he had Mr. Jurado at gunpoint as he raped Mrs. Jurado. Similarly, the fact that Watts did not shoot Mrs. Jurado is irrelevant. **Johnson v. State, supra.** Of course, Watts was hit with a chair and was fighting with Simon when Glenda fled, so he could not have shot her even if he wanted to.

In **Brown v. State**, 526 So.2d 903 (Fla. 1988), again, the jury recommended life in the face of substantial mitigation and a low IQ.

In **Livingston v. State**, 13 F.L.W. 187 (Fla. 1988), this Court engaged in resentencing after striking one of two aggravating factors. That case has been on rehearing for over a year and is not even a final decision.

In **Kight v. State**, 512 So.2d 922 (Fla. 1987), this Court held that a mere low IQ and tough childhood **could** be outweighed by statutory aggravating factors. Citing to **Mills v. State**, 462 So.2d 1075 (Fla. 1985), this Court held that a low "IQ" is not necessarily mitigating, citing **Lara v. State**, 464 So.2d 1173 (Fla. 1985), the court rejected the tough childhood excuse.

Kight, supra, at 933, also distinguished cases which relied upon these mitigating factors by noting that those cases involved jury recommendations of life, thus altering the standard of review.

In this case, the "weight" of Watts' mitigating evidence is not enhanced by a jury recommendation of life. Thus, the trial judge was free to weigh the evidence without the impediment of the so-called "**Tedder**" rule and in keeping with legislative intent.

Watts' sentence of death is not disproportionate. For example, a death sentence was upheld in **Freeman v. State**, 15 F.L.W. S330 (Fla. 1990), where a burglar was discovered by the victim and fought (and killed) the victim. The two aggravating factors in that case (prior conviction of violent crime and

pecuniary gain), outweighed Freeman's low intelligence and abused childhood.

In **Brown v. State**, 15 F.L.W. S165 (Fla. 1990), the defendant, a burglar, shot and killed a sleeping victim and wounded another. This Court, noting the existence of three valid aggravating factors offset only by a claim of mental duress, upheld the penalty.

In **Carter v. State**, 14 F.L.W. 525 (Fla. 1989), the defendant shot two people in a grocery store robbery "gone bad". Carter offered evidence of a tough childhood and possible retardation to offset three valid aggravating factors. This Court held that the death penalty was not "disproportionate" here, citing **Burr v. State**, 466 So.2d 1051 (Fla. 1985).[8]

Watts' case clearly falls within the category of capital cases. Using an approach tried before, Watts accosted a pedestrian (a jogger), gained entry to her home, terrorized and robbed her and her husband, sexually battered her and murdered her husband when he tried to save her. Watts; conduct and his prior record are not disputed. Four valid aggravating factors are present.

Against this Watts places some very inconsistent evidence of possible retardation. Watts' "hired gun" gave ridiculous testimony alleging that his adaptive behavior was so bad that he could not dress himself, find his way or get around town, or

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[8] The State, again, would rely upon **Johnson v. State, supra**, involving a drugstore robbery and a valid death sentence.

work,. Using improper tests and techniques, the "hired gun" was able to lower her client's IQ to 65.[9]

The record, however, shows that Watts was able to work (and a more than "minimum wage" jobs), that Watts knew his way around town, that Watts could read (he read the "Miranda" form aloud to the police), that Watts could handle money, plan crimes and escape, maintain silence until a lawyer arrived, change his appearance to frustrate identification (including cutting his hair to prevent the State from getting a specimen) and cooperate with counsel.

Given the four valid aggravating factors, the absence of serious mitigation, the jury's death recommendation, the jury's death recommendation and the proportionate nature of this crime, Watts was properly sentenced.

POINT VII

THE APPELLANT IS NOT ENTITLED TO RELIEF ON THE "RETARDATION" ISSUE

Mr. Watts is not retarded according to Drs. Barnard and Fennel. His IQ of 71 (the only nearly reliable score), places him above the "mildly retarded" range and into the "Borderline" range. Watts has no "deficits" in his adaptive behavior, Carbonell's exaggerated testimony not to the contrary.[10] We do

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[9] We note that Watts had tested as high as IQ-104 when young. Carbonell alleged people start out with high IQ scores and simply decline as they age. The other experts attributed Watts' subsequent scores, at least in part, to illiteracy and improper testing.

[10] Defense counsel is not a psychologist or psychiatrist and cannot competently argue from medical tests (Brief at p. 40). For example, the DSM III R, as noted above, carries a cautionary

not, therefore, accept Watts as "retarded" or has having standing to raise this issue.

Mr. Watts, however, asks this Court to do what it, and the United States Supreme Court, have traditionally refused to do; to-wit: declare the existence of an "evolving standard of decency" and then "legislate" criteria for designating classes of people who may be executed. This is a legislative function, not a judicial function, and any "evolving standards of decency" are to be identified by the legislature. (Watts' brief confesses that in other states the legislatures are handling this issue).

In **Gregg v. Georgia**, 428 U.S. 153 (1976), the Supreme Court recognized that the judiciary has a role in Eighth Amendment considerations, but in defining "evolving standards" the court held:

> Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.
>
> This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society legislatures, not courts,

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Footnote 10 (continued)

statement that it "may not be relevant to . . . legal determinations". **Diagnostical and Statistical Manual of Mental Disorders, 3rd Ed. Revised**, pg. **XXVI**, yet counsel relies upon it.

> are constituted to respond to the will and consequently the moral values of the people." **Furman v. Georgia, supra.**

Id, at 175-176.

More recently, in **Penry v. Lynaugh**, ____ U.S. ____, 106 L.Ed.2d 256, 289 (1989), the Supreme Court found no national consensus favoring exemption of the retarded from capital justice and, specifically, stated that it would await a **legislative** pronouncement as "an objective indicator of contemporary values upon which we can rely".

The people of Florida, as noted in **Penry**, allow an "insanity" defense and, following conviction, have specific safeguards to protect the profoundly incompetent from execution. Thus, any "evolving standards of decency" in Florida have already been addressed and are not subject to redefinition by judicial fiat, even if this Court was predisposed to do so.

The State would also suggest that an appellate proceeding is not an appropriate vehicle for making such a sweeping policy decision. The limited space of an appellate brief and the inability of the Court to receive expert testimony severely limits the scope of any review. This is especially true in as uncertain, nebulous and politically tainted an area as the "mental health" aspects of capital litigation.

The testimony of Dr. Fennel, Dr. Barnard and even Dr. Carbonell was consistent in noting the inexact and highly subjective nature of mental status evaluations and treatments.

Dr. Fennel, for example, demonstrated how a "hired gun" (Carbonell) could manufacture a diagnosis of retardation simply

by selecting various tests (which produce "false" positives") and by subjectively interpreting data. This very problem, in the context of assessing competence to stand trial, was also alluded to in **Incompetency to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform,** 39 Rutgers Law Review (1987); to-wit:

> Some clinicians have overdiagnosed incompetency in order to bring about what to them seems a more humane disposition of cases involving "heinous" or "revolting" crimes committed by defendants who were "pitiable or puzzling".

Id, at 284.

The American Psychiatric Association and the Florida Mental Health Association[11] have declared it a breach of professional ethics for their members to diagnose or treat the mentally deficient if any execution can result.

Compounding the unreliability of any "expert opinion" professing retardation or incompetence is the uncertain nature of this general discipline itself.

Whereas other fields of medicine deal with specific diseases and recognized, repeatable and verifiable diagnoses and treatments, the fields of psychology and psychiatry are totally and entirely inexact. The doctors in our case all agreed, for example, that their professions have recently "redefined" the meanings and classifications of "retardation", and that the

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[11] **Public Policy Statement**, F.M.H.A., July 21, 1984, see also article by Radelet and Barnard, **supra**.

perimeters of each category are still in dispute. If doctors cannot agree on who is retarded, how can this Court?

The controversy extends well beyond our several "experts".

The oft-cited "DSM III R", for example, has been criticized in all of its various forms ("DSM", DSM I, II, III, III R and IV) because mental illnesses are listed in that text, from one edition to the next, if they are **voted** in by the editorial board. Thus, "illnesses" drift in and out of the text as they gain or lose favor, not because they exist. (Also, foreign editions of any current edition of the DSM will differ from the U.S. edition). See Ziskin,[12] **The Expert Witness in Psychology and Psychiatry**, Science (July, 1988).

> There are no scientifically established and clearly defined "mental disease" entities. Other than neuro-physiological pathology the subject matter of psychiatry is not disease in any commonly understood meaning of the term, but rather involves problems of psycho-social adjustment and deficiencies of learning. To allow these problems to fall within the purview of medicine would have the effect of eradicating any boundaries to the expertise of the physician.

Coping With Psychiatric and Psychological Testimony, at 298.

and,

> There is a substantial body of scientific evidence demonstrating that psychiatric diagnosis and evaluation are seriously deficient in both reliability (stability) and validity (accuracy).

Id, at 299.

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[12] Professor Ziskin is a psychiatrist and an attorney, as well as a professor at Stanford University.

The **New York Times** has reported that psychologists are regularly fooled into incorrect diagnoses by 9 to 12 year old children submitted to them as pseudo-patients. **Psychologists Testimony Called Unscientific**, The New York Times, October 11, 1988.

Of course, this Honorable Court has already had reference to the famous Rosenhan study on the inability of psychiatrists to detect malingering. **On Being Sane in Insane Places**, Science, Vol. 179 (Jan. 1973).

The United States Supreme Court has held that there is no constitutional bar to executing the mildly retarded. Florida **does** have safeguards in place in the form of legal prohibitions to the actual execution of the retarded or truly insane. The medical community has been completely unable to manufacture consistent definitions from which additional rules can be designed. Medical (or psychological) evaluations are totally unreliable. The people of Florida have not manifested any desire to create another roadblock to capital justice.

It is submitted that Mr. Watts should, as the Supreme Court suggests, take his issue to the legislature.

Again, however, we must note that under the most recent definitions of "retardation", Watts is not retarded and lacks standing to raise this claim.

Conclusion

The judgment and sentence of death should be affirmed.

Respectfully submitted,

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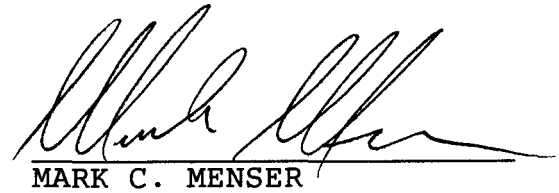
Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Mr. David A. Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 19 day of June, 1990.



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