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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF CITATIONS iii

STATEMENT OF THE FACTS 1

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. 4

ISSUE II

THE COURT ERRED IN FINDING WATTS COMPETENT TO BE TRIED IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS. 8

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. 9

ISSUE IV

THE COURT ERRED IN OVERRULING WATTS' OBJECTION TO THE PROSECUTION'S CLOSING ARGUMENT WHICH WAS DESIGNED TO ELICIT SYMPATHY FOR GLENDA JURADO. 11

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. 13

ISSUE VI

UNDER A PROPORTIONALITY REVIEW OF THIS CASE, A DEATH SENTENCE IS NOT WARRANTED. 16

ISSUE VII

IT IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION TO EXECUTE A MENTALLY RETARDED PERSON CONVICTED OF COMMITTING A FIRST DEGREE MURDER. 20

CONCLUSION 27

CERTIFICATE OF SERVICE 28

TABLE OF CITATIONS

CASES	PAGE(S)
Blanco v. State, 452 So.2d 520 (Fla. 1984)	13
Breedlove v. State, 413 So.2d 1 (Fla. 1982)	13
Brown v. State, Case No. 70,483 (Fla. March 22, 1990), 15 FLW S165	16
Buford v. State, 403 So.2d 943 (Fla. 1981)	20
Carter v. State, Case No. 71,714 (Fla. October 19, 1989), 14 FLW 525	16,21
Coker v. Georgia, 433 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)	20
Copeland v. State, 457 So.2d 1012 (Fla. 1984)	14
Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982)	20
Freeman v. State, Case No. 73,299 (Fla. May 31, 1990), 15 FLW S330	16
Jackson v. State, 522 So.2d 802 (Fla. 1988)	14
Johnson v. State, 442 So.2d 185 (Fla. 1983)	11
Johnson v. State, 393 So.2d 1069 (Fla. 1981)	13
LeCroy v. State, 533 So.2d 750 (Fla. 1988)	20,21,22
Lusk v. State, 446 So.2d 1038 (Fla. 1984)	13
Mims v. United States, 375 F.2d 135 (5th Cir. 1967)	5
Muhammad v. State, 494 So.2d 969 (Fla. 1986)	10
Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973)	9,10
Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. ___, 106 L.Ed.2d 256 (1989)	21,24
Porter v. State, Case No. 72,301 (Fla. June 14, 1990)	14

Stanford v. Kentucky, 492 U.S. ___, 109 S.Ct. ___, 106 L.Ed. 306 (1989) 20

State v. DiGuillo, 491 So.2d 1129 (Fla. 1986) 12

Teffeteller v. State, 439 So.2d 840 (Fla. 1983) 14

United States v. Makris, 535 F.2d 899 (5th Cir. 1976) 5

United States v. Mota, 598 F.2d 995 (5th Cir. 1979) 5

Woods v. State, 531 So.2d 79 (Fla. 1988) 21

STATUTES

Section 393.11, Florida Statutes (1969) 22

Section 393.11, Florida Statutes (1989) 22

Section 393.11, Florida Statutes (1970) 23

Section 393.11, Florida Statutes (1988) 23

Section 393.063(41), Florida Statutes (1989) 16,17

Section 916.107, Florida Statutes (1988) 24

Section 916.145, Florida Statutes (1988) 24

Section 947.185, Florida Statutes (1988) 24

IN THE SUPREME COURT OF FLORIDA

TONY RANDALL WATTS, :

Appellant, :

v. : CASE NO. 74,776

STATE OF FLORIDA, :

Appellee. :

_______________________:

REPLY BRIEF OF APPELLANT

STATEMENT OF THE FACTS

Watts objects to or clarifies the following statements presented in the State's Statement of the Facts:

1. On page 6, the State claims Dr. Miller performed an EEG on Watts. Dr. Miller was ordered to perform this test, but there is no evidence he ever did so.

2. On page seven,the state asserts that Dr. Barnard has a "defense bias." Dr. Barnard never admitted such a proclivity, and there is no evidence of such in the record.

3. On page seven there is also the statement that Dr. Carbonell consulted only with the defense team for information and limited her research. Dr. Carbonell said she had the following information available to her:

1. The reports of Dr. Barnard and Dr. Fennell (The court appointed mental health experts.)
2. Testing materials.
3. Depositions of Earnest Watts, Queen Cummings (Watts' girlfriend), and Perkins Hogan.
4. Watts' mother's medical records.
5. Watts' school records.

6. Booking and arrest reports.
7. Notes from the public defender interviews with Watts' mother and sister.
8. Notes from Ms. Fernandez (the person who administered the mental evaluation tests) or Dr. Fennell.
9. Arrest reports on prior convictions.
10. Glenda Jurado's deposition.

4. On page seven, the State says "Dr. Carbonell never testifies for the State in capital cases." (footnote omitted.) The implication is that Dr. Carbonell, as a matter of practice, has never nor will she ever testify for the state. There is no evidence to support that suggestion (T 1111).

5. On page 8, the State says Dr. Carbonell said Watts had an IQ of 104 when he was seven "because he performed, then and now, at that level." That is a bit confusing. What Dr. Carbonell said was that when he was six or seven, he had an IQ of 104 because that was the level he was performing at then. Since then, he has not progressed, and he is still performing at the level of a six or seven year old (T 140).

6. There is no evidence that the list of "representations" Dr. Carbonell made were bizarre. (Appellee's brief at page 8.).

7. Watts did not "short sightedly" want to be acquitted rather than institutionalized. (Appellee's brief at page 8) What was short sighted was his view of the evidence leading him to believe he would be found not guilty. (Initial brief at page 18.) He believed he had shot Simon Jurado that he would be found not guilty because one witness said the assailant looked

like a Puerto Rican (T 711), and Watts knew he was black not Puerto Rican.

8. Carbonell never said she would "deem someone `mentally incompetent' if they spoke a foreign language." (Appellee's brief at page 8.) What she said was that normal people may not be able to read Greek, but they have the capacity to learn it. Watts does not have the ability (T 173).

9. On page 9 of its brief, the State says Dr. Barnard, unlike Dr. Carbonell, sought "information form both sides." Yet Dr. Barnard had the same information as Dr. Carbonell, i.e., arrest reports, depositions of witnesses, prior rap sheet, medical records of the defendant's mother, letters from the state and defense attorneys, school records, and other records (T 196-97).

10. There is no evidence Watts intentionally tried to lower his IQ test score. (Appellee's brief at page 9.)

11. On page 10 of its brief, the state says Dr. Carbonell wrongly administered the Canter-Bender test because it should not be given to non-schizophrenics with known lesions. There is no evidence Watts, who presumably is not schizophrenic, has any brain lesions.

12. On the same page, the State says Carbonell used "highly subjective criteria for judging Watts' `adaptive ability.'" There is no evidence to support that statement, and the record citations given do not lend any credence to it.

13. On page 11, without record citations, the state says "the phone was apparently disabled by someone."

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.

Certainly the State will agree it should "jealously guards" a defendant's right to a fair trial, yet in this case it wants to be excused for being asleep at its post because Watts did not wake it up. That is the essence of its argument that Watts did not preserve this issue.

Watts also has not raised this issue "in a bald attempt at winning another roll of the dice, to see if he can avoid prosecution by lowering his scores." (Appellee's brief at page 15.) First, a trial is not a crap shoot, but a diligent search for the truth. Second, there has been no evidence Watts was malingering or in any other way trying to avoid prosecution. Third, if he is malingering, the experts appointed will certainly be aware of that possibility.

There is also no evidence 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)." Likewise, that "This simply does not happen" is a claim, which was not supported by the record. (Appellee's brief at page 15.) In the same paragraph as these quotes the State asserts that because Watts knows he can be convicted, "future malingering may be presumed." It cites three federal cases as authority for that remarkable assertion, but those cases do not provide the

support the State needs. In Mims v. United States, 375 F.2d 135 (5th Cir. 1967) and United States v. Mota, 598 F.2d 995 (5th Cir. 1979), the court merely held that the jury need not believe the expert's testimony of various mental problems the defendants have when it is contradicted by lay testimony. United States v. Makris, 535 F.2d 899 (5th Cir. 1976) provides better support for the State's assertion, but Makris was so much different than Watts that the case has no value in this instance. Makris, according to the court, was a brilliant man who had been charged with three counts of lying about his involvement in a securities crime. Besides being very smart, he spoke three languages, ran several companies and was a shrewd business man, and dealt in securities. Before trial, he had had a serious brain operation, the effects of which were strenuously contested. Experts who had extensively examined him said he was incompetent to stand trial, while lay acquaintances said he had virtually returned to his pre-operation level of competence.[1] The Fifth Circuit, said the court was not bound by the expert's finding of incompetence, but it could conclude Makris was faking his incompetence.

Watts is no Makris. He has, by all accounts, a very limited intelligence, he can barely speak one language, and he

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[1]After the operation he had acquired an extensive knowledge about his condition which he could have used to fool the experts.

can not hold a job. There is no evidence he has any idea why the mental health experts talked with him. The only conclusion that can be drawn is that there is no legal or factual basis to believe Watts will malinger in the future.

On page 15 the State also says the only credible "IQ score was the 71 recorded by Drs. Fennell and Barnard." Dr. Barnard did not measure Watts' IQ; instead he relied upon Dr. Fennell's determination of that score (T 1161).

Finally, on page 16, the State claims that this court should presume the "HRS survey would have produced the same results as those obtained by Dr. Barnard, Dr. Fennell, and, apparently, Dr. Miller (since the defense kept his report secret)." First, as to Dr. Miller,[2] there is no evidence, Dr. Miller also examined Watts for his competency, and this court can only speculate why defense counsel did not reveal Dr. Miller's results. Second, the State provides no reason why this court should presume the Diagnostic and Evaluation Team from HRS will get the same results as the experts used. To the contrary, the presumption should be that Drs. Barnard's and Fennell's results were incorrect because psychologists and psychiatrists generally lack the special expertise necessary to properly make mental retardation evaluations. That is why the

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[2]The court appointed him pursuant to a Defense request to assist him in the preparation of the defense of insanity (R 327-29).

legislature has given the job of determining retardation to HRS, which has the specialized expertise.

ISSUE II

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

In footnote five of its argument on this issue, the State says, "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)." (Emphasis in State's brief.) What that cautionary statement actually says is,

> The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determinations, and competency.

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.

On page 18 of its brief, the State claims Watts and his counsel had resolved their differences about counsel's representation of Watts and cites (R 398) to support that assertion. On that page, the defense counsel contradicted Watts' complaint that counsel had not seen him. Nothing was resolved except that the court denied counsel's renewed motion to have Watts declared incompetent.

The State has also misconstrued the issue. Watts is not contending the trial court had to advise him of the "option of self representation recognized in Faretta v. California" (Appellee's brief at page 18, citation omitted.) Instead, the issue is what the trial court should have done when Watts requested another lawyer (T 396). The State apparently has assumed that because Watts wanted another lawyer the only alternative open to him was to represent himself. That is not true, and the Fourth District's opinion in Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973) makes no similar limitation.

> 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.

Id. at 258. Thus, perhaps the "Faretta" issue may seem somewhat foolish" to the State, but it needs to re-examine what Watts' has argued.

The State on page 19 of its brief argues that the failure to hold the hearing indicated by Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973) can be harmless error, and it cites three reasons for this conclusion. It first says that Watts and counsel and counsel had resolved their misunderstanding and cites. (R 398) That conclusion is not supported by that citation, and Watts obviously still had problems with counsel several pages later (T 401-403).

Second, the State argues that Watts' low IQ and illiteracy would have "clearly have precluded self-representation even if a Faretta hearing had been held. Since the court had already determined that Watts was competent to stand trial, he could have represented himself. Muhammad v. State, 494 So.2d 969 (Fla. 1986) ("The Faretta standard does not require a determination that a defendant meet some special competency requirement as to his ability that the trial court "seems" to have satisfied the Nelson criteria. As argued in the initial brief, that is not so.

ISSUE IV

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

The State relies upon this court's decision in Johnson v. State, 442 So.2d 185 (Fla. 1983) to support its argument that the prosecutor's improper closing argument was harmless error. In Johnson, defense counsel in closing argument in the penalty phase of the trial discussed the evidence he had offered from Johnson's family. The prosecutor, in his closing, responded to this argument by saying "Another family, perhaps you haven't become closely associated with, that is the [victim's] family, will be facing this holiday season one short." Id. at 188. This court, although disapproving of what the prosecutor said, implied that it was almost a fair comment upon what the defense counsel had presented.

In this case, the objectionable comment was made at the very beginning of the initial closing argument of the State (T 869). It was not made in response to any argument or evidence Watts had presented, and the only conceivable use it could have had was to inflame the jury.

At the top of page 20 of its brief, the state says Watts has conceded the "State's case was strong, if not overwhelming, against him." Watts never admitted the case against him was overwhelming. As to his identity, the state presented a strong case, but as to his intent, it was much less compelling.

On page 21 of its brief, the State seems to imply that the error was harmless unless it was "the deciding factor at trial." That is not the harmless error test this court articulated in State v. DiGuillo, 491 So.2d 1129 (Fla. 1986).

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.

On page 22 of its brief, the State relies upon Johnson v. State, 393 So.2d 1069 (Fla. 1981) for the proposition that a murder can be especially heinous atrocious and cruel if the defendant was killed "execution style" while defending his property. The following is what the trial court said in Johnson and what this court approved:

> While the method and manner of the murder was not especially heinous, except to the extent that any murder is heinous, the murder was atrocious and cruel and was committed to reek revenge upon Woodrow Moulton for having defended his life and property in a completely lawful manner.

Id. at 1073. (emphasis supplied.)

On the same page, the State cites several cases for the proposition that slow, bleeding deaths resulting from a single shot or stab wound can qualify as especially heinous, atrocious, and cruel. Why it includes murders involving stabbings is a mystery because Watts never stabbed Jurado. Nevertheless, none of the cited cases support the State's position. In Blanco v. State, 452 So.2d 520 (Fla. 1984) this court said the trial court had erroneously found this aggravating factor even though the victim had been shot seven times. In Lusk v. State, 446 So.2d 1038 (Fla. 1984), Lusk stabbed the victim three times, not once. In Breedlove v. State, 413 So.2d 1 (Fla. 1982), Breedlove shot the victim once,

but this court said: "While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay asleep in his bed." Id. at 9. That scenario is not present in this case. In Copeland v. State, 457 So.2d 1012 (Fla. 1984), the victim was shot three times in the head after she had suffered for several hours. Finally in Jackson v. State, 522 So.2d 802 (Fla. 1988), Jackson shot the victim once and made him crawl into a laundry bag and lie on the floor of the co-defendant's car. The victim was then driven to a remote area, all the while pleading for medical help, where he was shot.

More on point to the State's "slow, bleeding death" argument is what this court said in Teffeteller v. State, 439 So.2d 840 (Fla. 1983):

> The criminal act that ultimately caused death was a single sudden shot from a shotgun. The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

Id. at 846.

Finally, in footnote 5 to its argument on this issue, the State says that "`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." As to the emotional pleasure a defendant must have to make the killing heinous, atrocious, and cruel, this court in Porter v. State, Case No. 72,301 (Fla. June 14, 1990) said,

in rejecting the trial court's finding the murder was especially heinous, atrocious, and cruel:

> Moreover, this record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful.

(Slip opinion at page 7.)

ISSUE VI

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

The State counters Watts' proportionality argument by citing several cases which it claims are similar enough to this case to make Watts' death sentence appropriate. Each case, however, significantly differs from the facts of this case. In Freeman v. State, Case No. 73,299 (Fla. May 31, 1990), 15 FLW S330, Freeman had a prior murder to aggravate the most recent killing. He also had a low intelligence, but this court did not say how low it was, or whether he had the additional deficits in adaptive behavior that would have rendered him mentally retarded. Sec. 393.063(41), Florida Statutes (1989). In Brown v. State, Case No. 70,483 (Fla. March 22, 1990), 15 FLW S165, Brown was under a severe mental strain from trying to support the victim's mother and her children. He also did not have a low intelligence. In Carter v. State, Case No. 71,714 (Fla. October 19, 1989), 14 FLW 525, Carter had a prior murder conviction to aggravate his sentence. Here, Watts does not have any prior murder convictions, and unlike the other cases, the experts uniformly agreed he had an IQ of no more than 71.

On page 25, the state says "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 work." There is no evidence Dr. Carbonell fabricated any of her findings. And more than Drs. Barnard and Fennell did, she examined Watts to see if he met the second prong of

the statutory definition of mental retardation, i.e., he had deficits in adaptive behavior. Sec. 393.063(41), Florida Statutes (1989). Moreover, Dr. Carbonell's testimony is not so ridiculous because Queen Ann Cummings, Watts' girlfriend, corroborated much of it. She was "more of a mother figure to him" (T 1137), who had to cook and clean and take care of his clothes because he could not do those simple chores for himself (T 1137). His former employer said he had to repeatedly tell Watts not to drive stick shift cars (T 698). Watts could not get them in gear, and he would inevitably "pop" the clutch and squeal tires (T 698). Eventually he was fired because he could not come to work on time (T 702). Driving a stick shift may require some skill, but if Watts' boss had to repeatedly tell him not to drive such cars, after a while he should have gotten the message. Apparently he never did, which is an indicator of his low ability to learn.

As to the implication on page 26 of the State's brief that Dr. Carbonell used improper tests and techniques to lower Watts' IQ to 65, such a score is not much lower than Dr. Fennell's findings that he had a performance IQ of about 70, and a verbal IQ of "68 or 69." (T 1161) Such results typically have a margin of error, so whatever disagreements exists is probably over one or two points on the IQ scale.

The State, however, insists that Watts IQ of 71 makes him ineligible to be classified as mentally retarded while on the other hand it argues that "the fields of psychology and

psychiatry are totally and entirely inexact." (Appellee's brief at page 29)

The State on page 26 of its brief presents several "facts" which show Watts did not have adaptive behavior deficiencies. The State provided no record citations for them, and Watts questions their accuracy. For example, contrary to what the State alleges on page 26, there is no evidence Watts changed his appearance to "frustrate identification." He cut his hair because it needed cutting and not to prevent the State from getting a specimen (T 657).[3] There is no evidence he dyed his hair, grew a beard, gained or lost weight, or did anything else that might have altered the way he looked. There is also no evidence he could plan crimes or escape, and the fact he stayed in town for almost two weeks after he knew the police wanted to talk with him shows he could not figure out that it would have been better for him to leave (T 582-583).

The evidence also shows Watts could not keep a job at a car wash, which is indicative of his intellectual level (T 702).[4]

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[3]Watts had his hair cut into a "shag." (T 658). It was short on top but long in the back. Such a cut would not have prevented the police from getting a sample of his hair.

[4]Watts has never alleged that he could not work, and the States' statement that "Watts was able to work" indicates its fundamental misunderstanding of the nature of mental retardation. The mentally retarded are not empty headed dolls that can only stay in one place and smile. They have the same emotions and feelings as normal men and women. Their learning
(Footnote Continued)

Thus, the State's case against Watts' proportionality argument does not withstand scrutiny, and this court should remand for imposition of a sentence of life without the possibility of parole for twenty-five years.

(Footnote Continued)
disorder means that they can never achieve what others might, but it does not mean they are precluded from working. "[D]uring their adult years, [the mildly retarded person] usually achieve social and vocational skills adequate for minimum self-support, but may need guidance and assistance when under unusual social or economic stress." DSM III R p. 32.

ISSUE VII

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

The State, on page 27 of its brief, asks this court refuse to consider Watts' argument on this issue because "this is a legislative function." Contrary to what the State suggests, this court and the United States Supreme Court have regularly engaged in an analysis to determine society's evolving standard of decency. In some cases this court and/or the U.S. Supreme Court have declared classes of defendants ineligible for a death sentence. This court in Buford v. State, 403 So.2d 943 (Fla. 1981) said persons which commit only a sexual battery cannot be executed. The United States Supreme Court, after surveying the fifty states, reached the same conclusion. Coker v. Georgia, 433 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the nation's high court refused to let killers who were not present at the time of the murder and who did not intend the death be executed.

On the other hand, neither this court or the U.S. Supreme Court found any constitutional impediment to executing children over the age of 16. Stanford v. Kentucky, 492 U.S. ___, 109 S.Ct. ___, 106 L.Ed. 306 (1989), LeCroy v. State, 533 So.2d 750 (Fla. 1988). More relevant to this case, the nation's high court, after determining the national will concerning executing

the mentally retarded, permitted them to be put to death. Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. ___, 106 L.Ed.2d 256 (1989). Contrary to what the State argues, courts have regularly engaged in an analysis of society's evolving sense of decency nationally and on a state level.

Unlike the United States Supreme Court, this court has not decided if the state can execute the mentally retarded. In Woods v. State, 531 So.2d 79 (Fla. 1988), a pre Penry case, three members of the court, in dissenting opinions, argued that under the state and federal constitutions, Florida could not execute the retarded. A year later a unanimous court skirted the Penry problem in Carter v. State, Case No. 71,714 (Fla. October 19, 1989), 14 FLW 525, by holding that the evidence of Carter's retardation was "so minimal as to render the Penry issue irrelevant.

If this court has not directly addressed the issue of executing the retarded, its decision in LeCroy v. State, 533 So.2d 750 (Fla. 1988) indicates the mode of analysis it will use when it does face it. In that case, the court detected Florida's evolving sense of decency regarding sentencing children to death by examining how Florida has historically treated them. Limiting its consideration to minors charged with crimes, it concluded that "legislative action through approximately thirty-five years has consistently evolved toward

treating juveniles charged with serious offenses as if they were adult criminal defendants."[5]

Applying this historical analysis to the question of executing the mentally retarded reveals that over the past decades Florida has increasingly sought to treat them with dignity and compassion rather than with vengeance or as pariah. The trend is two fold. First, the mentally retarded increasingly have been viewed as distinctly different than those who are mentally ill or have other mental disabilities. For example, as late as 1969, retarded people committed to state care were sent to a "Sunland Training Center for the Epileptic and Mentally Retarded."[6] Today, there are several facilities throughout the state which provide either prison or less harsh conditions for retarded persons. Also, a separate statutes regulate committing the mentally retarded to state care.[7]

Second, the legislature has dramatically increased the protections for and rights of the mentally retarded. In 1970, it required a physician, a psychologist, and a "responsible citizen of the state" to be on the committee examining the

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[5]LeCroy, supra, p. 757. Justice Barkett's analysis in dissent was not so limited, and she considered legislation regulating the age of marriage, drinking alcohol, voting, and others. Id., p. 759.

[6]Section 393.11, Florida Statutes (1969).

[7]Section 393.11, Florida Statutes (1989).

suspected retarded person.[8] By 1988 the composition of the committee had been upgraded to three disinterested experts "who have demonstrated to the court an expertise in the diagnosis, evaluation, and treatment of persons with mental retardation."[9] Instead of merely physicians and psychologists being on the committee, they have to be experts in evaluating mental retardation. Also the third person now has to be a professional social worker with "a minimum of masters degree in social work, special education, or vocational rehabilitation counseling."[10] In addition a "Diagnostic and Evaluation Team" from the Department of Health and Rehabilitative Services must examine the allegedly retarded person.

This person also is provided greater legal protections than he has ever enjoyed. He is entitled to counsel at all stages of the judicial proceeding to determine if the state should for his welfare. He must be given a hearing on the matter, and the court must enter an order making specific findings of fact justifying placing him in state care. The mentally retarded person also has the right to appeal.

Most significantly, if he has been charged with a crime, that allegation will be dismissed if, after two years, he

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[8]Section 393.11, Florida Statutes (1970 supplement).

[9]Section 393.11, Florida Statutes (1988).

[10]Id.

remains incompetent to stand trial.[11] That is not true of defendants found incompetent to stand trial for reasons other than retardation. Also, if paroled the mentally retarded parolee may be required to seek the retardation services of HRS.[12]

Finally, within the last five years the legislature has enacted a "Bill of Rights" for the mentally ill or mentally retarded, which seeks to maintain the dignity and provide treatment for such persons.[13]

Thus, unlike the trend regarding the treatment of youth, Florida has increasingly shown its willingness to consider the mentally retarded defendant differently than normal adults charged with crimes. That the legislature has recognized that this learning disability is different from epilepsy and mental illness shows a sensitivity unrecognized at least twenty-one years ago. While this is not overwhelming evidence of Florida's desire to let the retarded live, it becomes more compelling in light of polls showing that 71% of Floridians oppose executing the mentally retarded.[14] This is true even

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[11]Section 916.145, Florida Statutes (1988). That section was enacted in 1983. Chapter 83-274, Section 6, Laws of Florida.

[12]Section 947.185, Florida Statutes (1988).

[13]Section 916.107, Florida Statutes (1988).

[14]Penry, supra, 106 L.Ed.2d at 288-89.

though the great majority of the state's citizens also favor the death penalty.

A Proposed Solution.

If this court agrees with the U.S. Supreme Court that the state can execute the mentally retarded, perhaps it should do so with the same reluctance that court demonstrated. Unlike that court, however, this court can do more than register votes in favor or against the issue. It can let the state execute the mentally retarded murderer, but to do so it must overcome significant hurdles. For example, the jury could be instructed that if it finds the defendant is mentally retarded, life in prison is the presumed correct sentence. Nevertheless, if it believes that the aggravating factors outweigh his retardation plus any other mitigation it might find, it can recommend a death sentence but only if its vote is either unanimous or significantly greater than a simple majority.[15]

The sentencing judge, moreover, either cannot override the jury's recommendation of life if they find the defendant retarded, or he must provide some extraordinarily compelling reasons why this particular defendant should be executed. Such a solution properly channels the judge's discretion in sentencing the rare mentally retarded defendant who perhaps deserves to die while at the same time recognizing that the

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[15] e.g., 10-2 or 11-1.

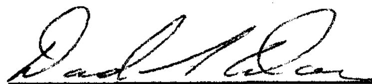
large majority of mentally retarded killers do not deserve a death sentence.

CONCLUSION

Based upon the arguments presented above, Tony Watts respectfully 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



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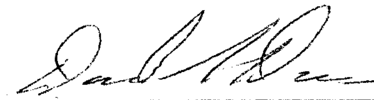
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mark C. 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 Box 747, Starke, Florida, 32091, on this 19th day of July, 1990.



DAVID A. DAVIS