IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
OF THE STATE OF FLORIDA

TONY LEON HAYES,

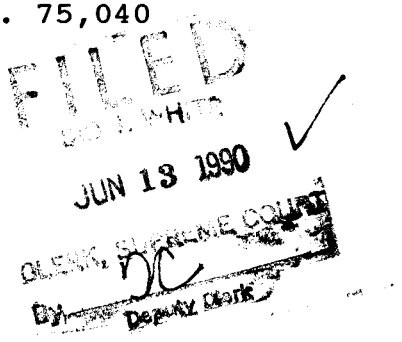
Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 75,040



APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On August 8, 1989, the Spring Term Grand Jury in and for Volusia County, Florida, returned a four-count indictment charging Tony Leon Hayes with first-degree murder, armed robbery, conspiracy to commit first-degree murder, and conspiracy to commit armed robbery. (R1174-5) Hayes entered a plea of not guilty on October 24, 1988. (R1177) On December 14, 1988, Hayes' counsel filed a motion to withdraw citing irreconcilable differences. (R1188-9) Although a hearing was held on this motion before the Honorable Judge Kim Hammond on December 15, 1988, at 2 p.m., the transcript of that hearing is not contained in the record on appeal. The motion was orally denied by Judge Hammond at the hearing. (R903-5)

Appellant filed a motion seeking severance of his trial

from that of his co-defendant's, Nathan Watson and Anthony Gillam. (R1206-7) The trial court granted the motion for severance. (R1208)

Appellant filed a motion for disclosure of the state's intent to rely on aggravating factors, but trial counsel subsequently withdrew that motion on August 24, 1989. (R908,1212)

On August 14, 1989, Appellant filed a motion to suppress statements that he made to Detective Greg Smith of the Daytona Beach Police Department. (R1225-7) Appellant also filed a motion to suppress Bruce Hayes' identification from a photographic lineup. (R1228-31) Following a hearing on August 24, 1989, the trial court denied both of these motions. (R900-1050) The trial court found that Hayes' statements to Smith were voluntary. (R1013-14) The trial court also concluded that there was no evidence to indicate that there had been any suggestiveness or taint in Bruce Hayes' identification of Appellant in a photographic lineup. (R1046)

On September 5, 1989, the case proceeded to a jury trial before the Honorable Gayle Graziano, Circuit Judge. (R1-897) During jury selection, the trial court restricted defense counsel's examination of the potential jurors. (R137-9) Also during voir dire, the trial court granted a state's cause challenge of a juror, but denied a similar challenge to another juror by the Appellant. (R82-5,256-8) Appellant exhausted all of his peremptory challenges. (R292-3)

During the state's case-in-chief, the trial court

overruled Appellant's objection and allowed hearsay evidence. (R499) During the testimony of Detective Smith, the trial court allowed the prosecutor to elicit certain testimony over Appellant's objection. (R680-2) The trial court also restricted the cross-examination of Felicia Ross and Nathan Watson. (R546-51,721) Additionally, the medical examiner arranged chairs to form the model of the taxi over defense objection. (R585-6)

After the state's case, Appellant moved for a judgment of acquittal which the trial court denied. (R726) Appellant attempted to present the testimony of Gerald Long during his case-in-chief. The state objected and the trial court excluded the witness based on irrelevance. (R771-97) After the trial court's ruling, Appellant presented no evidence, rested, and renewed his motion for judgment of acquittal. (R797-9) The trial court again denied the motion. Following deliberation, the jury returned with verdicts of guilty as charged on all four counts. (R893-5,1275-8)

On September 12, 1989, Appellant filed a notice of waiver of the jury advisory sentence. (R1279) Following a hearing, the trial court denied Appellant's motion. (R1052-6) The case proceeded to a penalty phase on September 14, 1989. (R1061-1152) Appellant objected to an instruction on both aggravating circumstances dealing with "during the commission of a robbery" and "pecuniary gain". (R1063-6,1138-9) Following deliberations, the jury returned with an eleven to one (11-1) recommendation that Tony Hayes should die. (R1148-50,1281)

Appellant filed a motion for new trial on September 15, 1989. (R1291-2) He also filed a motion to declare Section 921.141(5)(i), Florida Statutes, to be unconstitutional. (R1293-1310) At the sentencing hearing, the trial court denied both of these motions. (R1154-9) The trial court also denied Appellant's previously filed motion for leave of court to interview a juror. (R1155-6,1159,1288-90) The state prepared a scoresheet for the non-capital offenses resulting in a recommended guideline sentence of nine to twelve years. (R1319)

The trial court sentenced Tony Hayes to die in the electric chair and filed written findings of fact in support of that sentence. (R1171-2,1212-18) The trial court chose to depart from the recommended guidelines sentence and sentenced Hayes to forty years in prison for Count II, armed robbery. The court ordered this sentence to run consecutively to the death sentence and the sentence imposed in Count III. On Count III, conspiracy to commit first-degree murder, the trial court sentenced Hayes to thirty years in prison. The court ordered this sentence to run concurrently with the death sentence. The trial court also sentenced Hayes to fifteen years in prison to run consecutively to the death sentence imposed on Count III. (R1170-1,1320-7) The court allowed Hayes credit for 400 days previously served. The trial court orally cited four reasons in support of the departure which are reflected on the bottom of the scoresheet. The court cited the unscored premeditated capital murder, Appellant's use of drugs during the offense, the need to protect the public, and

Appellant's lack of remorse. (R1170-1,1319)

Hayes filed a notice of appeal on November 13, 1989. This Court has jurisdiction pursuant to Article V, Section 3(b)(1), Florida Constitution.

STATEMENT OF THE FACTS

GUILT PHASE

On July 20, 1988, Tony Hayes was visiting his friend Nathan Watson. The pair left Watson's house at approximately eight p.m. and met up with Anthony Gillam, another friend. (R451-4, 689-4) The trio bought some beer and each drank approximately one quart each. (R455,694) The trio also snorted some cocaine and imbibed in some marijuana. (R455) They eventually left Second Avenue and walked to the campus of nearby Bethune Cookman College. (R455)

They were out of money, so they discussed ways of obtaining more funds so that they could buy more cocaine. (R455,694,699) A taxi drove by and Gillam proposed that they rob a cabdriver. Hayes pointed out that they would be forced to shoot the driver, since all of the drivers carried guns. Gillam and Watson expressed their reluctance to shoot someone, so Hayes volunteered. (R456,697) The trio did not own a gun, but Gillam revealed that a friend of his had one they could borrow. (R455,694-5) The trio searched out Gillam's friend, and eventually obtained a .25 automatic pistol. (R456-8,695-7) The trio then walked to the Greyhound bus station and, on the way, planned the details of the crime. (R458-9,696-9)

At the bus station, Hayes used the free phone to call a cab. (R459-60,699) When the cab arrived, Gillam sat in the back seat with Hayes behind the driver. Watson sat in the front seat. Saying that they were from out-of-town, they directed the driver

to Emmet Street where they instructed him to turn. (R460-1,698,703) Hayes apparently lost his nerve, since he did not shoot the driver immediately after the turn pursuant to the plan. (R461-2) Hayes finally did shoot and kill the driver. (R461-2,575-85,703,706)

The plan called for Watson to grab the wheel after the shooting and direct the cab to a safe stop. The plan went awry and the cab careened off the road and through some bushes before finally striking a tree and coming to a stop. (R461-3,703-4) The trio jumped out of the cab and Gillam and Watson began wiping down the cab in an attempt to remove any fingerprints. Hayes went through the driver's pockets relieving him of the evening's proceeds. (R463-5,706-7) Gillam fled the scene in one direction while Watson and Hayes ran together in another. (R467-9,707-8) They rendezvoused later. With the forty-dollar proceeds, the trio bought some more beer and cocaine. (R351-6,470,469-700,708-9)

PENALTY PHASE

Tony's mom knew he was facing trial and potential death sentence when she left town with no forwarding address. (R1110) Tony's father deserted the family when Tony was a baby. Hayes' mother remarried an abusive stepfather who did not get along with any of his stepchildren. The stepfather continuously abused all of the children. (R1093-4,1106-7) When he was home, Tony was forced to stay in his own room. The "father" allowed his biological daughter to watch television, but would not allow the

other children. (R1107)

Tony's aunt admitted that her sister was not a good mother. Most of the time, Tony and his siblings went without food and proper clothing. (R1107) She never kept food in the house. The children were reduced to stealing in order to eat. (R1107) Tony's mother would leave town frequently leaving her children completely unattended. Other family members usually found out about the children's plight after they had been alone for weeks. (R1107-8) Tony's mother encouraged truancy. (R1108-9) At one point, Tony's mother was unable to provide shelter for her family. They slept in abandoned cars and on park benches. (R1109) Other family members attempted to help but were unable to do much. They reported Tony's mother to the authorities, but nothing was done. (R1109) Although Hayes completed his sophomore year at Seabreeze High School, he was in special classes. (R1093)

Dr. Malcolm J. Graham, III, an expert in the field of clinical psychology, examined Tony Hayes on three separate occasions. (R1086-8) Dr. Graham also conducted a battery of tests. Graham found that Hayes' IQ was 74 placing him in the borderline range of intellectual ability. An IQ of 70 is the cutoff for a retarded classification in the public school system. Hayes' school records were consistent with Dr. Graham's findings. (R1088-90) Hayes' reading skills were almost non-existent. (R1090) His math skills were equally low. Graham described Hayes as basically illiterate with kindergarten level skills. (R1090) Although treatment would have been appropriate, Hayes

never received any as an adolescent or a young child. (R1094)

Dr. Graham also documented Tony Hayes' extreme immaturity. One portion of the intelligence test measures a person's ability to make common-sense decisions. (R1095) Hayes fell woefully short in this category. His score placed him in the second percentile. An average eighteen-year-old would score in the fiftieth percentile. (R1095)

Dr. Graham also conducted a test to measure neuro-psychological functioning. Graham found marked central nervous system dysfunction, primarily in the left parietal and central lobe of the brain. The doctor was unable to discover the cause of such damage. Hayes did suffer two concussions during his mid-teens. (R1091) Hayes began drinking when he was fifteen consuming as many as 22 beers per day. He also consumed a fifth of cheap wine on occasion. His daily drinking continued for approximately three years. Hayes experienced multiple blackouts with some memory loss. At age sixteen, Hayes began smoking approximately ten marijuana cigarettes every two days. He also smoked cocaine on several occasions. (R1092) Dr. Graham opined that, if Hayes remained free of drugs and alcohol, he would stabilize. Hayes' use of cocaine and alcohol increased the probability of aggressive behavior. (R1095-6) The drug use coupled with Hayes' low intellectual functioning and central nervous system dysfunction would all increase the probability of aggressive behavior. (R1095-6) It was the doctor's expert opinion that Hayes' ability to conform his conduct to the

requirements of the law was definitely impaired that evening. (R1096) Graham found Hayes to be an excellent candidate for rehabilitation if he were sentenced to life imprisonment. (R1094)

SUMMARY OF ARGUMENTS

POINT I: This point deals with the improper introduction of hearsay evidence. Over objection, a state witness was allowed to testify to a hearsay statement that placed Appellant's best friend at the scene of the crime.

POINT II: The trial court improperly allowed the state to present evidence of Appellant's testimony at the suppression hearing. Such evidence is strictly prohibited by the holding in Simmons v. United States, 390 U.S. 377 (1968).

POINT III: Appellant contends that his statement to Detective Smith was neither intelligent, knowing, or voluntary. The state failed to meet its burden of showing that Appellant's statement was voluntary in light of the fact that the Appellant was borderline retarded, fatigued, drunk, and under the influence of cocaine and marijuana. The coercive atmosphere combined with these factors to render the statement involuntary.

POINT IV: At the suppression hearing, Appellant was attempting to show the court the involuntary nature of his statement. A psychologist testified on behalf of the defense. The trial court precluded defense counsel from asking the psychologist about the effect of alcohol and drugs on Appellant's ability to comprehend his constitutional rights.

POINT V: Appellant attempted to present evidence that the victim had cocaine and marijuana in his urine at the time he was killed. The trial court excluded evidence based on irrelevance. Without this witness, Appellant had no case at all.

POINT VI: Appellant asserts that the trial court was unfair in the disposition of challenges for cause during jury selection. One juror had a lawsuit pending against the city, but stated that she could be fair. The court granted the state's challenge as to that juror. In contrast, the trial court denied Appellant's challenge to a juror whose wife worked as a medical secretary for the medical examiner that testified at trial.

POINT VII: Bruce Hayes' identification of the Appellant was tainted based upon the totality of the circumstances. Hayes' accounts of what he saw vary greatly. He got only a glimpse under poor lighting. Appellant's photograph contained in the lineup was noticeably different from the other photographs.

POINT VIII: The facts of this case do not constitute grounds to impose the ultimate sanction. Imposition of the death penalty in this case is disproportionate when compared to other cases reviewed by this Court. Appellant's crime was a conventional first-degree murder. This fact coupled with Appellant's youth, deprived childhood, low intelligence, intoxication, and the treatment of his co-defendants, should result in a life sentence.

POINT IX: Appellant contends that the trial court erred in its consideration of the various aggravating and mitigating circumstances. A proper weighing should result in a life sentence.

POINT X: The jury recommendation was tainted where they were instructed on the aggravating circumstance dealing with "pecuniary gain" as well as the circumstance that the murder was

committed during the course of a robbery. Although the trial court did not weigh both of these factors in her written findings of fact, the state was allowed to present evidence and argue both of these factors. This constitutes impermissible doubling and renders the recommendation suspect.

POINT XI: Defense counsel filed a motion to withdraw citing irreconcilable differences with the Appellant. After a hearing, the trial court denied the motion. That hearing is not contained in the record on appeal and Appellant sought to supplement the record with it. Although the attorney general did not object to that particular portion of Appellant's motion to supplement, this Court inexplicably denied the request. This results in inadequate appellate review and denies Hayes his constitutional right to due process and equal protection.

POINT XII: Hayes urges reversal based upon various errors that either individually or cumulatively denied him a fair trial.

POINT XIII: Appellant urges that the Florida Capital Sentencing Statute is unconstitutional for a variety of reasons.

POINT I

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, THE TRIAL COURT ERRED IN OVERRULING A DEFENSE OBJECTION AND ALLOWING HEARSAY EVIDENCE WHICH CONTRIBUTED TO THE CONVICTION.

Bruce Hayes was driving with his thirteen-year-old son, Sedrick, when they saw the aftermath of Thomas Pabst's murder. (R494-8) One month after the crime, Bruce Hayes selected Nathan Watson's photo as well as the Appellant's photo from two photographic displays. (R626-18,641-9,501-3) At trial, Hayes identified the Appellant as one of the two men he saw in the vicinity of Pabst's cab immediately following the crime. (R498-9) Although Hayes did not recognize the men, his son, Sedrick, thought he recognized one of the men as Nay-Nay, also known as Nathan Watson. (R499,618-19) Over Appellant's timely and specific hearsay objection, the trial court allowed Bruce Hayes to testify to his son's statement, "Daddy, that's Nay-Nay and them." (R499) The trial court erroneously accepted the prosecutor's argument that a prior identification is an exception to the hearsay rule.

Section 90.801(2), Florida Statutes (1987) provides:

> (2) A statement is not hearsay <u>if the declarant testifies at the trial</u> or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> * * *
>
> (c) One of identification of a person made after perceiving him.

(emphasis added). Sedrick Hayes did not testify at the trial or any other hearing below. The above-cited section clearly states that a prior identification is not hearsay only if the declarant testifies. s. 90.801(2)(c), Fla. Stat. (1987). This exception recognizes that an identification made shortly after an event is much more reliable in most situations than identifications made at a later time. Ehrhardt, Florida Evidence, s.801.9 (2d. Ed. 1984). However, if the person making the out-of-court identification does not testify, evidence of the identification is not admissible. E.g. Graham v. State, 479 So.2d 824 (Fla. 2d DCA 1985) [reversible error for officer to testify that there were two witnesses, who were not called at trial, who identified the defendant as the perpetrator of the crime]; Postell v. State, 398 So.2d 851, 854 (Fla. 3d DCA 1981) [police officer's testimony concerning testimony by non-testifying informant is hearsay]; Cullimore v. Barnett Bank, 386 So.2d 894 (Fla. 1st DCA 1980) [person making identification did not testify therefore Section 90.801(2)(c) is not applicable]; and Knight v. State, 373 So.2d 52, 53 (Fla. 4th DCA 1974) [error to admit identification testimony where witness was not present at trial].

The prejudice of the objectionable evidence is clear. The statement placed Appellant's best friend at the scene of the crime. Throughout the trial, Appellant was identified as a close friend of Nathan Watson. They spent much time together and were frequently mistaken for brothers. It is therefore clear that the trial court's error in allowing the hearsay statement of Sedrick

Hayes is not harmless error. Sedrick's hearsay statement implicates Appellant through his association with Nathan Watson. The trial court's ruling denied Tony Hayes his constitutional right to due process of law and to a fair trial. Amends. V, VI, and XIV, U.S. Const; Art. I, ss. 9 and 16, Fla. Const.

POINT II

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE OF APPELLANT'S TESTIMONY FROM THE SUPPRESSION HEARING CONTRARY TO SIMMONS V. UNITED STATES, 390 U.S. 377 (1968).

An important issue at trial concerned the amount of beer consumed by Tony Hayes the night of the murder. Hayes' intoxication played an important role in the litigation of his motion to suppress statements to Detective Smith at the police station following the murder. See Point III, infra. During the waiver of his rights that night, Hayes told Detective Smith that he had consumed four beers earlier in the evening. (R1271) At the suppression hearing and at trial, Hayes' intoxication was a factor in considering the voluntariness of his statement. The amount of beer consumed by Hayes obviously also has a bearing on the issue of premeditation. It also was important in the consideration of mitigating factors.

At the suppression hearing, Detective Smith testified that Hayes told him that he drank four beers that night. (R936-8,1271) Hayes also testified at the suppression hearing. (R958-82) On cross-examination, the prosecutor managed to catch Hayes in a contradiction as to the number of beers he shared with his friends that night. (R966-7) This resulted in Hayes testifying at the suppression hearing that he only drank two beers. (R970-2)

Detective Smith testified at trial, during which the

voluntariness of Hayes' statement was presented to the jury. The jury heard that Hayes told Smith that he drank four beers prior to coming to the station. On redirect examination, the prosecutor asked Detective Smith if he had gained any other information regarding the amount of beer that Hayes claimed to have drunk that evening. Smith then revealed to the jury that Hayes testified under oath during the week before the trial that he only had two beers that night. (R680) Defense counsel objected, arguing that Appellant's testimony at the suppression hearing was inadmissible. At a bench conference the prosecutor contended that the testimony was admissible to impeach Appellant's original statement to Detective Smith. The trial court overruled defense counsel's objection and allowed Detective Smith to relate to the jury Hayes' testimony at the suppression hearing that he lied to Detective Smith in his original statement wherein he claimed to have had four beers, when in reality, he had only had two. (R680-82)

The trial court clearly erred in overruling Appellant's objection and allowing Detective Smith to testify concerning Appellant's testimony at the suppression hearing. Simmons v. United States, 390 U.S. 377 (1968) set forth the proposition that a defendant's testimony at a suppression hearing could not thereafter be admitted against him at trial on the issue of guilt, unless the defendant makes no objection. In reversing the decision of the lower court, the Supreme Court stated:

> Thus, in this case, Garrett was obliged either to give up what he believed, with

> advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.

Simmons, 390 U.S. at 394. In United States v. Garcia, 721 F.2d 721, 723 (11th Cir. 1983), the court applied the Simmons rule to a double jeopardy hearing:

> Like a pretrial suppression hearing, the double jeopardy hearing allows the defendant to testify and disclose matters without fear that the evidence will be used against him at the ensuing trial.

Pedreo v. Wainwright, 590 F.2d 1383 (5th Cir. 1979) applied a similar rule to a defendant's testimony in support of his insanity defense and incompetency claim at an arraignment.

An analogous case is presented in Clark v. State, 452 So.2d 1002 (Fla. 2d DCA 1984). The trial court in Clark allowed a prosecutor to testify to sworn statements made by Clark at a plea hearing on an unrelated charge in New Port Richey. Although the reversal was specifically based on Section 90.410, Florida Statutes (1983) [a defendant's statements at a change of plea hearing are inadmissible in any civil or criminal proceeding], the logic of the exclusion is the same. Even though there was overwhelming evidence of Clark's guilt, the district court held

that the overzealousness of the prosecution resulted in the deprivation of Clark's right to a fair trial. The admission of Clark's statements left an indelible impression of guilt on the jurors' mind.

Detective Smith's testimony was not proper impeachment. It should have been excluded. Simmons, supra. The prejudice is clear. The jury heard evidence that Hayes was a liar. Hayes' intoxication was critical to the voluntariness of his statement as well as the issue of premeditation. This blatent evidentiary error mandates a reversal.

POINT III

IN CONTRAVENTION OF HIS CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS TO DETECTIVE SMITH.

On August 14, 1989, Appellant filed a motion to suppress statements that he made to Detective Smith during an interview at approximately one o'clock a.m. on July 20, 1988. (R1225-7) Appellant contended below and now argues on appeal that the totality of the circumstances established that the waiver of his constitutional rights [1] was involuntary. Detective Smith first encountered Tony Hayes during the early morning hours of July 21, 1988. Detective Smith was investigating the murder of Thomas Pabst and had developed Nathan Watson as a suspect. He knew that Watson and Hayes were close friends. As Smith drove through the neighborhood, he spotted Hayes. Detective Smith testified that Hayes appeared to ambulate without difficulty. Smith stopped his car and, without explanation, asked Hayes if he would be willing to come to the station to talk. Smith testified that Hayes' speech and demeanor appeared normal. (R927-31,947-8) Hayes agreed to go and a squad car arrived within minutes. The patrolman patted Hayes down and Detective Smith ordered Hayes to get in the squad car. (R948)

Hayes was waiting in an interview room when Detective

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[1] Miranda v. Arizona, 384 U.S. 436 (1966)

Smith arrived at the station. (R931-2) Smith told Hayes that he was a suspect in a homicide. (R950) Hayes asked the detective what a homicide was and Smith explained that the term involved a killing. Detective Smith read Hayes his rights from a standard form. (R933-7,1271) In response to the detective's question, Hayes claimed to understand his rights. (R936) Detective Smith then read the waiver of rights statement from the same form. (R936,1271) The detective then asked Hayes to sign the form and Hayes revealed that he could not read or write. (R936) Alarmed, Detective Smith then asked Hayes if he was certain that he understood the rights as read to him and further explained that Hayes did not have to talk to Smith. Hayes repeated his previous answer, signed the waiver form, and responded to preliminary questions regarding his name, age, education, and drug use in the past twenty-four hours. Hayes admitted to having four beers earlier that evening. (R936-8,1271) During the preliminary reading of rights and discussion of literacy, Hayes asked the detective if he was under arrest. Smith assured Hayes that he was not and would not be arrested if he told the truth. (R952) Detective Smith then inquired about Hayes' whereabouts and activity earlier that evening. (R938) Detective Smith did not record his initial interview of Hayes. Detective Smith said that he first wanted to find out what Hayes was going to tell him. (R953)

After the first fifteen-minute interview, Detective Smith asked Hayes if he could record his statement. (R939-40)

Hayes told Smith that he was feeling drunk from all the beer that he had had. (R953) Hayes again asked Smith if he was going to be arrested. (R953) The detective told Hayes that, if he were telling the truth, he did not need to worry about being arrested. (R954) Hayes ultimately agreed to allow Detective Smith to record the second interview. (R939-41) During the interview, Hayes slouched in his chair, leaned back, and closed his eyes. (R954) Detective Smith never asked Hayes to perform any sobriety tests. Finally, Hayes asked that the questioning cease and expressed his desire to go home. (R955-6)

Hayes also testified at the hearing and revealed that, due to his drug use, he was unable to concentrate during Smith's interrogation. (R960-1) Hayes felt that he had little choice in accompanying Detective Smith to the police station. (R960-2) Hayes disputed that the detective explained his constitutional rights. (R962-3) Hayes' testimony further revealed that the statement was the product of coercion. (R965-6,975-6,979)

Dr. Malcolm Graham, an expert in the field of clinical psychology also testified at the suppression hearing. (R983-1005) His testimony revealed Tony Hayes' extremely low intelligence. (R984-88) Dr. Graham examined the waiver of rights form signed by Hayes. (R991-2) It was the doctor's opinion that Hayes would have extreme difficulty in comprehending the material contained in the form, even if someone read it to him. (R992-4) Hayes would also have extreme difficulty in understanding rapidly-paced questions or any questions that included large words or abstract

ideas. (R994-5)

The United States Supreme Court has long taken into account personal characteristics of the defendant in determining whether his will was overborne in the giving of an incriminating statement. Among the predominant factors taken into account by the court are the age [Haley v. Ohio, 322 U.S. 596 (1948)]; race or social status [Ward v. Texas, 316 U.S. 547 (1942)]; and the mental capacity of the defendant. Fikes v. Alabama, 352 U.S. 191 (1957), and Culombe v. Connecticut, 367 U.S. 568 (1961).

Perhaps the most important personal characteristic of a suspect is his mental capacity. On many occasions, the Supreme Court has referred to the education and IQ of a suspect in finding that the defendant was highly susceptible to coercion and that his will was overborne in the giving of an incriminating statement. Chambers v. Florida, 309 U.S. 227 (1940). Fikes v. Alabama, 352 U.S. 191 (1957) involved an individual with an education of less than the third grade. Davis v. North Carolina, 384 U.S. 737 (1966) involved an individual with low mentality.

This is not to say that low intelligence in and of itself is coercive. In Moore v. Dugger, 856 F.2d 129 (11th Cir. 1988), the court held that the confession was voluntary even though the defendant had an IQ of 62, functioned at the intellectual level of an 11-year-old, and was classified as educable mentally handicapped. See also State v. Reid, 394 N.W. 2d 399 (Iowa 1986). Moore, based its holding on Colorado v. Connelly, 479 U.S. 157 (1986), wherein the United States Supreme

Court held that, absent actual police coercion, even a person with mental disorders can be found to have confessed voluntarily. The Ninth Circuit has experienced difficulty with the analysis suggested by the Supreme Court in Connelly. In United States v. Wolf, 813 F.2d 970 (9th Cir. 1987), the court wrestled with the Connelly requirement of "police overreaching" as a prerequisite for finding a waiver to be involuntary. The Ninth Circuit was unsure of whether the focus of analysis should be on police coercion, the defendant's subjective state of mind, or a combination of the two.

One issue was left open in Connelly, i.e., an intelligent waiver. In Miller v. Dugger, 858 F.2d 1536 (11th Cir. 1988), the court held that, although a suspect's mental problems cannot in and of themselves make the waiver involuntary, they can prevent a waiver from being an intelligent exercise of choice. In addition to establishing Hayes' severe mental deficiency, defense counsel also made at least a prima facie showing that Hayes was intoxicated throughout the interrogation. The rights waiver form clearly reflects that Hayes told Detective Smith that he had four beers that evening. (R1271) On cross-examination at the suppression hearing, Hayes reduced the number of beers that he consumed to only two. (R270-1) However, the testimony reveals that Hayes drank malt liquor rather than regular or light beer. (R959) Hayes maintained that he snorted cocaine that evening (R271-3), and the trial testimony supports this testimony. (R455,465-6,699-700) He also smoked

approximately four marijuana cigarettes during the three hours preceding the interrogation. (R959-60) Hayes admitted that he was unable to concentrate and felt drowsy as a result of his use of intoxicants. (R960-1)

The United States Supreme Court has found statements of suspects involuntary when the suspects were in drug-induced stupors. Jackson v. Denno, 378 U.S. 368 (1964), and Townsend v. Sain, 372 U.S. 293 (1963). Likewise, when a suspect is in a state of extreme physical fatigue, whatever the cause, his statement will likely be suppressed. Ashcraft v. Tennessee, 322 U.S. 143 (1944). Statements made during a custodial interrogation while intoxicated are not per se involuntary or inadmissible. United States v. Brown, 535 F.2d 424 (8th Cir. 1976). The test is whether, by reason of the intoxication, the defendant's "will was overborne" or whether the statements were the "product of a rational intellect and a free will." Id. Each case will turn on its individual facts. In DeConingh v. State, 433 So.2d 501 (Fla. 1983), this Court ordered the defendant's statements suppressed where he was on powerful tranquilizers, in a distraught condition, and was subject to the coercive influence of a friend who was a law enforcement officer. In Atkins v. State, 452 So.2d 529 (Fla. 1984), this Court held that a defendant's confession was not rendered involuntary when a number of hours had passed between the alleged ingestion of beer and Quaalude.

In the case at bar, several factors are operative.

Tony Hayes was just beyond his juvenile years, only eighteen at the time of the interrogation. The state did not refute the extensive evidence presented by the defense regarding Hayes' extremely low intelligence. Additionally, Hayes was fatigued, intoxicated, and under the influence of cocaine and marijuana. Detective Smith used impermissible coercion in detaining Hayes, ordering him into the squad car at one a.m., and repeatedly informing Hayes that he would not be arrested if he simply told the truth. Certainly the state failed to meet its burden of proving Hayes' waiver and statements to be knowing, voluntary, and intelligence.

POINT IV

THE TRIAL COURT ERRED IN RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE AT THE SUPPRESSION HEARING IN CONTRAVENTION OF CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

Appellant filed a motion to suppress statements that he made to Detective Greg Smith. (R1225-7) Defense counsel contended in the motion that, considering the totality of the circumstances, Hayes' statements to Detective Smith were not knowing, voluntary, or intelligent. This contention was based on the fact that Hayes was only eighteen at the time when he was transported in a squad car to the police station at one o'clock in the morning. Hayes admitted his illiteracy and intoxication which became evident during the interview. (R1225-7) In an attempt to prove the allegations set forth in the motion, Hayes testified at the hearing. (R958-82) Additionally, Appellant presented the testimony of Malcolm Graham who was qualified and accepted by the state as an expert in the field of clinical psychology. (R983-4) Dr. Graham testified as to the battery of psychological tests that he conducted during his examination of Tony Hayes. The tests revealed that Hayes had an IQ of only 74 placing him in the first percentile of the general population. (R985-7) Dr. Graham testified that Hayes would have extreme difficulty comprehending his constitutional rights, even if someone read and attempted to explain them to him. (R991-3) Defense counsel then attempted to establish the further

debilitating effect that narcotics and alcohol would have on Hayes' ability to comprehend his rights.

> Let me ask you this: Again as an expert in the field of clinical psychology, would you have an opinion within a reasonable degree of probability whether or not the consumption of four or five alcoholic beverages and cocaine and marijuana would further decrease the ability of someone to comprehend, someone such as Mr. Hayes to comprehend the language?
>
> MR. DAMORE (prosecutor): Your Honor, I'm going to object to that particular question as to this field, he is not competent to testify as to an expert opinion. Further that the question as phrased does not reflect the evidence that was given both the Detective Smith and by the defendant himself.
>
> MR. KIMBALL (defense counsel): I believe, Your Honor, the defendant has testified about his consumption of alcoholic beverages and drugs and Dr. Graham --
>
> THE COURT: Mr. Kimball, I'm sustaining the objection as to competency.

(R993-4) Defense counsel then abandoned this fertile area of inquiry.

In general, it is the trial court's responsibility to determine the range of subjects on which an expert witness may testify, and this determination will not be disturbed on appeal absent a clear showing of an abuse of discretion. E.g., Guy v. Kight, 431 So.2d 653 (Fla. 5th DCA 1983). See also s.90.702, Fla. Stat. (1987). A trial court's discretion on this issue is

not completely unfettered. See, e.g. Carver v. Orange County, 444 So.2d 452 (Fla. 5th DCA 1983), and City Stores Company v. Mazzaferro, 342 So.2d 827 (Fla. 4th DCA 1977). Expert testimony may be given only if a witness is "skilled in the subject matter of the inquiry." Kelly v. Kinsey, 362 So.2d 402, 403 (Fla. 1st DCA 1978).

In Ross v. State, 386 So.2d 1191 (Fla. 1980), this Court recognized that a psychologist is competent to testify to a person's mental condition. In Ross, this Court credited a psychologist's testimony concerning the manifestations of organic brain damage. The cases dealing with the permissible scope of a psychologist's testimony generally deal with the propriety of a psychologist's (as opposed to a medical doctor) testifying about mental conditions. E.G., Executive Car and Truck Leasing v. DeSerio, 468 So.2d 1027 (Fla. 4th DCA 1985); Jenkins v. United States, 113 U.S. App. D.C. 300, 307 F.2d 637 (D.C.Cir. 1962); and Reese v. Naylor, 222 So.2d 487 (Fla. 1st DCA 1969).

In Wright v. Schulte, 441 So.2d 660 (Fla. 2d DCA 1983), the district court adopted the persuasive authority set forth in Radman v. Harold, 279 M.D. 167, 367 A.2d 472, 475 (1977), wherein the Maryland court held that the trial judge applied an erroneous rule of law in excluding the testimony of an expert.

> [A] witness may be competent to express an expert opinion if he is reasonably familiar with the subject under investigation, regardless of whether this special knowledge is based upon professional training, observation, actual experience, or any combination of these factors. . . .

> . . . A witness is qualified to testify as an expert when he exhibits such a degree of knowledge as to make it appear that his opinion is of some value, whether such knowledge has been gained from observation or such knowledge standard books, maps of recognized authority, or any other reliable sources. The knowledge of an expert in any science or art would be extremely limited if it extended any further than inferences from happenings within his own experience. His testimony is admitted because it is based on this special knowledge derived not only from his own experience, but also from the experiments and reasoning of others, communicated by personal association or through books or other sources.

Appellant submits that even a basic psychology text book will necessarily include a section dealing with the effect of intoxication on the mind's ability to comprehend and understand. C. Wade & C. Tauris, Psychology, (Harper & Row 1987). As a clinical psychologist, Dr. Graham certainly was qualified to express his opinion on the effect of Hayes' consumption of alcohol and narcotics would have on his ability to understand his constitutional rights as read by Detective Smith that evening. The trial court's ruling denied Hayes this opportunity to present relevant evidence at the suppression hearing that was critical to the Appellant's contention that he failed to fully understand his rights. The ruling constituted an abuse of discretion and denied Hayes his constitutional right to due process of law and to a fair trial.

POINT V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE WHERE SUCH EVIDENCE WAS HIS ONLY DEFENSE, THEREBY RESULTING IN A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

During the guilt phase of the trial, Appellant attempted to present the testimony of Gerald Long, a toxicologist supervisor in the physicians' lab. The substance of Long's testimony, if allowed, would have proven that there was cocaine and marijuana found in the victim's urine. Neither substance was found in the victim's blood. The presence in the urine indicated past use of the substances by the victim, but the witness was unable to state with particularity when the victim used the illicit substances. Long could conclude that the absence of the substances in the bloodstream indicated that the victim had not used cocaine within the past twenty-four to forty-eight hour period and had not smoked marijuana for the past several days. After extensive argument and a proffer, the trial court excluded the testimony based on a lack of relevance. (R771-97) Having no other evidence to present, the defense rested his case. (R797-8)

The right of an accused to present witnesses to establish a defense is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14 (1967). Indeed, this right is a cornerstone of our adversarial system of criminal justice. Both the accused and the prosecution present a version

of facts to the judge so that it may be the final arbiter of truth. Id.; United States v. Nixon, 418 U.S. 683, 709 (1974).

Without the testimony of Gerald Long, Appellant had no case at all. Defense counsel was willing to forego final closing argument (the "hammer") in order to present what he obviously considered to be critical evidence. When questioned by the trial court, defense counsel set forth at least five or six different theories of relevance. (R776-9) Some dealt with theories of defense, while others cast doubt on the state's case. This Court should adopt a broad standard for the admission of even marginally relevant evidence in a capital case. See e.g. Hitchcock v. Dugger, 481 U.S. 393 (1987). The trial court's exclusion of Appellant's entire case cannot be called harmless error. Justice requires a new trial.

POINT VI

APPELLANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY WAS VIOLATED WHEN THE TRIAL COURT GRANTED THE STATE'S CHALLENGE FOR CAUSE AS TO JUROR KUBEL BUT DENIED APPELLANT'S CAUSE CHALLENGE AS TO JUROR SEYMORE.

Juror Kubel had experienced a run-in with the Daytona Beach Police Department. She was suing that agency as a result of her arrest. (R82-5) Initially, Juror Kubel stated that she did not believe that she could be fair, since some members of that agency were scheduled to testify at Hayes' trial. Kubel then stated that she thought she could be open-minded, even though she still had many hostilities over what happened. None of the officers scheduled to testify were involved in Kubel's arrest. Kubel concluded that she could separate her bad experience and the facts of Hayes' trial and indicated that she could be fair.

The state challenged Kubel for cause based on the pending litigating. The prosecutor stated that, even though Kubel made representations that she would attempt to be fair, the prosecutor opined that it would be very difficult for her to do so. (R84-5) Defense counsel pointed out that the juror stated under oath that she could be fair and requested that the challenge for cause be denied. Defense counsel pointed out that Kubel's excusal would be more appropriate through the use of a peremptory challenge. (R85) The trial court granted the state's challenge for cause and excused Juror Kubel based on her pending

litigating against the Daytona Beach Police Department. (R85)

A short while later, Juror Seymour recognized the name of a state witness, Dr. Sherman, the associate medical examiner who performed the autopsy on the victim in this case. (R195-6,575-9) Juror Seymour revealed that his wife was currently Dr. Sherman's medical secretary. (R196,211) She worked for the lab at Humana Hospital doing work for the medical examiner's office and was in direct daily contact with Dr. Sherman. (R241-2) Juror Seymour was of the opinion that these facts would have no effect on his partiality. (R196) Juror Seymour testified that he would not feel uncomfortable if a jury that he served on found the defendant not guilty. He did not believe that such a result would affect his wife's job. (R242)

At the appropriate time, defense counsel challenged Juror Seymour for cause pointing out that his wife worked for the medical examiner's office and was in direct contact with Dr. Sherman on a daily basis. (R256) The trial court incorrectly replied that Seymour's wife worked at the hospital but was not employed by the medical examiner's office. The prosecutor pointed out that Juror Seymour testified that the relationship would have no effect on his ability to deliberate. The prosecutor also argued that the cause of death was not an important part of the state's case. (R256-7) The trial court denied defense counsel's challenge for cause. (R257) Defense counsel then was forced to exercise a peremptory challenge and excused Juror Seymour in that manner. (R258,263) Defense counsel

ultimately exhausted his peremptory challenges and was forced to accept the jury, though he made it clear that he would have stricken Juror Lockman if he had any challenges remaining. (R292-3)

Lockman had been the victim of an armed robbery. (R273,281) Lockman also had relatives involved in law enforcement. (R290) He had a first cousin as well as an uncle who were deputy sheriffs. (R273) Lockman also had prior criminal jury service. (R271-2) Lockman specifically articulated that he had no difficulty accepting the testimony of accomplices and recognized that sometimes the state was forced to make a deal in order to obtain a conviction. (R286-7) Additionally, due to Juror Lockman's last-minute shift from an alternate seat to the regular jury, his views on capital punishment were explored perfunctorily at best. (R265-96) The jury with Lockman on it, subsequently found Tony Hayes guilty as charged on all four counts and recommended the ultimate sanction by a vote of eleven to one. (R893-5,1148-50,1275-8,1281)

Appellant contends that his Sixth Amendment right to an impartial jury was thwarted by the trial court's abuse of discretion in determining both Juror Kubel's and Juror Seymour's competence to sit on the jury. See Singer v. State, 109 So.2d 7, 18-25 (Fla. 1959); Ashley v. State, 370 So.2d 1191, 1194 (Fla. 3d DCA 1979) The test is not whether the jury can control any bias or prejudice, but whether the juror can lay aside those considerations and decide the case solely on the evidence

presented in the trial court's instructions. Singer, 109 So.2d at 24; McCullers v. State, 143 So.2d 909 (Fla. 1st DCA 1962); s. 913.03(10), Fla. Stat. (1987). Where a reasonable doubt is presented as to a juror's capacity to render an impartial verdict the benefit of that doubt must go to the accused. Singer, supra; Blackwell v. State, 101 Fla. 997, 132 So. 468 (1931); Crosby v. State, 90 Fla. 381, 106 So. 741 (1925); Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981). As noted in United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976), "[T]he principle [the Sixth Amendment right to an impartial jury] is implemented is through the system of challenges exercised during the voir dire of prospective jurors." The trial court's exercise of discretion in conducting voir dire is "subject to the essential demands of fairness." Aldridge v. United States, 283 U.S. 308, 310 (1931).

Appellant has a reason in transposing the trial court's rulings on the cause challenges of Jurors Kubel and Seymour. Appellant contends that the record shows a lack of even-handedness by the trial court in granting the state's challenge but denying Appellant's challenge based on very similar grounds. Both Jurors Kubel and Seymour said they could be fair. Kubel said that her lawsuit against the Daytona Beach Police Department would not effect her deliberations. Likewise, Juror Seymour claimed that his wife's employment as the medical examiner's secretary would not effect his deliberations. Appellant submits that if Juror Seymour was qualified to serve, Juror Kubel was similarly qualified. Both said they could be fair in spite of

their bias as to certain witnesses; Kubel as to the police, and Seymour as to the medical examiner. Inexplicably, the trial court granted the state's challenge, but denied the defense's challenge. While the trial court does have discretion on these matters, such discretion should be exercised even-handedly and fairly. Thus, Appellant submits that he has demonstrated an abuse of discretion in this case. As a result, he got stuck with a juror that he did not want and who's attitudes about the death penalty were not even explored. As a result, Appellant's constitutional right to a fair trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 16, of the Florida Constitution was violated.

POINT VII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS A TAINTED IDENTIFICATION RESULTING IN A DEPRIVATION OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL.

On August 21, 1989, defense counsel filed a motion to suppress the photographic lineup identification of the Appellant. (R1228-31) Appellant attacked the identification on several grounds and concluded that there was a substantial likelihood of misidentification at trial based upon the totality of the circumstances. (R1228) The trial court heard evidence and argument on the motion at a hearing on August 24, 1989. (R900,1015-50)

At the time of the murder, Bruce Hayes [no relation to the Appellant] was driving his car on Oak Street. He saw a yellow cab plow through some bushes and hit a tree before coming to a stop. He turned his car around and stopped to investigate. He saw two black males in the vicinity of the cab. The taller one stood on the sidewalk apparently waiting for Hayes to drive on. The shorter man ran in front of the car, while the man on the sidewalk eventually ran around the back of Hayes' car. (R1033-4)

At the suppression hearing, Hayes testified that he got a better look at the face of the taller man that went behind his car. (R1034-6) Defense counsel impeached Hayes with his testimony from the deposition where Hayes swore that he did not

get a look at the face of the one that went behind his car. (R1036-7) Hayes identified the Appellant as the taller man on the sidewalk who ran behind his car. (R1040-1) Hayes admitted that the incident happened very quickly, under poor lighting, a long time ago. (R1039,1043-4)

One month after the incident, Detective Greg Smith showed two photographic lineups to Bruce Hayes. (R1018-21,1272-4) The first lineup included a photograph of Nathan Watson while the second included a photograph of the Appellant. (R1018-20) Contrary to Bruce Hayes' testimony at the hearing, he told Detective Smith that both men crossed in front of his car with one looking directly at him as he passed. (R1022) Bruce Hayes examined the first display before finally putting it aside without making an identification and asked to see the second lineup. (R1024) Hayes then examined both lineups at the same time. Hayes initially identified Nathan Watson from the first lineup and finally identified the Appellant from the second. (R1024) Hayes told Detective Smith that he was certain of his identification of Watson. Hayes also said that he was certain of the identification of the Appellant, but added that he would rather view the Appellant in person. (R1025) In spite of this request, Detective Smith never attempted to arrange a live lineup. (R1025) The entire process from the beginning to the ultimate identification took approximately ten minutes. (R1027)

Appellant's motion pointed out that the photographs of Watson and the Appellant depicted prominent facial views. This

contrasted with the other photos which were not similarly enhanced. (R1229) The motion also pointed out the numerous discrepancies in Bruce Hayes' account of his observation of the culprits at the crime scene. (R1229-30) At the hearing, the state contended that Appellant had not met its burden of establishing that Hayes' identification of the Appellant was tainted. (R1045) Defense counsel contended that Hayes' identification was completely unreliable as demonstrated by the numerous discrepancies in Bruce Hayes' varying accounts. (R1045-6) The trial court denied Appellant's motion specifically finding no indication of taint or suggestiveness in the identification.

There are two situations which may require exclusion of in-court identification testimony. The first is when the police have obtained a pre-trial lineup identification in violation of the defendant's right to counsel. See United States v. Wade, 388 U.S. 218 (1967) The second is when the police have obtained a pre-trial identification by means of an unnecessarily suggestive procedure. See Manson v. Braighwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972); Simmons v. United States, 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967). In both situations, the in-court identification may not be admitted unless it is found to be reliable and based solely upon the witness' independent recollection of the offender at the time of the crime, uninfluenced by the intervening illegal confrontation. Wade; Neil.

In gauging the reliability of an in-court identification, the trial judge must consider the following facts: any prior opportunity the witness had to observe the alleged criminal act; the existence of any discrepancy of any pre-trial lineup description and the defendant's actual description; any identification prior to the lineup of another person; any identification by picture of the defendant prior to the lineup; the failure to identify the defendant on a prior occasion; any time lapse between the alleged act and the lineup identification; and any other factors raised by the totality of the circumstances that bear upon the likelihood that the witness' in-court identification is not tainted by the illegal lineup. Wade, 388 U.S. at 241.

The United States Supreme Court dealt specifically with photographic identification in Simmons v. United States, 390 U.S. 377 (1968). The Court recognized the latent element of danger of misidentification.

> It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal or may have seen him under poor conditions. Even if the police subsequently followed the most correct photographic identification procedures in showing the picture of a number of individuals without indicating whom they suspect there is some danger that the witness may make an incorrect identification. This danger would be increased if the police displayed to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the

> pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photographs rather than the person actually seen, reducing the trustworthiness of such lineup or courtroom identification.

Simmons, 390 U.S. at 383-4. Simmons established a two-pronged test to be applied in cases such as the one at bar. The pretrial identification by photographs should be set aside (1) if the procedure was impermissibly suggestive, and (2) if it gave rise to a substantial likelihood of irreparable misidentification. United States v. Allen, 497 F.2d 160 (5th Cir. 1974). See also Hamilton v. State, 303 So.2d 656 (Fla. 2d DCA 1974).

Considering the totality of the circumstances in the case at bar, one cannot help but reach the conclusion that Bruce Hayes' identification of the Appellant is both tainted and unreliable. The suggestiveness of the lineup is obvious even at a glance. (R1273) The Appellant is pictured in photograph number four, the only photograph among the six that was obviously taken outdoors. (R1018-20,1273) The backdrop of all of the other photographs is some type of wall. Appellant's and Watson's photographs are the only ones with outdoor settings in the background.

Other considerations also militate against the

reliability of Bruce Hayes' identification of the Appellant. Hayes did not view the photographic lineup until one month after the incident. (R1021) Hayes also expressed some doubt about his certainty in identifying the photograph and stated his preference of seeing the individual in person. (R1024-5,1031) Hayes admitted that he only selected the photographs that most closely resembled the people that he saw. (R1033) Hayes admitted to etective Smith that he was not positive of his identification. (R1033,1040) Hayes admitted that the lighting was poor and his look at the assailants was brief. (R1039)

It is also clear from the record that Hayes vacillated in the various retellings of his observations of the aftermath of the murder. At one point, Hayes told Detective Smith that both of the men crossed in front of his car. (R1022) Hayes later testified that one man went in front of his car while the other went behind. (R1034) Hayes also flip-flopped as to whether or not he got a look at either of the men's faces. (R1034-7,1039)

The record in the present case reveals that the state failed to meet its burden of demonstrating that the in-court identification of the Appellant rested upon an independent and untainted foundation. Instead, the identification was based on an impermissbly suggestive photographic identification procedure carried out by Detective Smith. The trial court erred in denying Appellant's motion and allowing Bruce Hayes to identify the Appellant at trial. Amends. V, VI, and XIV, U.S. Const.

POINT VIII

HAYES' DEATH SENTENCE IS DISPROPORTIONATE IN CONTRAVENTION OF HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The trial court found only two aggravating circumstances, i.e., pecuniary gain and heightened premeditation. (R1313-14) Neither circumstance is especially compelling. They are in fact rather ordinary, found in a large number, if not most murders. Against the backdrop of these routine aggravators, this Court must consider Tony Hayes' youth, his extremely low intelligence, his deprived childhood, and the treatment of his co-defendants. The trial court found that, although not retarded, Hayes definitely suffered from a developmental learning disability. (R1316) The evidence indicates that Hayes was probably borderline retarded with an IQ in the high 60's or low 70's. (R1088-91) Although it was a close call, defense counsel specifically waived reliance on the statutory mitigating circumstance dealing with no significant criminal history [s.921.141(6)(a)]. (R1056-8) Also a close question was the trial court's rejection of both statutory mental mitigating circumstances. (R1314-15) Considering the spectrum of capital cases that this Court reviews, this case simply does not qualify as one warranting the imposition of the ultimate sanction.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georgia, 408 U.S. 238, 306

(1972)(Stewart, J., concurring), that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1, 17 (Fla. 1973). See also Coker v. Georgia, 433 U.S. 584 (1977) (the requirement that the death penalty be reserved for the most aggravated crimes is a fundamental axiom of Eighth Amendment jurisprudence). This Court reviews "each sentence of death issued in the state," Fitzpatrick v. State, 427 So.2d 809, 811 (Fla. 1988), to "[g]uarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case," Dixon, 283 So.2d at 10, and to determine whether all of the circumstances of the case at hand "warrant the imposition of our harshest penalty." Fitzpatrick, 527 So.2d at 812. Tony Hayes' case is neither "the most aggravated" nor "unmitigated."

In addition to Hayes' personal shortcomings considered in mitigation, this Court should consider, as did the trial court, the treatment of Hayes' co-defendants. The trial court pointed out that Watson and Gillam both worked a deal with the state and could be out of prison in four or five years. (R1317) While it is true that Hayes was the triggerman, the first one to suggest robbing a cab was Anthony Gillam. (R455,694) Although Hayes pulled the trigger, all three helped plan the crime and willingly participated. (R451-72,692-709) Under the laws of this state, all are equally culpable for the murder of Thomas Pabst. s. 782.04(1)(a)(2)(d), Fla. Stat. (1987). Although Hayes pulled

the trigger, it seems grossly unfair to this writer for Hayes to be executed while Gillam and Watson are released from prison while still in their early twenties. If this Court reduces Hayes' sentence to life, he would very likely spend the rest of his existence in prison. In addition to the mandatory twenty-five year minimum, Hayes would also have to serve the consecutive forty-year term imposed by the trial court. (R1170-1,1320-7) While Hayes may not be fit to stay in society, he does not deserve to die. He was born defective and was worn out further through time.

Dr. Graham's testimony concerning Hayes' mental disability was not refuted by the state. In addition to Hayes' extremely low intelligence, Dr. Graham also focused on Hayes' immaturity. One portion of the intelligence test administered to Hayes measured the ability to make common-sense, everyday judgments. This was one of Hayes' weakest areas as he fell in the second percentile. Dr. Graham testified that the average eighteen-year-old would generally fall in the fiftieth percentile. (R1095) Hayes' use of alcohol and narcotics exacerbated the problem. (R1095-6) Dr. Graham concluded that Hayes' ability to conform his conduct to the requirements of the law was definitely impaired that night. (R1096)

This Court has previously recognized the mitigating quality of crimes committed impulsively while the perpetrator suffered from a mental disorder rendering him temporarily out of control. E.g., Holsworth v. State, 522 So.2d 348 (Fla. 1988);

Amazon v. State, 487 So.2d 8 (Fla. 1986); Miller v. State, 373 So.2d 882 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); and, Jones v. State 332 So.2d 615 (Fla. 1976). Amazon was nineteen with the emotional development of a thirteen-year-old. Like Hayes, Amazon was raised in a negative family setting and had a history of drug abuse. There was only inconclusive evidence that Amazon had ingested drugs on the night of the murder. The trial court found no mitigating circumstances in Amazon's case. Reversing the death sentence, this Court said, "In light of these mitigating circumstances, one may see how the aggravating circumstances carry less weight and could be outweighed by the mitigating factors." Amazon, 487 So.2d at 13.

In Livingston v. State, 13 FLW 187 (Fla. March 10, 1988), two valid aggravating factors existed. Livingston shot a convenience store clerk during the course of a robbery. Livingston also fired a shot at another woman who was in the store. Previously that day, Livingston had burglarized a residence. Livingston and Hayes share deprived childhoods and marginal intelligence as mitigating factors. Livingston's youth and immaturity were certainly strong factors in this Court's decision to vacate his death sentence. Appellant can see little to distinguish the facts of Livingston from the instant case.

Under this Court's duty to conduct proportionality review, like cases should have similar results. See also Proffitt v. State, 510 So.2d 896 (Fla. 1987) (defendant stabbed victim as he awoke during a burglary of his residence); Caruthers

v. State, 465 So.2d 496 (Fla. 1985) (defendant shot a convenience store clerk three times during an armed robbery); Rembert v. State, 445 So.2d 337 (Fla. 1984) (defendant bludgeoned storeowner during a robbery); and Richardson v. State, 437 So.2d 1091 (Fla. 1983) (defendant beat victim to death during a residential burglary in order to avoid arrest). Given Tony Hayes' social background, his low intelligence, his intoxication, the treatment of his co-defendants, and the commonplace facts of the murder, Tony Hayes does not deserve to die. Amends. VIII and XIV, U.S. Const; Art. I, s.17, Fla. Const.

POINT IX

IN CONTRAVENTION OF RIGHTS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN THE WEIGHING OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AND IN CONCLUDING THAT DEATH WAS THE APPROPRIATE SANCTION.

The trial court found only two aggravating circumstances, i.e., pecuniary gain [s.921.141(5)(f)], and heightened premeditation [s.921.141(5)(i)]. (R1313-14) The only statutory mitigating circumstance found by the trial court dealt with Hayes' youth. (R1315) [s.921.141(6)(g)]. However, the trial court specifically stated that she considered it a minor mitigating factor, "As there was no evidence indicating immaturity in any way contributed to the act." (R1315) The trial court's conclusion on this point is unsupported by the record. In fact, the only evidence on this issue was the explicit finding by Dr. Graham that Tony Hayes was extremely immature. A portion of the intelligence test measured this specific trait. Dr. Graham testified that Hayes fell in the second percentile, where an average eighteen-year-old would score in the fiftieth percentile. (R1095)

In addressing the evidence of other mitigating factors, the trial court found Hayes suffered from low intelligence but specifically rejected the evidence that he was retarded. (R1316) The trial court concluded that Hayes was "definitely developmentally learning disabled." (R1316) The court also cited

the fact that Hayes was a school dropout. The trial court also relied upon Hayes' deprived environment. He was the son of a neglectful mother and a missing father. He suffered at the hands of an abusive stepfather. (R1316) As a result of this environment, Tony Hayes learned to survive on his own at a very early age.

The trial court's consideration of the treatment of Hayes' co-defendants is difficult to decipher. The court wrote:

> Finally, in assessing possible mitigating factors, the court has considered the co-defendants, their plea bargains, their testimony, their potential sentences, and their participation in this offense. Having done so, it is quite obvious that their participation was less culpable than Mr. Hayes. Mr. Hayes was the dominant party in this plan, the one who chose to obtain a gun, decided that the victim must be shot and did, in fact, shoot the victim himself with no concern for the victim or the consequences of his act.

(R1316) Yet, in the conclusion portion of the trial court's findings, the judge wrote:

> Other mitigating factors include the pleas and possible sentences received by the co-defendants, ANTHONY GILLAM, and NATHAN WATSON. ANTHONY GILLAM plead guilty to Second Degree Murder and Armed Robbery pursuant to a plea agreement and will not even receive a life sentence. NATHAN WATSON plead guilty to Second Degree Murder and Armed Robbery and also will not receive even a life sentence. Both will more likely than not be sentenced to the guidelines sentences of 12-17 years and 17-22 years, respectively, and will not (sic) doubt serve only a portion of that sentence. Therefore, the Court has reflected on this and the Defendant's

> TONY LEON HAYES' action in this matter to determine whether his culpability is so great and so different from his co-defendants as to warrant the ultimate penalty of death.
>
> It is further noted, that the plea bargaining decision is an executive function and this Court defers to the wisdom of the state and the choices it had to make. The consequences imposed upon the co-defendants while considered and heavily weighed by this Court, do not outweigh the personal conduct of the defendant, TONY LEON HAYES, in this matter.

(R1317) Appellant submits that, in spite of the trial court's assertion to the contrary, she failed to follow this Court's dictates in Rogers v. State, 511 So.2d 526, (Fla. 1987). (R1314) The court's consideration of the non-statutory mitigating factors, although wide-ranging, fail to specify exactly what the court found in mitigation, what it rejected, and how much weight was given to each.

The trial court states that the two run-of-the-mill aggravating circumstances are "strong circumstances that must be given great weight." (R1316) Appellant thinks that this Court will recognize otherwise. As argued in Point VIII, these aggravating circumstances are found in the vast majority of first-degree murders. They are not so shocking that each one alone "greatly outweighs any and all mitigation found" by the trial court, in spite of the court's assertion to the contrary. (R1317) Further evidence in support of Appellant's argument on this issue, is the willingness of the state to accept Hayes' plea to a life sentence. (R1049-50) If this murder were truly as

shocking as the trial court's findings of fact assert, the state would not have been willing to offer such a deal.

Even though it is unclear whether or not the trial court specifically found all of the mitigating evidence that she discusses in her sentencing order, it is clear that the mitigating factors outweigh the aggravating circumstances in this case. A mere counting of words in the trial court's findings supports this contention. The trial court spends little more than half a page discussing the two aggravating factors relied upon. (R1313-4) In contrast, the trial court spends over three pages discussing the mitigating evidence in this case. While it is true that some of the space is used to discount some of these mitigating circumstances, the fact that the trial court was forced to expend that much energy explaining why certain mitigators were not present is a sign that the question is a close one. An accurate weighing of the actual mitigating factors against the two conventional aggravating circumstances should have resulted in the imposition of a life sentences. Amends. VIII and XIV, U.S. Const; Art. I, ss.9 and 17, Fla. Const.

POINT X

IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON TWO AGGRAVATING CIRCUMSTANCES, ONLY ONE OF WHICH COULD BE APPLIED, WITHOUT INSTRUCTING THE JURY ON THE ISSUE OF IMPROPER DOUBLING.

Over objection, the trial court allowed the prosecutor to argue the application of both "pecuniary gain" and "during the commission of a robbery." (R1063-6) [ss.921.141(5)(d) and (f), Fla. Stat. (1987)] The prosecutor argued both aggravating factors to the jury at the penalty phase. (R1076-7,1080-1,1125) Although defense counsel attempted to tell the jury that the two factors actually constituted only one aggravator, counsel's argument is certainly not equal to an instruction from the court. (R1084) The trial court instructed the jury on both "pecuniary gain" and "during the commission of a robbery." (R1138-9) After hearing the evidence, the offending argument by the prosecutor, and the objectionable instructions, the jury returned with an eleven-to-one recommendation that Tony Hayes be executed. (R1281)

Appellant recognizes that this Court has specifically rejected the instant claim in Suarez v. State, 481 So.2d 1201 (Fla. 1985). The Suarez trial court also instructed the jury on the same two aggravating circumstances at issue in the instant case. This Court held that such an instruction was not reversible error where the trial court recognized the improper doubling in the sentencing order and only considered one of the

aggravators. Suarez, 481 So.2d at 1209. This Court wrote:

> The jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case. The judge, on the other hand, must set out the factors he finds both in aggravation and in mitigation, and it is this sentencing order which is subject to review vis-a-vis doubling.

Id. The trial court in this case recognized the doubling problem and, therefore, weighed only one of the two aggravating circumstances at issue. (R1313)

Appellant urges this Court to reconsider its holding in Suarez. It is expressly submitted that giving the objectionable instruction violated the Eighth Amendment, in that the presence of that legally improper instruction was confusing and misleading to the jury concerning their recommendation of the appropriate sanction. The presence of the instruction on both aggravating circumstances was prejudicial and confusing. This was not a situation where the jury was read verbatim all of the statutory aggravating circumstances which, if unobjected to, is apparently not reversible error. See Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). The jury in this case received instructions on only three aggravating circumstances. The jury should not have had before them the consideration of both aggravating circumstances because clearly, as a matter of law, only one should be weighed. Appellant submits that the prosecutor's action in arguing the applicability of both aggravating circumstances coupled with the

trial court's instruction thereon, tainted the jury's recommendation and violated Hayes' constitutional rights. Amends. VI, VIII, and XIV, U.S. Const.; Art. I, ss. 9 and 16, Fla. Const.

POINT XI

THIS COURT'S DENIAL OF APPELLANT'S MOTION TO SUPPLEMENT THE RECORD RESULTS IN INADEQUATE APPELLATE REVIEW AND DEPRIVES TONY HAYES OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS.

On November 28, 1989 this Court rendered an order directing the court reporter to start immediately transcribing all proceedings. (emphasis in the original). The record on appeal was filed in this Court on February 5, 1990. After reading the record on appeal, the undersigned counsel filed a motion to supplement the record on appeal with the original indictment, a transcript of Appellant's taped statement played to the jury at trial, and a transcript of the hearing held on trial counsel's motion to withdraw. Trial counsel filed the motion on December 14, 1988. (R1188-9) The record reveals that a hearing was held on December 15, 1988, before Judge Hammond. (R903-4) That hearing was never transcribed by the court reporter and is not contained in the record on appeal. Appellant sought to supplement the record with, inter alia, a transcript of that hearing. The Office of the Attorney General filed a reply to Appellant's motion to supplement the record on appeal objecting to supplementation with most of the items requested. However, the attorney general did not object to supplementation of the record with the December 15, 1988, hearing on counsel's motion to withdraw. On June 1, 1990, this Court denied Appellant's motion

to supplement the record.

Rule 9.140(b)(4)(A), Florida Rules of Appellate Procedure, provides:

> When the notice of appeal is filed in the Supreme Court, the Chief Justice will direct the appropriate chief judge of the Circuit Court to monitor preparation of the complete record for timely filing in the Supreme Court. (emphasis added).

Rule 9.200(f), Florida Rules of Appellate Procedure, provides:

> (1) If there is an error or omission in the record, the parties by stipulation, the lower tribunal before the record is transmitted, or the court may correct the record.
>
> (2) If the Court finds the record is incomplete, it shall direct the parties to supply the omitted parts of the record. No proceeding shall be determined because the record is incomplete until an opportunity to supplement the record has been given. (emphasis added).

Appellant deserves an entire record of the proceedings below for the purpose of appellate review. Anything less than a full report of the proceedings has the effect of precluding complete appellate review. The omission in the record denigrates Appellant's right to meaningful consideration of his cause by this Court as well as other courts that may consider this case in the future. Art. I, Sec. 16, Fla. Const.; Amends. VI, XIV, U.S. Const.; Estes v. Texas, 381 U.S. 532 (1965); Magill v. State, 386 So.2d 1188 (Fla. 1980); State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Castor v. State, 365 So.2d 701 (Fla. 1978); Clark v.

State, 363 So.2d 331 (Fla. 1978); Spinkellink v. State, 313 So.2d 666 (Fla. 1975); State v. Barber, 301 So.2d (Fla. 1974); Wainright v. Sykes, 433 U.S. 72 (1977); Smith v. State, 407 So.2d 894 (Fla. 1981).

Without a complete record, this Court cannot adequately review Tony Hayes' convictions and sentences. The motion to withdraw as counsel cites irreconcilable differences between Hayes and his trial counsel. (R1188-9) Trial counsel stated his professional opinion that his relationship with Hayes was irretrievably damaged and that further representation would be counterproductive. Trial counsel alleged that the interests of justice required that the court appoint new counsel and pointed out that the prosecutor had no objection. (R1189)

At the beginning of the suppression hearing held on August 24, 1989, Judge Graziano reviewed the previous rulings of Judge Hammond and disposed of any pending motions. (R903-24) The motion to withdraw was mentioned and the December 15, 1988, hearing was discussed. (R903-5) Defense counsel reported that Judge Hammond orally denied the motion. (R903) Defense counsel also stated that, "Judge Hammond if my recollection serves me correctly basically told Mr. Hayes that he didn't have any input as to the particular attorney and if there wasn't any real problems, he had to make due with the attorney he had and Mr. Hayes said that was acceptable by him and everybody went on with the case." (R903) Defense counsel did withdraw many of the pending motions at that time. (R905,908-12) Defense counsel

specifically declined to withdraw the previously filed motion to withdraw as counsel stating that Judge Hammond had already ruled on it. (R904) The trial court did ask Hayes if he was satisfied with counsel and Hayes replied affirmatively. (R904-5)

Appellant does not believe that appellate counsel and this Court should necessarily accept trial counsel's representations as to what occurred at a hearing on a motion. Certainly the better practice would be to examine the transcript of that hearing. The ruling by Judge Hammond was adverse to the defense and should be adequately reviewable during this appeal. This is especially true in a capital case. The norm of capital cases is many years of protracted litigation in both state and federal court. The problem of procedural bar is also a consideration in the disposition of this argument. Tony Hayes is entitled to the record of his entire trial, not only for this appeal, but for all future litigation involving this case. Since he is indigent, he is unable to obtain the transcript himself. This Court has denied his attempt to obtain that transcript resulting in a violation of his constitutional right to equal protection under the law.

Should this Court rely on the vagaries of trial counsel's memory as to what occurred at the hearing? Appellant thinks not. Trial counsel admitted that his recollection could be inaccurate. Perhaps other important issues arose at the hearing that have now been forgotten. Appellant cannot know without the transcript of the hearing. This Court's ruling

denying Appellant's attempt to obtain that transcript results in a violation of his right to due process of law and to equal protection under the law.

POINT XII

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BASED UPON THE CUMULATIVE EFFECT OF NUMEROUS ERRORS THAT OCCURRED BELOW.

The Due Process clauses of the United States and the Florida Constitutions provide an accused the right to a fair trial. Although an accused is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error. See Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977). Appellant submits that he was denied his right to a fair trial and is entitled to a new trial based upon the cumulative error of the points presented in this argument. Albright v. State, 378 So.2d 1234 (Fla. 2d DCA 1979). The following which, either considered alone, in combination with another, or in combination with other points presented in this brief have the cumulative effect of denying Hayes his constitutional right to a fair trial. In presenting these points, Appellant is also mindful of the growing application of the doctrine of procedural bar in our state and federal court systems.

During jury selection, the trial court, without any prompting from the state, limited defense counsel's questioning of the venire. (R137-9) Appellant contends that such a limitation denied him a fair trial. Rule 3.300(b), Florida Rules of Criminal Procedure, guarantees voir dire examination by counsel. See also Jones v. State, 378 So.2d 797 (Fla. 1st DCA 1980). Wide latitude is allowed during voir dire. Cross v.

State, 103 So. 636, 89 Fla. 212 (1925) Defense counsel was simply attempting to ascertain any latent or concealed prejudgments by perspective jurors. Jones, 378 So.2d at 798. The trial court abused its discretion in restricting defense counsel's examination.

On two occasions, the trial court restricted defense counsel's cross-examination of witnesses. This occurred during the cross-examination of Felicia Ross (R546-51) and the cross-examination of Nathan Watson. (R721) This Court is well aware of the fundamental nature of an accused's right to confront witnesses. Amends. VI and XIV, U.S. Const.; Davis v. Alaska, 415 U.S. 308 (1974); Coxwell v. State, 361 So.2d 148 (Fla. 1978).

The trial court also erred in overruling Appellant's objection and allowing the medical examiner to, in essence, build a model of the taxi in the courtroom for demonstrative purposes. The prosecutor played the role of the cab driver and told the medical examiner to, "Place these chairs wherever you feel they should be, ... " (R585) Defense counsel posed a relevance objection and the prosecutor responded that he wished to establish the trajectory of the bullet. (R586) The trial judge allowed it and the medical examiner testified that the wound would have been delivered from a person sitting almost directly in back of the driver. (R586) The witness admitted that his demonstration was based on the assumption that the driver's head was straight at the time the shot was fired. (R586) On cross-examination, the doctor admitted that he had no personal

knowledge as to the position of the victim when the shot was fired. (R591) He also admitted that the shot could have been fired from a person sitting to the side of the driver. (R591) Appellant contends that error occurred. The doctor's demonstration had no basis in fact as was eventually revealed on cross-examination. The demonstration was not relevant under Section 90.401, Florida Statutes (1987). The demonstration is analogous to an experiment conducted under conditions not similar to the conditions which prevailed at the time of the alleged occurrence. See e.g. Lawrence v. State, 45 Fla. 42, 34 So. 87 (Fla. 1983). See also Hisler v. State, 52 Fla. 30, 42 So. 692 (1906). The jury easily could have been misled by this prejudicial evidence on this critical point. Amends. VI and XIV, U.S. Const.

The trial court denied Appellant's motion for leave of court to interview a juror. (R1155-6,1159,1288-90) Appellant submits that he cannot ascertain juror misconduct without leave of the court to examine the jury.

Appellant also submits that the trial court was less than even-handed in its rulings on minor evidentiary points throughout the trial. The court frequently sustained state's objections, but overruled similar objections by defense counsel. See, e.g., (R489,1044)

POINT XIII

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies Due Process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in summary form in recognition that this Court has specifically or implicitly rejected each of these challenges to the constitutionality of the Florida statute, thus detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The failure to provide the defendant with notice of aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives the defendant of Due Process of Law. See Gardner v. Florida, 430 U.S. 349 (1977). Appellant filed a motion seeking such disclosure. (R908,1212)

The Florida Standard Jury Instructions, as well as comments made by the prosecutor and the trial court, diminished the responsibility of the jury's role in the sentencing process contrary to Caldwell v. Mississippi, 472 U.S. 320 (1985). Such comments occurred throughout Hayes' trial. (R156-9,163-4,166,175-6,215,217-8,286,838,1074) Appellant recognizes that this Court has previously ruled that Caldwell is not applicable in Florida. Combs v. State, 525 So.2d 853 (Fla. 1988).

The exclusion of jurors who hold objections to the death penalty is unconstitutional. This results in a denial of Appellant's constitutional right to a fair trial. Juror Harrison was excused on these grounds pursuant to the state's request. (R156-64,170,181,186-7)

Section 921.141, Florida Statutes (1987), is unconstitutional on its face and as applied based upon the arbitrary and capricious manner in which various prosecutors decide to seek the ultimate sanction in any given case. The United States District Court, Central District of Illinois, vacated a death sentence and declared the Illinois death statute to be unconstitutional based upon this contention. United States of America, ex. rel. Charles Silegy v. Howard Peters III, et. al, Case No. 88-2390 (April 29, 1989).

The state in this case agreed to forego its request for death provided Hayes pleaded guilty to the crimes as charged. (R1049-50) Hayes' refusal of the state's offer and subsequent exercise of his constitutional right to a jury trial ultimately resulted in the imposition of the death penalty. This result violates his constitutional rights.

The death penalty in Florida is imposed in an arbitrary and capricious manner based on factors which should play no part in the consideration of sentence. The State of Florida is unable to justify the death penalty as the least restrictive means available to further its goals where a fundamental right, human life, is involved. Rowe v. Wade, 410 U.S. 113 (1973). The

Florida statute is unconstitutional on its face, because the qualifying language describing the statutory mitigating circumstances places an unnecessary limitation on the finding of such evidence by the jury and the court. It thereby violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. Specifically, the language of three statutory mitigators require "extreme mental or emotional disturbance," "substantial" impairment of ones ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and "extreme" to describe the level of duress. ss.921.141(6)(b)(e)(f), Fla. Stat. (1987). This contention is very appropriate in Hayes' case.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (Fla. 1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 445 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980)(England, J. concurring). Herring v.

State, 446 So.2d 1049, 1058 (Fla. 1984)(Ehrlich, J., Concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Elledge Rule [Elledge v. State, 346 So.2d 998 (Fla. 1977)], if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the United States Constitution.

Section 921.141(5)(d), Florida Statutes (1985)(the capital murder was committed during the commission of a felony), renders the statute unconstitutional in violation of the Eighth

and Fourteenth Amendments to the United States Constitution, because it results in arbitrary application of this circumstance and in death being automatic in felony murders unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

The Florida death penalty statute discriminates against capital defendants who murder whites and against black capital defendants in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. McClesky v. Kemp, 481 U.S. 279 (1987) (dissenting opinion of Brennan, Marshall, Blackman and Stevens, J.J.)

This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 459 U.S. 895 (1982)(Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

The death penalty as applied in Florida leads to inconsistent, arbitrary, and capricious results. In King v. State, 514 So.2d 354 (Fla. 1987), this Court invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having previously

approved it on King's direct appeal in King v. State, 390 So.2d 315 (Fla. 1980). See also Proffitt v. State, 510 So.2d 896 (Fla. 1987); Proffitt v. State, 372 So.2d 1111 (Fla. 1979); Proffitt v. State, 360 So.2d 771 (Fla. 1978); and Proffitt v. State, 315 So.2d 461 (Fla. 1975).

CONCLUSION

Based on the cases, authorities, and policies cited herein, Appellant requests that this Court grant the following relief:

As to Points I through VII, XI and XII, reverse and remand for a new trial;

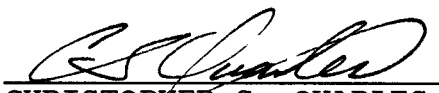
As to Points VIII through IX, remand for the imposition of a life sentence;

As to Point X, remand for the imposition of a life sentence or, in the alternative, a new penalty phase; and,

As to Point XIII, remand for the imposition of a life sentence, or in the alternative, declare Florida's Death Penalty Statute to be unconstitutional.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Tony Leon Hayes, #595233, P.O. Box 747, Starke, Fla. 32091 on this 12th day of June, 1990.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER