52 pages —

IN THE SUPREME COURT OF FLORIDA

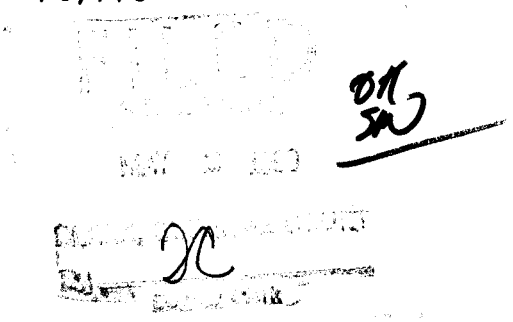
TONY RANDALL WATTS,

Appellant,

v. CASE NO. 74,776

STATE OF FLORIDA,

Appellee.



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

INITIAL BRIEF OF APPELLANT

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR #271543

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IN THE SUPREME COURT OF FLORIDA

TONY RANDALL WATTS, :

Appellant, :

v. : CASE NO. 74,776

STATE OF FLORIDA, :

Appellee. :

_____:

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This case presents the novel issue of whether, under the state and federal constitutions, it is cruel and unusual to execute a person who is mentally retarded. Tony Watts is the defendant in this capital appeal. References to the record and transcripts will be by the usual letters "R" and "T."

STATEMENT OF THE CASE

An indictment filed in the circuit court for Duval County on September 29, 1988 charged Tony Watts with one count of first degree murder, armed burglary with an assault, armed robbery, and armed sexual battery (R 313-316). Before trial, Watts filed several motions, several of which are relevant to this appeal:

> 1. Motion for Appointment of Expert to assist Counsel in the Preparation of the Defense of Insanity. (R 327-328). Granted (R 329).
> 2. Motion for Continuance and Suggestion of Incompetence to be Proceeded Against. (R 515-521). The motion to continue was granted, and Watts was determined competent to stand trial (R 522, 573).
> 3. Motion for Third Mental Health Professional to examine Defendant to Determine his competency to Proceed. (R 557-561). Denied (R 569).

Watts proceeded to trial before the honorable Page Haddock. At the close of the state's case, the court granted Watts' motion for a judgment of acquittal as to the armed sexual battery count and reduced the charge to sexual battery using physical force (T 813). The court denied Watts' motion on the remaining charges. The jury returned guilty verdicts on all of the counts as charged (R 653-656).

Watts then proceeded to the penalty phase of his trial, at which the jury heard additional evidence presented by both sides. Watts asked the court not to instruct on the aggravating factor that the murder was committed in an especially heinous, atrocious, and cruel manner (R 704-705),

but the court denied that request (R 706). The jury returned a recommendation of death by a vote of 7-5 (R 707).

The court followed the jury's recommendation and sentenced Watts to death (R 726). In support of this sentence, it found the following aggravating factors:

> 1. Watts had previous convictions for an aggravated assault and an aggravated battery.
> 2. Watts committed the murder during the course of a sexual battery or while attempting to escape from it.
> 3. Watts committed the murder for financial gain.
> 4. Watts committed the murder in an especially heinous, atrocious, and cruel manner. (R 731-732).

In mitigation, the court found that Watts' low IQ somewhat lowered his judgmental abilities, and it also found his age of 22 as mitigation (R 732).

On the armed burglary and armed robbery convictions, the court sentenced Watts to consecutive life terms (R 727-728) with the provision he serve a minimum mandatory three years for using a firearm during the crimes. For the sexual battery conviction, the court ordered Watts to spend thirty years in prison consecutive to the other offenses. It also imposed a minimum mandatory sentence of three years for using a firearm during the the sexual battery (R 729).

This appeal follows.

STATEMENT OF THE FACTS

Sometime after 9 a.m. on February 17, 1988 Glenda Jurado was returning home from an eight mile jog (T 515). She turned onto the street where she lived in Jacksonville and saw a man walking down the middle of the street. As she passed him, he turned and looked at her. Scared, she hurried home. Normally, she kept her house keys in her car while she ran, and as she reached inside the car to get them, the man came up behind her with a gun (T 515). He told her to be quiet and pushed her towards the house. He told her he had just gotten out of prison and needed fifty dollars to leave town (T 516).

Jurado's husband, Simon, answered the door, and Glenda told him the man had a gun and wanted money (T 516). She and her assailant came inside, and the Jurados gave him all the money they had, which was about fifteen dollars (T 520). The man demanded more money and said if they did not give it to him, he would kill Glenda (T 520).

Simon said they had a piggy bank in the study, and the three people went there, got the bank, and came back into the kitchen (T 521). They returned to the study to get a bag to put the change in, then the assailant started looking through the rest of the house. He told Simon to get undressed in the bathroom, and while he was doing that, the man told Glenda to also get undressed (T 523). She disrobed from the waist down (T 524), and he made her lay on the bed in the couple's bedroom where penetrated her with his finger (T 524). He tried to have sexual intercourse with her, but he had only a partial erection

(T 524). Simon, seeing what was happening, yelled at the attacker, and threw a chair at him (T 525). That knocked the man into the hallway where the two men struggled. Helpless, Glenda ran outside (T 526). She heard a shot and her husband scream (T 527). The assailant ran out of the house with the gun in his hand, and he fled down the street (T 527). Simon ran out of the house and collapsed on the front lawn. He had been shot in the mouth, the bullet severing an artery that went to his brain (T 782). He quickly lost consciousness and died a short time later (T 787).

Over the next several months, Ms. Jurado looked at several pictures of persons who may have killed her husband, but she never identified anyone until September (T 531) when she looked at a picture of Tony Watts (T 532).[1] A neighbor who had seen the assailant flee also identified Watts (T 609). During the investigation that followed the shooting, the police found a baseball cap inside the house which had belonged to the attacker (T 564). They also lifted Watts' fingerprint from the inside front porch door of Jurado's house (T 571).

Tony Watts was twenty-two years old in 1988 (R 732). He was one of six children born to his mother Francis Watts

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[1]Watts' father lived only a few blocks from where the Jurado's lived (T 164).

(T 1141). Francis is schizophrenic, and during Watts' childhood she would walk around the house with a mask on her face believing that she had been cursed (T 1143). Watts' father was alcoholic, and when drunk he would beat his children and threaten them with a gun (T 1144). Once, when Watts was a child, he was kicked down some stairs, and he landed on the bottom, hitting his head on an iron pole (T 1145). No one helped him even though his head was bleeding and a knot had swollen up "as big as my hand." (T 1145).

Eventually Watts' father and mother split up. She went to a mental institution. Watts and his sister lived with his father and another woman he kept (T 1149), and the boy was beaten while he lived with these people (T 1149). Even after his mother was released and the family got back together, life was tough for Watts, his sister, and brothers. At times they had no food, and the children would go to a nearby cookie factory and eat the thrown away cookies. Sometimes they did this for "weeks and weeks." (T 1150). There were "plenty of Christmases" where they got nothing, and the children were in fact homeless (T 1150).

This bleak life changed for the worse when Watts saw his eighteen month old brother Everett hit by a car and killed.

> It just seem like he came--he just gave up, you know. We were always was--didn't have too much to be happy about and then when Everett died it just tore us apart. The baby wasn't around. He used to keep us happy and stuff.

(T 1153).

Watts gave up, and his school work reflected his defeat. At best, he had an IQ between 65 (T 1053) and 71 (T 1161) which meant that he was mildly retarded (T 1065-1066). Although he was never treated for his retardation (T 1145), the schools he attended placed him in special programs for his disability (T 1060, 1071). Still, he did poorly in school, getting mostly D's. Not surprising, he was absent a great deal, and he repeated two grades before he dropped out of school in the seventh grade (T 1176).

As he grew older, he tried to be an adult. He had a job at a car wash, but he was fired because he could not show up for work on time (T 702). He got a girlfriend, but she was more of a mother to him (T 1137). She cooked and cleaned for him and took care of his needs because he could not do those things for himself (T 1137).

But he could get in trouble, and by 1988 he had prior convictions for aggravated assault and aggravated battery (T 1035-1036). In the aggravated assault, he had tried to sexually batter a woman, but he fled when a car drove by (T 1035). In the aggravated battery, he sexually assaulted a man (T 1035).

SUMMARY OF ARGUMENT

Watts' mental retardation permeates almost every issue raised in this brief. In the first issue, Watts argues the court erred when it failed to appoint the diagnostic and evaluation team from the Department of Health and Rehabilitative Services to evaluate Watts' level of retardation. Section 916.11(1)(d) gives HRS the exclusive duty to determine a defendant's mental retardation, and the court erred by appointing two experts not connected with HRS to make that evaluation.

In his second issue, Watts also complains that the experts appointed by the court were unqualified to measure mental retardation. The court accepted the evaluation of a Dr. Fennell and rejected that of Dr. Carbonell, the defense expert who said Watts was incompetent to stand trial. A careful reading and comparison of these two expert's findings, however, reveals that they essentially agreed on their evaluation of Watts. Dr. Finnell differed from Dr. Carbonell only in that she said Watts was competent to stand trial if the questions asked were no more sophisticated than those that would be asked a second or third grade child. As is evident from reading the transcript, the court never kept the proceedings on that simple of a level. The court should, therefore, have found Watts incompetent to stand trial.

During jury selection, Watts asked for another lawyer, but the court gave short shrift to that request. That was error because the court should have asked Watts why he thought his

lawyer was not adequately representing him, and it should have also given him the opportunity to represent himself.

At the start of the state's closing argument, the state told the jury that Glenda Jurado's life would never be the same. That comment unfairly played to the juror's natural sympathies for Mrs. Jurado. It caused them to disregard their obligation to view the evidence dispassionately and find Watts guilty simply because of the suffering caused this victim.

At sentencing, the court found this murder to have been committed in an especially heinous, atrocious, and cruel manner. It was not. This was a simple shooting that occurred during a struggle. It has none of the additional indicia that separate especially heinous, atrocious, and cruel murders from the norm of capital felonies.

Following the previous argument, Watts argues that when his case is compared with other cases in which the defendant was mentally retarded, he should not be sentenced to death.

Finally, Watts argues that under the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution, this court should not approve the execution of Watts. Florida has demonstrated that it does not believe that mentally retarded persons should be executed, and there is no retributive purpose served when the state executes the mentally retarded.

ARGUMENT

ISSUE I

THE COURT ERRED IN FAILING TO APPOINT THE DIAGNOSTIC AND EVALUATION TEAM OF THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES TO EXAMINE WATTS WHEN THE ISSUE OF HIS MENTAL RETARDATION HAD BEEN RAISED IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Throughout this trial, the central issue has been Tony Watts mental condition, specifically his mental retardation. Defense counsel repeatedly raised this issue. In his Motion for Appointment of Expert to Assist Counsel in the Preparation of the Defense of Insanity, counsel said, "Defendant's school records indicate psychological problems and an IQ in the mentally handicapped range. He is almost totally illiterate." (R 327). In his Motion for Third Mental Health Professional to Examine Defendant to determine his competency to Proceed" (R 557-561) counsel specifically requested an expert in mental retardation because Watts' mental state indicates he was retarded. Also, during the competency hearing, Dr. Carbonell, the defense expert, unequivocally said Watts was mentally retarded (T 145). Dr. Barnard, one of the court appointed experts said Watts was "borderline retarded." (T 204), and Dr. Fennell, the other court appointed expert, agreed that Watts functioned "at the borderline in terms of his intellectual ability (T 239). Despite the abundance of evidence that Watts may have been mentally retarded, the court did not appoint the Diagnostic and Evaluation Team from the Department of Health

and Rehabilitative Services as required by §916.11(1)(d) Fla. Stats. (1988) Failure to do so was reversible error.

THE REQUIREMENTS OF §916.11(1)(d)

That section provides:

> (d) If a defendant's suspected mental condition is mental retardation, the court shall appoint the diagnosis and evaluation team of the Department of Health and Rehabilitative Services to examine the defendant and determine whether he meets the definition of `retardation' in section 393.063 and, if so, whether he is competent to stand trial.

The significant portion of this statute denies the court any discretion in appointing the HRS team. If mental retardation is suspected the court shall appoint the diagnosis and evaluation team. In another context, this court said that a rule of Criminal Procedure which said the court "shall instruct on penalties" meant exactly that. Shall means shall. Tascano v. State, 393 So.2d 545 (Fla. 1981). Moreover, an appellate court could not say that failure to instruct on the penalties was harmless error. Murray v. State, 403 So.2d 417,418 (Fla. 1981). Similarly here, the clear meaning of this section requires the court to appoint the HRS team when it suspects a defendant is mentally retarded. It has no discretion, and failure to do so cannot be harmless error.

Nor can the experts who examined Watts be somehow considered the functional equivalent of the diagnostic and evaluation team. By enacting §916.11(1)(d) the legislature distinguished experts qualified to decide mental retardation from those experts who could discover other mental

deficiencies. Subsection 916.11(1)(a) requires HRS to provide the court with a list of approved mental health professionals. That provision could be thought to include experts on mental retardation except that subsection (1)(d) specifically gives to HRS the duty to evaluate mental retardation. The legislature, thus, has recognized a distinction between mental retardation and other mental illnesses. It made this distinction because mental health professionals generally lack the expertise to deal with the subtle and pervasive problems of retarded defendants. See, Ellis and Luckasson, "Mentally Retarded Criminal Defendants," 1985 The George Washington Law Review 414, 427-432, 485-486.[2] Only the diagnostic and evaluation team possesses the uniform, in-depth sensitivity to the peculiarities of the mentally retarded. Thus, the legislature has pre-empted other mental health professionals from determining mental retardation.

PRESERVATION OF ISSUE

As mentioned earlier, Watts' retardation was raised by way of a motion to determine his competency to stand trial as well as to appoint experts to evaluate his retardation. The only

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[2]For example, a psychiatrist may have asked a retarded defendant if he understood what it meant to "waive your rights," and the defendant may have immediately responded yes. But unless the expert realized the limited communication skills and lack of knowledge mentally retarded persons uniformly have, he may not have asked him to explain what it meant to "waive your rights." Had he done so, the defendant may have "waved" his arm.

question left was the means to measure his intellectual and adaptive functioning. §916.11 requires that the diagnostic and evaluation team make that determination, but instead of following the statute, the court appointed a psychiatrist and psychologist to examine Watts.

§916.11(1)(d) places the burden upon the court to appoint the diagnostic and evaluation team when the court "suspects" a defendant is mentally retarded. That section provides that the court "shall" appoint the HRS unit. It does not say, "upon motion of the defendant" or "at the discretion of the court." Instead it uses the strongest language possible to put the court on notice that it has the independent responsibility to appoint the diagnostic and evaluation team. Watts' failure to ask the court to appoint that team did not relieve it of its duty to do so.

In Pate v. Robinson, 383 U.S. 375, 384, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), the court said that a defendant could not waive his right to a competency hearing. This court in Lane v. State, 388 So.2d 1022 (Fla. 1980) also emphasized that a defendant's intentional acts to become incompetent cannot avoid the court's independent duty to decide his competency. Thus, a defendant cannot waive the method to evaluate his competency. Failure to follow the the requirements of §916.11(1)(d), which Florida has established to "jealously guard" Watts' right to a fair trial, Drope v. Missouri, 420 U.S. 162, 172-173, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) denies him that right. The court erred by not appointing the diagnostic and evaluation team.

ISSUE II

THE COURT ERRED IN FINDING WATTS COMPETENT TO BE TRIED IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

Watts asked the court to determine his competency to stand trial, and the court appointed two experts, Drs. Barnard and Fennell to examine him (R 527). Watts also had a Dr. Carbonell examine him. Dr. Barnard, a psychiatrist, spent two hours with Watts and said he could be tried (T 203). Dr. Fennell, a clinical psychologist specializing in clinical neuropsychology, examined Watts for eight hours, and she said gave a qualified opinion that he was competent to stand trial (T 232). Dr. Carbonell, also a clinical psychologist, said Watts was incompetent (T 138). The court rejected Dr. Carbonell's conclusion, and found Watts had the present ability to consult with his lawyer with a reasonable degree of rational understanding:

> I will be very frank with you I prefer the testimony of medical doctors over psychologist in terms of my reliance and I have expressed that opinion before and haven't changed it yet, and I respect Dr. Barnard's credentials in his being a psychiatrist and a medical doctor. I respect his credentials highly but I find Dr. Fennell's analysis of the situation to be the most persuasive of that I have heard however, the combination of Dr. Barnard and Dr. Fennell would certainly persuade me that Mr. Watts is competent to stand trial and I do so find.

(T 253-254). The court erred, however, in making this determination.

The court's first error is that it gave far more credence to Dr. Barnard's short examination of Watts than it deserved. His testimony should have been more suspect because he was a psychiatrist. Generally, psychiatrists do not have the specialized training required to properly diagnose and evaluate persons who may be retarded, and it has been suggested that psychiatrists limit their expertise to not include mental retardation.[3] In this case, there is no evidence Barnard has had any special training regarding mental retardation. Psychiatrists are more at home with crazy people than dumb ones and Barnard's testimony reflects that perspective when he said "There was no indication [Watts] was not in contact with reality." (T 203) Dr. Barnard's predilection to want to see Watts in terms of a mental illness rather than mental retardation became very evident during the sentencing phase of the trial.

> A. Okay, I did not see any indication that he was disoriented or not aware of what he was doing, that he was able to assess his relationship with the victims and to carry out conversation that made sense, that there was no break with reality, that one might see with a serious mental disorder in which the person was operating under delusions or having hallucinations or something like that at the time. (T 1169)

Over defense objection (T 1178) Dr. Barnard also said at the sentencing hearing that Watts was not insane (T 1179).

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[3]Ellis and Luckasson, supra., 484-485.

Dr. Barnard, despite his credentials and great familiarity by this court, was simply not tuned to the subtle problems Watts' mental retardation presented.[4]

Dr. Fennell also reflected her proneness to see Watts in terms of her specialization, neuropsychology. "[S]o I had some trouble with some of the tests [Dr. Carbonell] used, and then also frankly the interpretation she places on those tests on the basis of the one she selected because I do not think they should be consistent given the limitation of testing with what would be considered a standard interpretation from a neuropsychological perspective." (T 227-228) Thus, from the outset, neither of the court appointed experts had the peculiar sensitivity required to detect the subtle problems Watts posed because he was retarded, and their testimony is suspect because of that.

Despite Dr. Fennell's bias, she and Dr. Carbonell agreed on far more aspects of Watts' competency to stand trial than they disagreed on. All the experts recognized Watts was retarded or nearly so, and there was a depressing abundance of evidence which Drs. Fennell and Carbonell uncovered indicating Watts could not consult with his lawyer with a reasonable degree of rational understanding. Rule 3.210 Fla. R. Crim. P. Both doctors recognized Watts' very limited intellectual development. He cannot write, he cannot read, and he cannot

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[4]Id. at 486-487

spell[5] (T 143, 153, 240). He has the vocabulary of a seven year old (T 138), and he gets along well with six year old children (T 140). He has a very poor memory (T 240), and with that, he had poor or non-existent abstract reasoning ability (T 240). He even thinks poorly in concrete terms. He does not, for example, know the difference between a sack of flour, a sack of cornmeal, and a sack of sugar (T 144). He cannot cook, he cannot take care of his clothes, he does not know what to do if he has a toothache (T 187-188). He cannot read street signs or the newspaper or use public transportation (T 188). It is as if Watts' spaceship had crashed on earth, forcing him to survive in a world he does not know or understand.

Drs. Carbonel and Finnell both agreed that Watts could testify relevantly, but they qualified that conclusion to the point that he could not meaningfully help in his defense. That is, if the questions asked Watts, a witness, or other participants at his trial were on a first or second grade level, Watts could understand them (T 146, 234-235). He is so slow he needs everything repeated, rephrased, and re-explained (T 149). While his counsel may have been able to do that if Watts had testified, counsel certainly could not have done so for other witnesses. "I don't know we have the weeks that it might be necessary to try a person. You don't make those

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[5]Actually he can spell his name and one word, cat (T 143).

accommodations in a trial." (T 248) Watts, in short, could not deal with the inherent complexities of a criminal trial (T 149).

This inability was evident when Watts', over his lawyers' advice, wanted to go to trial before counsel was ready. When Watts told the court he wanted a "speedy trial," counsel had not finished his competency inquiry (T 33). Nevertheless, when informed that a delay meant he would have a greater chance of winning, he still wanted to go to trial "next Monday." (T 31)

Dr. Carbonell explained Watts' short-sighted rationale. Watts was convinced he would be found not guilty because one witness had described the assailant as looking like a Puerto Rican (T 144). What Patricia Merritt, the witness Watts referred to, said was, "[T]he way he appeared to me was to be a black man but not a typical black man. He is a brown skin man, a light skin with what is to me hispanic feature like Puerto Rican or Mexican look to his face." (T 711). Watts therefore reasoned that because he was not Puerto Rican, he was therefore not guilty. Thus, he wanted to be found competent to stand trial because he would then be exonerated, and once free he could marry Queenie, his girlfriend (T 169). Watts obviously had a very simple view of the evidence, indicating he could not have comprehended the complexities of his trial (T 149).

Dr. Fennell said Watts could relate events to his attorneys (T 232, 234), yet at trial Watts complained that his lawyers never saw him (T 394). Counsel denied this (T 398), and Watts probably simply did not remember those visits.

Several months later, Watts raised this complaint again during jury selection.

> THE DEFENDANT: Yes, sir. We are going to trial and my attorney have not been over there to see me or nothing. I mean he came and saw me one time and told me we was going to trial and that was it. I mean before you go to trial you have to get prepared to go to trial.
> THE COURT: Okay.
> THE DEFENDANT: I am just unsatisfied. I mean I feel that it should be held a little more attention to it of something as serious as this case is.
> THE COURT: Well, there is an awful lot of work been done in this case, Mr. Watts, by lawyers on both sides. Okay. Let's see.
> MR. CHIPPERFIELD: We are up to Mr. Buffkin.
> THE COURT: It's the state's turn.

(T 394).

This discussion clearly shows the court was more concerned with moving the trial along than with taking the time Dr. Finnell said was necessary for Watts to be competent. It never took the time to repeat, rephrase, or re-explain to Watts what was happening. Counsel pointed out to the court that Watts' latest objection was not only based on his faulty memory, it also reflected on his inability to understand what was happening. Counsel again asked the court to declare Watts incompetent, which the court refused to do (T 398). If Watts' complaint shows his lack of understanding of trial procedures, it also illustrates the court's insensitivity to his slowness. It refused to do what Dr. Finnell said needed to be done to make Watts competent to stand trial. That is, things needed to be made simple for him. They needed to be repeated, rephrased, and re-explained. That was never done by counsel or the court.

Dr. Carbonell agreed Watts knew who his lawyer was and generally understood the adversary nature of the legal process (T 141-142). But being mentally retarded does not mean Watts cannot learn anything, nor does it mean he has a thinking disorder, he is irrational, paranoid or delusional. It means he is limited in what he can learn, the time it takes to learn it, and the amount he retains. Thus, he may know that the prosecutor is "against him" (T 171), but such knowledge does not help him defend against the prosecutor's attacks in any meaningful way. He simply was to slow to follow the fast paced trial, to detect the nuances in testimony, to understand the expert testimony, or to provide assistance and advice to his counsel. Thus, Watts may, on a superficial level, have satisfied the factors listed in Rule 3.211 Fla. Rules of Crim. P. From the totality of the situation, however, the reality is that he did not have the present ability to consult with his lawyer with a reasonable degree of rational understanding. Watts was incompetent to stand trial.

ISSUE III

THE COURT ERRED IN FAILING TO ADVISE WATTS OF HIS RIGHT TO REPRESENT HIMSELF AND IN FAILING TO CONDUCT AN INQUIRY PURSUANT TO FARETTA V. CALIFORNIA, WHEN HE ASKED TO DISCHARGE HIS COURT APPOINTED LAWYER.

Watts went to trial in the last part of July 1989. At a February 1989 hearing his lawyer orally moved for a continuance because he was not ready for trial (T 22). Watts objected (T 25-31); he wanted to go to trial immediately (T 31). Despite Watt's personal preferences, the court granted the continuance (T 35).

Watts' dissatisfaction with his court appointed counsel festered over the next several months and finally erupted during jury selection:

> THE DEFENDANT: Yes, sir. We are going to trial and my attorney have not been over there to see me or anything. I mean he came and saw me one time and to me we was going to trial and that was it. I mean before you go to trial you have to get prepared to go to trial.
> THE COURT: Okay.
> THE DEFENDANT: I am just unsatisfied. I mean I feel that it should be held a little more attention to it of something as serious as this case is.
> THE COURT: Well, there is an awful lot of work been done in this case, Mr. Watts, by lawyers on both sides. Okay. Let's see. (T 394).

Jury selection continued, but Watts would not let the matter lie.

> THE DEFENDANT: I prefer to have another attorney appointed for me.
> THE COURT: Okay. You don't get to pick your lawyer, Mr. Watts, and you got the best two the Public Defender's office has got.

THE DEFENDANT: I do have a right.
THE COURT: I would think if I know anything about this business which I believe I do you probably have two of the best in the country, so I can't think of why I would give you that could be better than these two. Don't have the right to pick you lawyer either way but if I could pick two lawyers for me these two would be in my first two choices no matter how much money I had. If I could get them I would get them. (T 396)

Still unwilling to accept the court's ruling, Watts returned to the court's denial of his motion to continue:

THE DEFENDANT: I want to say one more thing.
THE COURT: Okay.
THE DEFENDANT: I mean March the 6th some time my attorney he made the statement saying I was brain damaged but you-- when you went off-- I went and seen the doctors. Just because a man -- I agree with the state attorney. Just because a man cannot read that do not mean that he have difficulty understanding things, you know. I mean-- but it was no right for you all to violate my rights. There was no proper cause because I spoke to you plainly.
MR. CHIPPERFIELD: I think Mr. Watts is talking about the continuance granted over his objection.
THE DEFENDANT: Right.
THE COURT: I gathered that's what you meant. Mr. Watts, as I told you at that time I can't guarantee you a fair trial until your attorneys say they are ready for trial, and they said they weren't ready and I believe they weren't ready for good reason.
(T 401-402).

* * *

THE DEFENDANT: Well, I felt that, you know, my attorney by he having so much time-- I have been in jail for about a year or something I mean, but I have never-- I mean by him saying--by him saying that I was brain damaged and I am not brain damaged I don't understand why you sawed it off and stuff.
THE COURT: Well, they are going to say a lot of things that are intended to help you

> which might not make you happy.
> THE DEFENDANT: It wasn't his decision whether it would be start off or anything. It was my decision.
> THE COURT: Actually in this case it was mine. Let's go ahead and get finished today.
> (T 403).

Watts, before trial started, on more than one occasion had told the court he was dissatisfied with his counsel's representation. He said he wanted a new lawyer once, and he impliedly made the same request at other times. The court should have asked why Watts was dissatisfied and if he wanted to represent himself.

When a criminal defendant asks to discharge his court appointed lawyer, the trial judge must decide if the defendant is receiving competent representation. The court in Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), outlined the requirements:

> It follows from the foregoing that where a defendant, before the commencement of trial, makes it appear to the trial judge that he desires to discharge his court appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reasons for the request to discharge. If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and

> advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute. See Wilder v. State, Fla.App. 1963, 156 So.2d 395, 397. If the defendant continues to demand a dismissal of his court appointed counsel, the trial judge may in his discretion discharge counsel and require the defendant to proceed to trial without representation by court appointed counsel.

Ibid, at 258-259; approved, Hardwick v. State, 521 So.2d 1071, 1074-1075 (Fla. 1988). If the defendant still wants to fire his lawyer, such persistence is the same as requesting to represent himself. Jones v. State, 449 So.2d 253 (Fla. 1984); McCall v. State, 481 So.2d 1231, 1232 (Fla. 1st DCA 1985); Smith v. State, 444 So.2d 542 (Fla. 1st DCA 1984); Williams v. State, 427 So.2d 768, 770 (Fla. 2d DCA 1983). The court must then follow the procedures concerning a defendant's waiver of counsel as discussed in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) and Fla.R.Crim.P. 3.111(d).

Here, the court ignored the first requirement of Nelson because it did not inquire into Watts' complaints about his lawyer's representation. Instead, it lectured Watts about the quality of his lawyers or the difficulties of trying capital cases (T 25-26, 396). When Watts said he wanted another lawyer, the court simply said that he could not pick his lawyer, and he had the best public defenders the office had (T 396). He made no inquiry, as required by Nelson of "the reasons for the request to discharge." Nelson, at 258-259.

More significant, the court completely failed to comply with the second part of the Nelson procedures -- the judge

never told Watts he could represent himself without counsel. Watts had the option of either accepting his appointed lawyer or representing himself, and the trial court should have given him those choices. Nelson; Chiles v. State, 454 So.2d 726 (Fla. 5th DCA 1984); see, also, Smith v. State, 444 So.2d at 544-545; McCall v. State, 481 So.2d at 1232-1233. Instead of treating Watts' request for other counsel as a request to proceed pro se, Judge Haddock extolled the virtues of his counsel (T 396). (T 539) See, Black v. State, Case No. 88-1402 (Fla. 4th DCA, June 14, 1989)(District court reversed denial of defendant's request to discharge court appointed lawyer where trial judge's response to the request was "Forget it.") This deprived Watts of the opportunity to exercise his Sixth Amendment right to represent himself.

In Chiles v. State, 454 So.2d 726, the Fifth District Court of Appeal reversed the defendant's conviction because the trial judge ignored the Nelson procedures. The defendant asked to dismiss his court appointed lawyer, and he alleged his lawyer had not done enough on the case and had a conflict of interest. Summarily denying the motion, the trial judge said: "I see no matters contained in that motion that constitutes a legal cause to dismiss Mr. Saunders as your Court appointed counsel in this matter. If you are to have a Court appointed counsel provided for you, that court appointed counsel in going to be the Office of the Public Defender, and they have designated Mr. Saunders to represent you in this matter." Ibid. The Court of Appeal reversed, noting that the trial

court's failure to follow Nelson indicated Chiles could go to trial only with his court appointed counsel. Also, the defendant was never told he could represent himself.

> If the judge concluded that no reasonable basis existed for a finding of ineffective assistance, he should have informed Chiles that if he discharged counsel, the state would not be required to appoint a substitute. See, Williams v. State, 427 So.2d 768 (Fla. 2d DCA 1983). Had this procedure been followed and Chiles been advised that substitute counsel would not be appointed, he could have insisted on dismissal of Saunders and chosen to exercise his right to represent himself provided his demand to do so was unequivocal. See, Raulerson v. State, 437 So.2d 1105 (Fla. 1983) and Frazier v. State, 453 So.2d 95 (Fla. 5th DCA 1984). In this case, the procedure outlined in Nelson, was not followed and in summarily denying Chiles' motion, the trial judge indicated to Chiles that his only course was to accept Saunders as his advocate.

Ibid, at 727. Judge Haddock, likewise, told Watts that he had no choice but to accept his current public defenders. He never knew that he could have represented himself. Watts is now entitled to a new trial.

ISSUE IV

THE COURT ERRED IN OVERRULING WATTS' OBJECTION TO THE PROSECUTION'S CLOSING ARGUMENT WHICH WAS DESIGNED TO ELICIT SYMPATHY FOR GLENDA JURADO.

At the start of its closing argument, the state made the following comment about Simon and Glenda Jurado:

> Ladies and gentlemen, we are here today because Simon Jurado is dead. We are here because he died an evil and tragic death. We are here today because the last thing that Simon Jurado saw before he died was his wife Glenda as she laid on this bed in the guest room with a gun in his face as the defendant sexually assaulted and violated her and raped her.
> We are also here today because Glenda Jurado's life will never be the same.
> MR. CHIPPERFIELD (Defense Counsel): Objection, Your Honor, and ask to approach the bench.

(T 869).

Counsel objected to the State's argument because it was "designed to evoke sympathy for the victim, Glenda Jurado. (T 869). In response, one prosecutor said it was relevant because it was a fair comment on the evidence. Another prosecutor said it was a legitimate argument because the events were so traumatic Ms. Jurado would never forget them (T 870). It was neither, yet the court overruled the objection, and denied Watts' motion for a mistrial (T 871). It erred in doing so.

The law in this area is simple, and its application straight forward. The purpose of closing argument is to assist the jury in analyzing and applying the evidence presented at trial. United States v. Door, 636 F.2d 117, 120 (5th Cir.

1981). The prosecutor, therefore, commits error when, during its closing argument, it elicits the jury's sympathy for the victim's family. Johnson v. State, 442 So.2d 185 (Fla. 1983). (The victim's family will be facing the holiday season one short.); Harper v. State, 411 So.2d 235 (Fla. 3rd DCA 1982) (The defendant is sorry and so are the victim's wife and three children. They are sorry too.)

The state clearly asked the jury to feel sorry for Mrs. Jurado. Why? Because Watts had killed her husband almost as she watched. What can be more tragic than to see a loved one in the prime of life killed so senselessly. Nothing can be harder to endure, so telling the jury that Simon Jurado's wife will never be the same evoked the strongest sympathy for her possible. The state's comment was error. The only question was its harm.

The state, concededly, had a strong case against Watts. It had his fingerprint on the Jurado's front door, and Mrs. Jurado and a neighbor identified him. Perhaps the evidence was "overwhelming," but that does not mean the state's appeal to the juror's sympathy was harmless. State v. DiGuillo, 491 So.2d 1129 (Fla. 1986). To be harmless, the error could not, within a reasonable possibility, have affected the jury's verdict. Id. at 1139. The state's comment in this case could not be harmless.

Murders inherently evoke the strongest feelings of sympathy for the usually innocent victims and their families. There is nothing wrong with this, and it is only natural that

we share the grief of the family who has lost a member by a senseless, violent killing. The law recognizes these natural feelings, but it tries to minimize their impact on the jury. For example, unless absolutely necessary, a relative of the victim should not testify at a murder trial to identify the murdered relative. Justus v. State, 438 So.2d 358 (Fla. 1983) ("The rule is designed to avoid the potential of prejudice due to jurors' sympathy for the victim's family.")

In this case, Simon and Glenda Jurado were a young couple who had been married for less than two years (T 513). They obviously looked forward to a long and happy marriage, yet those dreams were snuffed out with the senseless murder of Glenda's husband as he tried to protect his wife (T 525). Glenda Jurado's life would never be the same. The shame of being raped, the grief of losing a brave husband, and the anger at the man who had ended her dreams will be with her for life.

The jury heard Mrs. Jurado testify, they heard her recount the painful details. With that pain evident, and the grief as palpable, the state needed to say very little to inflame the jury and to cloud the dispassionate judgment the law requires.[6] Counsel for Watts perceived the prejudice of the comment because he immediately objected to it. He did not have to think about its impact, its prejudice was apparent. The court

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[6]"This case must not be decided for or against anyone because you feel sorry for anyone, or are angry at anyone." Fla. Std. Jury Instr. (Crim.) 2.05(3).

was also concerned about it. "It sounded to me like you were starting to get into mental anguish and all that." (T 870-871) The court was correct, the state was getting to get into "mental anguish," and in this emotionally charged trial, that is all the state needed to do to ignite the jury's sympathies for Mrs. Jurado and against Tony Watts.

The state's comment was not harmless beyond all reasonable doubt.

ISSUE V

THE COURT ERRED IN FINDING THIS MURDER ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL AND IN INSTRUCTING THE JURY THAT THEY COULD ALSO FIND IT.

In sentencing Watts to death, the court found, as an aggravating factor, that Watts had committed the murder in an especially heinous, atrocious, and cruel manner:

> The crime for which sentence is being imposed was especially wicked, evil, atrocious, and cruel. The Defendant required a young husband to suffer the excruciating agony of watching his wife being raped while held at gunpoint. The victim knew that if he helped his wife, he would probably die, but the torture of watching her being violated, right before his eyes, was more compelling than his fear of death. Simon Jurado literally gave up his life to stop the horror being forced upon him, without conscience or pity, by Tony Watts.

(R 731-732).

As this court has said many times, a murder is especially heinous, atrocious, and cruel when it is "extremely wicked or shockingly evil: or the killer intended to "inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering" of the victim. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Murders committed without pity or which involve an unnecessary amount of torture to the victim become especially heinous, atrocious, or cruel. Consequently, murders in which the victim was shot only once and died instantly or nearly so do not qualify for this aggravating factor. Jackson v. State, 502 So.2d 409 (Fla. 1986); Tefteller v. State, 439 So.2d 840, 846 (Fla. 1983).

The mental anguish suffered by the victim before his death can support this aggravating factor. Swafford v. State, 533 So.2d 270 (Fla. 1988). In Swafford, although the victim died almost instantaneously, Swafford had kidnapped her and taken her to a remote location where he raped her and then shot her nine times. Most of the shots were in her torso, and she died from a loss of blood. This murder was especially heinous, atrocious, and cruel. If the victim knows that he will be murdered, his awareness of the inevitability of his death can make the murder especially heinous, atrocious, and cruel. Harvey v. State, 529 So.2d 1083 (Fla. 1988). In Harvey, this aggravating factor applied because the victims, a husband and wife, learned of their impending deaths when Harvey and his co-defendant discussed the need to dispose of witnesses. When the elderly couple tried to flee, Harvey shot both of them, killing the husband instantly. He shot the wife at point blank range when he heard her moaning.

In this case, Watts did not tell Simon Jurado that he was going to kill him. Unlike Harvey and Swafford, there was no impending, inevitable death. Instead, Jurado, as far as the evidence shows, was killed during a struggle with Watts. In that situation, the single gunshot does not take this murder out of the norm of capital felonies. In Jackson v. State, 502 So.2d 409 (Fla. 1986), Jackson and another man tried to rob a store. As Jackson reached into the cash register, the clerk struggled with him. The co-defendant shot him, killing him instantly. That murder was not especially heinous, atrocious,

and cruel. Likewise, in Riley v. State, 366 So.2d 19 (Fla. 1979), a father's murder did not have this aggravating factor because the son watched it. Nor does a husband's pleas to spare his wife make her murder especially heinous atrocious and cruel. Clark v. State, 443 So.2d 973 (Fla. 1984).

In this case, the court said this crime was especially heinous, atrocious, and cruel because Simon Jurado saw his wife being raped, and this torture compelled him to throw away his life to save her. While what Jurado saw certainly was terrible, it was qualitatively different from seeing one's wife killed. Assuming the rape to have been especially heinous, atrocious, and cruel does not mean that necessarily the murder was so. Also, the mental anguish Jurado admittedly suffered is different than that suffered by victims over the imminent death of themselves, Harvey, Supra, or their wife or father. Clark, Riley, supra. As sublime as what Juardo saw may have been, it does not show Watts killed Jurado because he enjoyed seeing him suffer. The single shot to the head during the struggle for the gun does not make this murder especially heinous, atrocious, and cruel.

Watts' retardation also reduces the likelihood that Watts "enjoyed" Jurado's suffering. In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), Fitzpatrick, in a bizarre scheme to rob a bank, kidnapped several hostages and barricaded himself in an office and killed a policeman in the resulting shoot-out. This court noted that the court had not found that the murder to be especially heinous, atrocious, and cruel. It was the product

of a seriously disturbed "man-child" not that of a person who could fully appreciate what he was doing. So here, the state and defense experts agreed that Watts was mildly retarded or nearly so (T 1065-1066, 1168, R 237). While he could perhaps understand what he was doing, he probably did not "enjoy" the pain he inflicted upon Jurado. This is evident by his flight immediately after he shot him. He did not shoot him again, even though he must have known he was alive, and he did not shoot Jurado's wife, even though he he must have known she could identify him. See, Rembert v. State, 445 So.2d 337 (Fla. 1984). Like Fitzpatrick, Watts is a seriously disturbed man, and the murder was not especially heinous, atrocious, and cruel.

Finally, if the court erred in finding this murder especially heinous, and cruel, it also erred in instructing the jury it could find this aggravating factor. With the vote for death being 7-5, the error in instructing them on this aggravating factor could not have been harmless.

ISSUE VI

UNDER A PROPORTIONALITY REVIEW OF THIS CASE, A DEATH SENTENCE IS NOT WARRANTED.

As part of its review of death sentences, this court in recent years has shown an increasing willingness to reduce death sentences to life imprisonment despite a jury recommendation of death. It has done so because it has the obligation to review death sentences to insure that the sentence in a particular case is deserved when compared with other cases involving similar facts.

> Our function in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert denied, 416 U.S. 943 S.Ct. 1951, 40 L.Ed.2d 295 (1974).

Menendez v. State, 419 So.2d 312, 315 (Fla. 1982). Thus, this court will compare the facts of the case under consideration with other cases involving similar situations and will decide if a death sentence is warranted. Proffitt v. State, 510 So.2d 896 (Fla. 1987). In this case, the proper cases to compare are those where the defendant has a mental deficiency, especially mental retardation.[7] Those are the appropriate cases because

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[7]A corollary to this rule is that the jury's life or death recommendation is irrelevant when this court conducts its proportionality review. This court compares the facts of one case against another to if death is a sentence proportional to the crime committed. The jury's recommendation is not a "fact" which is inherently part of the facts of the case presented by the state and defense at trial.

Watts' mental retardation permeated everything he did, and this case can be understood only in light of his mental retardation.

In Cochran v. State, 547 So.2d 928 (Fla. 1989) Cochran had an IQ of 70, a long standing mental deficiency, and he was likely to become emotionally unstable under stress. He created that stress when he tried to rob a woman. He forced her into her car and drove away. She jumped at Cochran and tried to stab him. The gun Cochran had pointed at her went off with the bullet hitting the woman. She asked to be taken to a hospital, but Cochran, scared, left her on the side of the road and fled. He said he later returned to where he had dumped her, but he never found her.

The court admitted evidence that Cochran had a history of emotional problems, and he had a crippling learning disability. He was, in short, probably mentally retarded. He was also under pressure from his girl friend. The trial court heard this, and it considered it as mitigation, but it still sentenced Cochran to death. This court reduced that sentence to life in prison.

In Brown v. State, 526 So.2d 903 (Fla. 1988) Brown and his co-defendant had robbed a convenience store clerk and had fled the scene. A police officer, alert to the robbery and the description of the robbers, stopped Brown. He ordered him and the co-defendant out of the car and had them place their hands on the hood of his car as he radioed for help. Brown jumped the officer, and during the ensuing struggle, Brown shot the

officer once in the arm. He begged for his life, but Brown killed him.

Brown had an IQ between 70-75 and had been in a school for the emotionally handicapped since he was 10 years old. He had the emotional maturity of a pre-schooler, and both of the statutory mitigating factors applied. The killing was impulsive, and Brown was not a naturally vicious or predatory person.

In Livingston v. State, Case No. 68,328 (Fla. March 10, 1988), 13 FLW 187, Livingston broke into a house and stole a gun. Later that day, he went into a convenience store, pointed the gun at the clerk and demanded money. She bent down, and he shot her. He then went to the rear of the store where another person had hidden in a closet. As she closed the door to the closet, he fired through it, but he did not kill her. Livingston then took the cash register and fled the scene. This court reduced his death sentence to life in prison because his childhood had been marked by severe beatings, parental neglect, and an intelligence that could "best be described as marginal."

In Kight v. State, 512 So.2d 922 (Fla. 1987) this court affirmed Kight's death sentence even though he had a low IQ (69) and had been abused as a child. In that case, Kight had tried to rob a cab driver and then stabbed him. The victim fled but fell down about 30 or 40 feet from the cab. Kight went to him, stabbed him some more and finally cut his throat

to avoid the victim identifying him. Kight then drove the cab into a river.

Kight is distinguishable from this case and the others cited because what Kight did shows more deliberation and planning than is typical of most mentally retarded persons. The initial stabbing may have been impulsive, but then Kight went after the man and deliberately killed him. Why? To avoid identification. He ran the car into a river to prevent any effort to uncover the murder and discover who had killed the cab driver.

This case, and the other cases cited involved impulsive killings. Cochran killed the victim during an attack on him. Of course that attack, like the one in this case, occurred during a robbery, but apparently the robbery was also impulsive. It certainly was here.

Similarly, in Brown the killing occurred on impulse. Brown had fled from a robbery, but had been caught. Under stress and on impulse, he jumped the officer and killed him. Here, Watts impulsively decided to rob Glenda Jurado. There is no evidence he had carefully plotted the robbery. To the contrary, she happened to run by him as he walked in the middle of the street, and he, on impulse, decided to rob and sexually batter her. The killing, like those in Brown and Cochran, occurred while he struggled with the victim, and can only be described as fortuitous or the result of impulsive behavior. Nothing Watts did after the shooting showed any cunning efforts to make sure the victim was dead or to hide the murder. To the

contrary, as soon as the single shot was fired, Watts fled. What Watts did was an impulsive reaction to a stressful event that he probably did not fully understand. Thus, while this case is factually different from Livingston, Brown, and Cochran, none of the defendants in these cases deserve a death sentence.

ISSUE VII

IT IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT TO THE UNITES STATES CONSTITUTION AND ARTICLE I SECTION 17 OF THE FLORIDA CONSTITUTION TO EXECUTE A MENTALLY RETARDED PERSON CONVICTED OF COMMITTING A FIRST DEGREE MURDER.

To be classified as mentally retarded a person must have a "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior."[8] Tony Watts is mentally retarded (T 152, 237-239). He has an IQ of 65-71,[9] and he has deficits in his adaptive behaviors (T 240, 1061-1071); that is, he has "significant limitations in [his] effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his [] age level and cultural group."[10]

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[8]Classification in Mental Retardation, ed. Herbert J. Grossman (Washington D.C.: American Association on Mental Deficiency, 1983) p. 11.

[9]The upper IQ limit may be extended to 75. Classification in Mental Retardation, Ed. Herbert J. Grossman (Washington D.C.: American Association on Mental Deficiency, 1983) pp. 22-23. Watts is technically "mildly retarded" and 85% of those who are retarded will be so classified. Diagnostic and Statistical Manual of Mental Disorders, 3rd Edition, revised. p. 32. The remaining 15% are either moderately retarded (IQ 35-40 to 50-55), severely retarded (IQ 20-25 to 35-40), or profoundly retarded (IQ below 25). Watts' argument focuses exclusively upon those who are mildly retarded, although it would apply with greater force to those who are more severely retarded than him.

[10]Classification in Mental Retardation, supra. p. 11. See also, Diagnostic and Statistical Manual of Mental Disorders, 3rd Edition, Revised. pp. 31-32. Mental retardation also has to begin before a person is 18, which occurred in this case. Id.

As a person with a significantly limited intelligence and ability to adapt to modern society, Tony Watts and those similarly situated should not be executed for the murders they have committed. Although what they have done is morally reprehensible, they lack, as a group, that extra moral culpability necessary to make them eligible for execution. To put them to death is a cruel and unusual punishment.

THE EVOLVING SENSE OF DECENCY

This court has not articulated a different standard for punishments to be cruel and unusual under the state constitution than that established by the United States Supreme Court under the Eighth amendment. See, Gammill v. Wainwright, 357 So.2d 714 (Fla. 1978). This does not mean it cannot do so, and this case presents the opportunity for it to differ from that court, and grant to its citizens greater protection than the United States Constitution guarantees. Under Article I, Section 17 of Florida's Constitution, this court should prohibit executions of mentally retarded persons.[11]

In Penry v. Lynbaugh, ___ U.S.___, ___ S.Ct.___ 106 L.Ed.2d 256 (1989), the Supreme Court held that a state can execute a mentally retarded person without violating the cruel and unusual clause of the Eighth Amendment. Four justices

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[11]Section 17. Excessive punishments. - Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

disagreed, and they would have precluded execution of all mentally retarded persons. Only Justice O'Connor would have required some additional evidence of a lack of moral culpability before she would preclude executing the mentally retarded. Id. at 106 L.Ed.2d at 290-291.

The Eighth Amendment analysis has two prongs relevant to this case. The first prong looks to evidence of the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion). In Penry, the court said the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Penry, supra. 106 L.Ed.2d at 286. This analysis merely seeks to confirm in constitutional terms what everyone has already acknowledged. For example, in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the Supreme Court, after surveying the fifty states, said Florida was out of step with the evolving standards of decency when it allowed aiders and abetters who were not present at the time of a murder and did not intend to kill to be executed.

When the Supreme Court decided Penry, only one state, Georgia, had prohibited the execution of mentally retarded defendants.[12] Five justices had little problem deciding that

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[12]It had done so in reaction to the execution of Jerome Bowden, a mentally retarded person. Georgia to Bar Executions
(Footnote Continued)

society's standards of decency had not evolved to the point where mentally retarded people were ineligible for execution. Since Penry, Maryland, Tennessee, and Kentucky have also banned executions of the mentally retarded.[13] The federal government also prohibits executing retarded people who violate the federal Anti-Drug Abuse Act of 1988.[14]

The Supreme Court restricted itself solely to state legislative acts said when it measured the evolving standards of decency. That was a departure from what it had done in earlier cases where it had also considered other sources of public opinion. Stanford v. Kentucky, 492 U.S. ___ 109 S.Ct. ___ 106 L.Ed.2d 306 (1989)(Brennan, dissenting.); Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. ___, 101 L.Ed.2d 702 (1988). In Penry several professional and voluntary organizations interested in people with mental retardation, joined together in an Amicus Curiae brief opposing executing the mentally retarded.[15] Also, the American Bar Association opposed

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(Footnote Continued)
of Menatally Retarded Killers, N.Y. Times, April 12, 1988, at A26, col.4.

[13]Maryland House Bill 675 (1989); Tennessee House Bill 2107 (1990); Kentucky Senate Bill 172 (1990).

[14]Pub L 100-690, §700(1), 102 Stat 4390.

[15]They were The American Association on Mental Retardation, The American Psychological Association, The Association for Retarded Citizens of the United States, The Association for Persons with Severe Handicaps, The Americian Association of University Affiliated Programs for the Developmentally Disabled, The American Orhtopsychiatric
(Footnote Continued)

executing the mentally retarded.[16] Unlike the debate about the death penalty in general, the growing consensus about sparing the mentally retarded from execution has no organized opposition.

This court is in a different analytical position than the U.S. Supreme Court was when it faced this issue. That court could glean the evolving standards of decency from fifty legislatures, not one. The sense of what is evolving in Florida cannot be gauged by examining only what the legislature has done with the same confidence as the U.S. Supreme Court could do by examining fifty legislatures. Thus, this court should look beyond what the legislature has done when it decides whether, under the state constitution, the mentally retarded can be executed.[17]

(Footnote Continued)
Association, The New York State Association for Retarded Children, Inc., The National Association of Private Residential Resources, The National Association of Superintendents of Public Residential Facilities for the Mentally Retarded, The Mental Health Law Project, and the National Association of Protection and Advocacy Systems. See, Amicus brief in Penry v. Lynbaugh, pp. 1-4.

[16]Recommendation of the American Bar Association, February, 1989. "As it did in the case of juveniles, the Ameircan Bar Association should make clear that a modern and enlightened system of justice cannot tolerate the execution of an individual with mental retardation." Id. at p. 6.

[17]Whatever the analysis this court uses, three members of the court already believe it is cruel and unusual punishment to execute the mentally retarded. Woods v. State, 531 So.2d 79 (Fla. 1988).

Although the legislature has not prohibited the execution of the mentally retarded, it has recognized those citizens deserve special attention, and it has singled them out for special treatment. For example, only a special diagnostic and evaluation team from the Department of Health and rehabilitative Services can determine a defendant's competence to stand trial. §916.11(1)(d) Fla. Stats. (1988). Mental retardation is so different from other mental disabilities that otherwise qualified mental health experts cannot measure the competency of mentally retarded defendants. In addition §916.145 Fla. Stats. (1988) requires the court to dismiss all charges pending against a defendant who remains incompetent to stand trial for more than two years because he is mentally retarded. If a mentally retarded defendant is found competent, tried, convicted, and sentenced, upon release from prison, he may be required to apply for retardation services from HRS. §947.185 Fla. Stats. (1988). Thus, the Florida legislature has repeatedly shown its compassion towards the mentally retarded.

When polled, the people of Florida strongly support, in the abstract, the death penalty. Yet, by an even larger margin than they support the death penalty, they have also recognized that death is an inappropriate punishment when the defendant is mentally retarded.[18] Also, no one has advocated executing the

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[18] 71 percent of those polled in Florida opposed executing the mentally retarded while 12 percent had no such opposition. Penry, supra, 106 L.Ed.2d at 288-289.

mentally retarded. This court can only conclude that Florida's evolving sense of decency is clear, and Floridians want to precluded executing mentally retarded persons.

THE RETRIBUTION ANALYSIS

The second prong of the 8th Amendment analysis focuses upon the question of:

> whether the application of the death penalty to particular categories of crimes or classes of offenders violates the Eighth amendment because it `makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering ' or because it is grossly out of proportion to the severity of the crime.

Penry, supra. 106 L.Ed.2d at 289. The relevant goal of punishment is that of retribution.

The desire to strike back at a murderer is a natural part of man, yet in an ordered society, only society inflicts punishment. Otherwise, "[w]hen people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they `deserve,' then there are sown the seeds of anarchy-of self-help, vigilante justice, and lynch law." Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Stewart, concurring). By its nature, then, retribution focuses upon the sins of the individual, and only the defendant's personal culpability justifies a death sentence under this rationale. Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). Further, a sentencer can impose death only if the defendant has

sufficient moral culpability. Mere acts cannot justify a death sentence. If they could, the Supreme Court would have approved mandatory death sentences. See, Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 974 (1976)

Thus, the aggravating factors in Florida's death penalty statute are merely circumstantial evidence of the defendant's mental state. They tend to show the defendant's indifference to human life and suffering, and it is that mental attitude which is punished. For example, the cold, calculated, and premeditated aggravating factor obviously shows the defendant's heightened intent to kill. Rogers v. State, 511 So.2d 526 (Fla. 1987). Likewise, murdering to avoid lawful arrest shows the defendant's contempt for life. Bates v. State, 465 So.2d 490 (Fla. 1985). Especially heinous, atrocious, and cruel murders exhibit the defendant's enjoyment in the suffering of others. State v. Dixon, 283 So.2d 1 (Fla. 1973)

Mental retardation mitigates a death sentence in two ways. First, it undercuts the strength of the aggravating factors. More significantly, however, it provides overwhelming evidence that the defendant lacked the mental state necessary to justify imposing death. To understand why this is so, we must understand the mentally retarded person.

First, in terms of numbers, approximately 2-3 percent of the general population is mentally retarded. The percentage of mentally retarded criminal defendants is only slightly

higher.[19] Those who are mildly retarded (such as Watts) have an IQ between 50-55 to 70, they usually die in their fifties, and they come from predominantly lower class families. Their mental abilities limit their academic progress, and most can reach only the sixth grade. Typically, they can make change, manage a job, and with some effort or assistance they can plan or budget what they earn.

Watts fits this classic mold. He dropped out of school officially when he was in the seventh grade, but practically, he had quit years earlier. He could not spell, read, or write, skills necessary at least by the time a child is in the second or third grade. His parents obviously came from the low end of the social-economic spectrum, and they did not provide him the intellectual stimulation or nutrition necessary to avoid retardation.[20] They also could not provide him the additional care and attention he needed.[21] Watts held a job for a while

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[19]Ellis and Luckason, "Mentally Retarded Criminal Defendants," 53 George Washington Law Review, 414, 425-426.

[20]"Socioeconomic class is a crucial variable. Severe or profound mental retardation are distributed uniformly across all socioeconomic classe, but mild mental retardation is more common in low socioeconomic class. . . . In the lowest socioeconimic class there is a 10 to 30 percent prevalence of mental retardation in the American school-age population." The American Psychiatric Textbook of Psychiatry, p 706. Poverty, disease, deficiencies in health care, and impaired health seeking, impoverished positive stimulation of children contribute to developing mentally retardation. Id.

[21]Id. Raising a mentally retarded child heavily taxes the resources of the best families. At best, Watts' parents had
(Footnote Continued)

at a car wash, but he was fired because he could not show up regularly or on time (T 702). Thus, Watts, like most mildly retarded persons, has the capability to minimally function in a simple world, but he and they also have significant liabilities which cloud this already bleak picture.

Mental retardation is a learning disorder.[22] The mentally retarded are slow learners, but more than that they cannot learn beyond a certain level of abstraction, and what they learn they tend to forget quickly. This disorder has several manifestations:[23]

> 1. They have poor communication skills and a short memory.
> 2. They are impulsive and have short attention spans.
> 3. They tend to have immature or incomplete concepts of blameworthiness and causation.
> 4. They will tend to deny and mask their retardation.
> 5. They spend more time learning basic skills and less on the world in which they live
> 6. They tend to lack motivation to solve their problems.

In short, in virtually every aspect of their thought processes, the mentally retarded person has significant and substantial limitations. "[T]hose who are mentally retarded

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(Footnote Continued)
severe problems of their own, and his family life could only have contributed to or created his retardation.

[22]Ellis and Luckason, supra at pp. 424, 427. "Mentally ill people encounter disturbances in their thought processes and emotions; mentally retarded people have limited abilities to learn." Id.

[23]Ellis and Luckason, Supra, 428-432.

have a reduced ability to cope with and function in the everyday world." Cleburne v. Cleburne Living Center, 473 U.S. 432, 442, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Unlike blindness, deafness, or a missing arm or leg, mental retardation defines the capabilities of a person. Thus, as a class, mentally retarded persons will commit murders which are the least aggravated and the most mitigated, State v. Dixon, 283 So.2d 1 (Fla. 1973), and they are not the ones for whom the death penalty was intended.

THIS CASE

The case against executing the mentally retarded becomes more compelling in this case. Watts meets the clinical definition of mild mental retardation. He has an IQ between 65-71 (T 139, 224), and he has significant adaptive behavior disabilities:

> 1. He cannot read, write, or spell (T 1062).
> 2. He cannot shop. He does not know the difference between a sack of flour, sugar, or corn meal (T 1063).
> 3. He cannot take a bus, and he does not know how to call a dentist (T 1063).
> 4. He does not know how to set a table, which is probably fortunate, because he can not cook (T 1063).

In all ways except physically, Watts remains a child (T 1061-1064, 1074, 1137). Like Morris Brown in Brown v. State, 526 So.2d 903 (Fla. 1988), the schools identified Watts as a child with learning disabilities, and he was placed in classes for the mentally retarded (T 1073). Like Jessie Livingston, in Livingston v. State, Case No. 63,328 (Fla. March 10, 1988), 13 FLW 187, Watts grew up like a weed. He had no

morals training, and the people who should have loved and cared for him beat and terrorized the boy (T 1149-1150). His mother was crazy, and his father alcoholic (T 1070). He lived as an animal, in fear (T 1153), never knowing where his next meal would come from (T 1150). Then the crushing tragedy, he saw his 18 month old brother killed.

> It just seem like he came-- he just gave up, you know. We were always was--didn't have too much to be happy about and then when Everett died it just tore us apart. The baby wasn't around. He used to keep us happy and stuff.

(T 1153).

In Penry, Justice O'Connor said that, in her opinion, a defendant's mental retardation by itself was not enough to prevent Penry's execution.

> On the record before the Court today, however, I cannot conclude that all mentally retarded people of Penry's ability-by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility-inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty.

Id. 106 L.Ed.2d at 291.

Even under that "mental retardation plus" standard[24], it would be cruel and unusual punishment to execute Watts. Therefore this court should reduce Watts sentence to life in prison without the possibility of parole for twenty-five years.

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[24]which no other justice on the court joined.

CONCLUSION

Based upon the arguments presented above, Watts asks this honorable court to either: 1. reverse the trial court's judgment and sentence and remand for a new trial, 2. reverse the trial court's sentence of death and remand for a new sentencing hearing, or reverse the trial court's sentence of death and remand for imposition of a life sentence without the possibility of parole for twenty-five years.

Respectfully submitted,

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mark Menser, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant TONY RANDALL WATTS, #286020, Florida State Prison, Post Office 747, Starke, Florida, 32091, on this 2nd day of May, 1990.

DAVID A. DAVIS