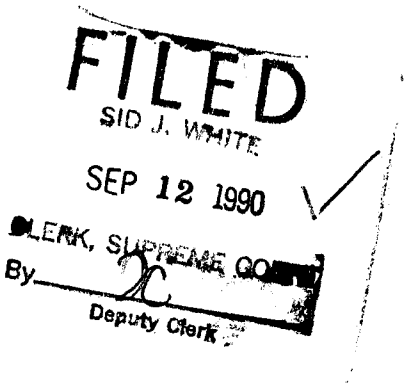
IN THE SUPREME COURT OF FLORIDA



ROBERT BRYANT, JR.,

Appellant,

v. CASE NO. 75,317

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR TAYLOR COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Robert Bryant is the defendant in this capital case. References to the many volumes of the transcript will be indicated by the letter "R."

STATEMENT OF THE CASE

An indictment filed in the circuit court for Taylor county on 18 May 1989 charged the appellant, Robert Bryant, with one count of first degree murder, robbery with a firearm, sexual battery with a firearm, burglary with a firearm, and possession of a firearm during the course of a felony (R 8-10). Subsequently, Bryant filed several motions relevant to this appeal:

> 1. Motion for appointment of expert witnesses (R 62-63). Granted (R 77).
> 2. Motion to Suppress Statements (R 64-66) and Motion to Suppress Statements and Other Relief. Denied (R 1268).
> 3. Bryant also requested the court sever all the charges (R 1195), which the court refused to do (R 1201).

Bryant proceeded to trial before the honorable Vernon Douglas. He was found guilty as charged of the first degree murder, sexual battery, and burglary, but he was found guilty of only attempted robbery (R 160-61).[1] After the sentencing phase of the trial, the jury recommended death, and the court followed that opinion. In imposing a death sentence, the court found in aggravation:

> 1. Bryant had a prior conviction for aggravated assault, a violent felony.
> 2. The defendant committed the murder during the course of a sexual battery.
> 3. The murder was committed to avoid or prevent lawful arrest or effect an escape from custody.
> 4. The murder was committed for pecuniary

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[1]The State, before trial, dropped the possession of a firearm charge (R 1199).

gain.
5. The murder was especially heinous, atrocious, and cruel (R 317-18).

In mitigation the court found only that Bryant had a relatively low IQ but that did not affect his understanding of what he was doing. (R 318)

As to the other convictions, the court sentenced Bryant to life in prison for the sexual battery and burglary, and fifteen years for the attempted robbery (R 309-11). All the prison terms are to be served concurrently but consecutively to the death sentence. In addition, the court imposed the minimum mandatory three year prison sentence for using a firearm during the commission of the felonies for which he was convicted.

Bryant filed a motion for a new trial (R 287-291), which the court denied (R 1455). This timely appeal follows.

STATEMENT OF THE FACTS

By June 1988 Robert Bryant was 25 years old and mentally retarded (R 1380-81). His had not been a happy childhood, mainly because of his retardation and his father. He grew up in Taylor County, and the school system there early on recognized Bryant's emotional problems, and it placed him in their special programs for the emotionally handicapped (R 1350, 1360). He made little progress, and consequently had considerable difficulty in school (R 1351). At best he could read on a second or third grade level (R 1368), and he repeated the ninth grade three times before finally dropping out of school the fourth year (R 1362). When in a controlled environment he behaved well, but on his own he had trouble getting along with other students (R 1361).

The difficulty of the school work, however, was not the direct cause for Bryant's quitting school. When he was 16 or 17 his father deliberately shot him in the arm with a shotgun (R 1352). Throughout the boy's life, his father had abused him physically, and and when drunk he terrorized him and the rest of the family by threatening them with the guns he had (R 1323, 1352, 1382-83). Bryant spent several months in a hospital recovering from the wound, yet there was only so much the doctors could do (R 1324). For all practical purposes he had lost the use of his right arm (R 1384). It was, as the prosecution admitted, withered (R 1114).

The shooting was a major turning point for Bryant

(R 1363). Until then, he had been making slow, but steady progress in school (R 1368), and he planned, for example, to play football (R 1363). After the shooting, he just gave up (R 1363). A boy cannot do much with a withered arm, and Bryant had his additional emotional and mental handicaps to deal with. Consequently, at best he got only temporary jobs at a sawmill, but because he did not have a good arm, he was usually let go after a few days work (R 981).

The boy drifted on, and by June 1988, he would do occasional lawn mowing for his mother and neighbors in Perry, such as Annie Kennedy, to earn a little spending money (R 1000). The money he got he spent on drugs and alcohol, and by this time he had developed serious drug and alcohol problems (R 1381).

On June 3, he mowed Ms. Kennedy's lawn in the morning, which took about four hours to finish (R 1003). When he was through, Ms. Kennedy could not pay him then, but he came back some time later, and she gave him ten dollars (R 1006), which he used to buy liquor so could get drunk (R 1021).

Annie Kennedy was 67 years old and a rather small woman, being about five feet tall (R 488). She had known Bryant for several years and was friendly to him in a grandmotherly sort of way (R 999). He would do work for her, and on occasion just visit (R 994, 1001, 1019). He also ran her errands and bought her gin or cigarettes (R 995, 1004).

On the evening of June 3 Bryant got drunk. He was so drunk that when he stumbled home about 10:30 p.m. he fell into

his bed and immediately went to sleep (R 914-15). He had been asleep for a few minutes when he rolled off the bed. He did not wake up, and his mother and a friend picked him up and put him back (R 916). When he rolled off again, they left him on the floor (R 916).

The next morning Ms. Kennedy's body was discovered laying in the living room of her house (R 389). She had been beaten about the face and sexually battered, and the money from her welfare check taken (R 489, 491). She had been shot once and the bullet had entered the area above her left breast and exited behind her right shoulder (R 497). She had been dead several hours, and the best estimate was that she had been shot sometime around midnight (R 500). Police investigators found Bryant's fingerprints on a cigarette package lying between Ms. Kennedy's legs, blood stains matching Bryant's blood type, and a single hair in Ms. Kennedy's pubic area that had the same characteristics as Bryant's hair (R 674-73, 737-38, 821).

The police questioned Bryant several times about the murder during the next year, and twice he voluntarily gave them blood, saliva, and hair samples (R 588-90). He was finally arrested in May 1989, almost a year after the murder (R 3).

Bryant denied killing Mrs. Kennedy, and he presented two witnesses (and tried to present a third (R 324, 354)) that someone else had committed the murder and the other crimes (R 964-974).

SUMMARY OF THE ARGUMENT

Bryant has raised 11 issues for this court to consider, 4 guilt and 7 sentencing issues.

Issue 1. During voir dire, an unusually large number of prospective jurors said they would automatically recommend a death sentence if they found the defendant guilty of murder. The court refused to excuse them for cause, which violated state law in that there was a reasonable doubt the challenged jurors could be impartial. It also violated constitutional law because their view would have substantially impaired their performance as jurors.

Issue 2. Bryant offered as a defense that someone other than him had committed the murder of Mrs. Kennedy. As part of his defense he wanted Clarence Mauge, a police investigator, to testify that a Mary Harris had told him that she had been in Kennedy's house at the time of the murder. The court refused to let him testify because Bryant had presented no corroborating evidence of her statement. The court erred because there was evidence to confirm sufficiently the truth of what she had said. Additionally, even if there was no such evidence, the court should have admitted this testimony. Requiring corroboration unfairly limits the jury from hearing all relevant evidence in a case in general and in this case specifically.

Issue 3. Bryant's trial occurred in late November, and the court recessed for four days during the Thanksgiving holiday. During that time, someone shot a bullet through one

of the juror's windows in her home. It became evident during the jury's subsequent deliberations on Bryant's guilt that this juror told others about what had happened. At least one juror was afraid for her and her family's safety. While the court questioned the two jurors about their ability to be fair, it refused to inquire of the rest of the jury about any bias or fear they might have had. That was error because any tampering with or pollution of the jury presumptively taints whatever verdict is reached. Without asking each individual juror about what effect the shooting incident may have had on them, the presumption of prejudice could not have been overcome.

Issue 4. The court found this murder to have been committed to eliminate a witness, but it reached this conclusion because that was the only result that it could think of that explained Mrs. Kennedy's death. The law, however, requires that there be positive evidence that the dominant motive for the murder was to avoid lawful arrest. This aggravating factor cannot be found by default.

Issue 5. Bryant presented several witnesses at the penalty phase of the trial who said Bryant had a severe emotional handicap as a child. Despite this evidence, and other evidence of his drug and alcohol abuse and physical abuse by his father, the court refused to instruct the jury that they could find as a mitigating factor that Bryant committed this murder while under the influence of an extreme mental or emotional disturbance. If the law requires only that he have presented "some" or "any" evidence to support giving an

instruction, the court should have given the standard instruction on this statutory mitigating factor.

Issue 6. The court found in mitigation only that Bryant had a low IQ. It ignored the wealth of other mitigating evidence Bryant had presented. To do so was error as this court's decision in Campbell v. State, Case No. 72,622 (Fla. June 14, 1990) clearly indicates. The court is required to consider, and in writing, evaluate all the mitigation a defendant offers. Failure to do so, renders the subsequent death sentence invalid.

Issue 7. When compared with other death cases in which the defendant's intelligence has been an important factor, this case is not a death case. Bryant's mental retardation permeates every aspect of his character, and his drug and alcohol addiction render this murder truly senseless. As such, Bryant lacked the moral culpability required to justify capital punishment in this case.

Issue 8. Because Bryant is mentally retarded it is cruel and unusual punishment under the state's constitution to execute him. Persons who are mentally retarded, as a class, lack the mental ability to have the additional moral culpability to be death worthy. Also, Florida has historically shown greater compassion in caring for the retarded defendant than it has the normal, accused person. Such history shows that Florida's evolving sense of decency now condemns executing the mentally retarded.

Issue 9. During the penalty phase the state improperly elicited testimony that Bryant was sane when he committed the murder, and it argued that sanity to rebut the mitigation Bryant had presented. To have allowed the state to do this was error because Bryant's sanity was an irrelevant issue during the penalty phase of the trial. Just as a defendant cannot argue any lingering doubt as to his guilt at the penalty phase, likewise the state cannot argue his sanity. Issues resolved by a guilty verdict cannot be relitigated in the penalty phase.

Issue 10. The state's case rested solely upon circumstantial evidence. Even though this court has omitted the standard instruction regarding how the jury should consider such evidence, the court in this case abused its discretion in not giving it.

Issue 11. During closing argument in the guilt phase of the trial, the state improperly asked the jury to find Bryant guilty because Clarence Mauge, the police investigator for this case, believed he was guilty when he arrested him. That improperly bolstered the state's case and should not have been permitted.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING BRYANT'S CHALLENGE FOR CAUSE OF ELEVEN PROSPECTIVE JURORS WHO SAID THEY WOULD AUTOMATICALLY RECOMMEND A DEATH SENTENCE IF THEY FOUND BRYANT GUILTY OF PREMEDITATED FIRST DEGREE MURDER, WHICH ERRORS VIOLATED BRYANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

A. THE FACTS

During the voir dire, counsel for Bryant asked the jurors about their views regarding the death penalty. Counsel questioned prospective juror Padgett about his views:

> MR. HARRISON [Defense Counsel]: Now, Mr. Padgett, I would like to ask you, since you indicated you pretty emphatically agree with the death penalty, do you have personal feelings as to when, under what circumstances the death penalty should be imposed?
>
> PROSPECTIVE JUROR PADGETT: Yes, sir.
>
> MR. HARRISON: In other words, there are certain crimes that you think the death penalty should be applied in, right?
>
> PROSPECTIVE JUROR PADGETT: Yes, sir.
>
> Mr. HARRISON: Okay. Now, what are your feelings in that regard?
>
> PROSPECTIVE JUROR PADGETT: Well, there is, like self-defense or endanger of your life, or something, where you might kill someone. But where you have got premeditated murder, the person knows he is going to to out and kill someone,that is my opinion.
>
> MR. HARRISON: In other words, if you found Robert Bryant guilty of premeditated murder, you would think that pretty much automatically that would deserve the death penalty, right?
>
> PROSPECTIVE JUROR PADGETT: Yes, sir.

MR. HARRISON: Mr. Byrd, would you agree with Mr. Padgett?

PROSPECTIVE JUROR BYRD: No.

MR. HARRISON: Okay. Ms. Ratliff, would you agree with Mr. Padgett?

PROSPECTIVE JUROR RATLIFF: Uh-huh.

MR. HARRISON: You are saying yes?

PROSPECTIVE JUROR RATLIFF: Yes.

MR. HARRISON: Mr. Taylor, would you agree with Mr. Padgett?

PROSPECTIVE JUROR J. TAYLOR: I agree with what he said, yes.

MR. HARRISON: Mr. Thomley, how about you? Would you agree with Mr. Padgett?

PROSPECTIVE JUROR THOMLEY: (Nodding head.)

MR. HARRISON: In other words, if you come back with a first degree murder conviction, then automatically the death penalty would be appropriate in those cases, right?

PROSPECTIVE JUROR THOMLEY: Yes.

MR. HARRISON: Mr. Floyd, would you agree with Mr. Padgett?

PROSPECTIVE JUROR FLOYD: Yes.

MR. HARRISON: Mr. Kerley, would you agree with Mr. Padgett?

PROSPECTIVE JUROR KERLEY: Yes.

MR. HARRISON: Mr. Whitson, how about you, sir, would you agree with Mr. Padgett?

PROSPECTIVE JUROR WHITSON: Yes.

MR. HARRISON: And Mr. Dice, how about you? Would you agree?

PROSPECTIVE JUROR DICE: I agree, also.

MR. HARRISON: And Mr. Payne, would agree,

also?

PROSPECTIVE JUROR PAYNE: Yes, sir.

(R 72-73)

The State, recognizing the problem, tried to rehabilitate these jurors:

> MR. PHELPS: I want to ask some questions concerning, this surrounds the death penalty issue again and concerning jury instructions. Do all of you understand that just because a person is guilty of first degree murder, that the death penalty is not necessarily appropriate in every first degree murder, that the death penalty is not necessarily appropriate in every first degree murder case under the law? Do all of you understand that?
>
> (No response.)
>
> MR. PHELPS: And if the judge tells you in jury instructions that before, under the law, you can even impose or vote to impose the death penalty certain conditions must apply, that is, certain aggravating circumstances must exist, and further, he tells you that you must consider not only the aggravating circumstances but the mitigating circumstances, things that would speak in favor of the defendant, do each of you understand that you would be duty bound to consider each of those circumstances before voting either to impose the death penalty? Do all of you understand that?
>
> (Whereupon, all prospective jurors indicated affirmatively.)
>
> MR. PHELPS: Could all of you follow those instructions?
>
> (Whereupon, all prospective jurors indicated affirmatively.)

(R 87-88).

Finally, counsel for Bryant asked them again if they would automatically impose a death sentence if they found Bryant guilty of first degree murder:

> MR. HARRISON: Mr. Floyd, let me return to that last question that was asked by Mr. Phelps. Do you remember when I discussed things with Mr. Padgett, and I asked him under what circumstances he felt the death penalty was appropriate, and he said that premeditated murder would be an example where he felt that, I believe he said the death penalty automatically would be the appropriate thing. Is that your feeling still?
>
> PROSPECTIVE JUROR FLOYD: Right.
>
> MR. HARRISON: Okay. And Mr. Kerley, that was your feeling, too?
>
> PROSPECTIVE JUROR KERLEY: Yes.
>
> MR. HARRISON: That where a person commits first degree murder, automatically the death penalty would be appropriate in that case, rich?
>
> PROSPECTIVE JUROR KERLEY: Yes. I think so.
>
> MR. HARRISON: Mr. Whitson, do you still agree with Mr. Padgett?
>
> PROSPECTIVE JUROR WHITSON: Yes.
>
> MR. HARRISON: Mr. Dice, do you still agree with Mr. Padgett?
>
> PROSPECTIVE JUROR DICE: I do.
>
> MR. HARRISON: Mr. Payne?
>
> PROSPECTIVE JUROR PAYNE: (Nodding head.)
>
> MR. HARRISON: Mr. Thomley?
>
> PROSPECTIVE JUROR THOMLEY: (Nodding head.)
>
> MR. HARRISON: Mr. Taylor?
>
> PROSPECTIVE JUROR J. TAYLOR: (Nodding head.)

MR. HARRISON: Ms. Ratliff?

PROSPECTIVE JUROR RATLIFF: (Nodding head.)

MR. HARRISON: And Mr. Byrd?

PROSPECTIVE JUROR BYRD: Would you repeat that, please.

MR. HARRISON: Well, do you feel that if this jury comes back and determines that Mr. Bryant is guilty of premeditated first degree murder, that the death penalty is appropriate and would be your recommendation in that case?

PROSPECTIVE JUROR BYRD: Yes, sir.

MR. HARRISON: You do?

PROSPECTIVE JUROR BYRD: (Nodding head.)

MR. HARRISON: Okay. Ms. Taylor, how about you? Do you agree with Mr. Padgett and Mr. Byrd?

PROSPECTIVE JUROR B. TAYLOR: Yes, sir.

Bryant challenged these eleven prospective jurors for cause because of their views on imposing death, but the court denied them because, "I don't think Mr. Harrison inquired far enough to explain to them their options under mitigating circumstances, and I don't, so I don't think the motion is well-founded." (R 96)[2]

Later, during voir prospective juror Whitson reiterated the position he had taken earlier:

PROSPECTIVE JUROR WHITSON: Okay. I will tell you, and then-- well, I believe in the

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[2]The State later tried to rehabilitate Mr. Kerley and Mr. Payne, and they eventually served as jurors in this case, with Mr. Payne being the foreman (R 179-82, 1189-90).

> death penalty for first degree murder that would not call for the death penalty because of the situation. . . . a person could be convicted of first degree murder, they premeditated this thing, but there is evidence there that says, if I didn't do this, then something was going to happen to me. And if that is what I am saying. I went out or anybody went out and intentionally murdered somebody, I believe in the death penalty instantly. I mean, I don't believe in hanging around with it.
>
> MR. HARRISON: I understand.
>
> PROSPECTIVE JUROR WHITSON: So there is my position on it.

(R 185).

That was Mr. Whitson's last statement, and immediately after, counsel challenged him for cause, but the court denied it (R 185). Bryant then excused him peremptorily (R 186). Later counsel exhausted all his peremptory challenges and asked for ten more (R 252-53). The court gave him one (R 256) which Bryant used and asked for ten more (R 298), but the court denied that request (R 299).

B. THE LAW AND ITS APPLICATION TO THIS CASE

In Singer v. State, 109 So.2d 7 (Fla. 1959), this court articulated the state law standard to be applied when a prospective juror's competency to serve has been challenged:

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on motion of a party, or the court on its own motion.

Id., at 23-23; accord, Moore v. State, 525 So.2d 870 (Fla. 1988); Hill v. State, 477 So.2d 553 (Fla. 1985).

In Hill, prospective juror Johnson said he would vote for a death sentence for defendants who had committed premeditated and felony murder. This court reversed Hill's sentence of death because a reasonable doubt existed that the prospective juror had the state of mind necessary to render and impartial sentencing recommendation. In Thomas v. State, 403 So.2d 371 (Fla. 1981), a juror, as in Hill, said that under no circumstances could he recommend a life sentence if the defendant was guilty. This court reversed, relying upon the standard established in Singer.

On a constitutional level, in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court receded from the strict standard lower courts had applied in evaluating the excusal for cause of death scrupled jurors and reinterpreted the standard originally announced in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Witherspoon required a showing of unmistakable clarity that the juror's beliefs would cause him to automatically vote for life without considering a death sentence. In Witt, the Supreme Court adopted language from its decision in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), and restated the standard:

> We therefore take this opportunity to clarify our decision in Witherspoon, and to reaffirm the above quoted standard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a

> juror in accordance with his instructions his oath." We note that in dispensing with Witherspoon's reference to "automatic" decision-making, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity."

Witt, at 424. (footnote omitted)

This standard also applies to prospective jurors, who as in this case, favor the death penalty to the point that they would impose it regardless of whatever mitigation was presented. Ross v. Oklahoma, 487 U.S. ___, 108 S.Ct. ___, 101 L.Ed.2d 80, 88 (1988); Hill v. State, 477 So.2d 553 (Fla. 1985); Thomas v. State, 403 So.2d 371 (Fla. 1981). Under either standard, the trial court erred in not excusing the prospective jurors Bryant challenged for cause.

Here, there is at least a reasonable doubt that several of the prospective jurors Bryant challenged for cause could not impartially consider what sentence to impose. Prospective Juror Whitson, for example, made his position regarding imposition of death unmistakably clear: "If I went out or anybody went out and intentionally murdered somebody, I believe in the death penalty instantly. I mean, I don't believe in hanging around with it." (R 185) Other jurors, while not so explicit as Whitson, were as adamant that if anyone committed a premeditated murder, they would vote for imposition of a death sentence. Likewise, the challenged prospective jurors' views would have substantially impaired their ability to impartially determine Bryant's sentence as instructed.

This court can only conclude that the final statements these people made represents their beliefs concerning imposition of the death penalty because the trial court also made no effort to rehabilitate any of the jurors. In Lambrix v. State, 494 So.2d 1143 (Fla. 1986), the State and defense counsel during voir dire had, as this court said, "led Mrs. Hill [a prospective juror] down the path of their choosing." Id. at 146. What persuaded this court that she could not recommend a death sentence under any circumstances was the trial court's inquiry which confirmed this position. Here, the trial court made no similar inquiry of any of the challenged prospective jurors. Instead, it faulted Bryant for not explaining fully Florida's death penalty scheme (R 96).

Under this court's ruling in Singer and the United States Supreme Court's holding in Witt, the jurors Bryant challenged for cause should have been excused, and the court erred in not granting his challenges. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN EXCLUDING THE PROFFERED TESTIMONY OF MARY HARRIS, THEREBY DEPRIVING APPELLANT OF HIS FUNDAMENTAL RIGHT, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, TO PRESENT WITNESSES IN HIS OWN BEHALF TO ESTABLISH A DEFENSE.

The state's case against Bryant was exclusively circumstantial. Bryant, for his defense, presented several witnesses who said he was at home, drunk, and asleep, on the night of the murder. He also presented testimony that another person killed Mrs. Kennedy. Maggie Blackshear lived with Katherine Anderson, and late on the evening of June 3 or the morning of June 4, Anderson came into the trailer they shared, crying (R 964). She had blood on the front of her, was holding a pistol and asking "Why they did it?" Blackshear questioned her, but she would not talk (R 964). Blackshear took the gun, hid it in a vent, but it later disappeared (R 966-67). Another witness, Teresa Hampton said that shortly after the murder Anderson told her she did not mean to do it, but "he made me do it." (R 974) She also tried to sell a gun to Blackshear (R 974).

Bryant wanted to introduce the testimony of Clarence Mauge, a police investigator, who had talked with Mary Harris about the Kennedy murder. She told him that on June 3 she, Nathaniel McNeil, Cal Lockett and others (not including Bryant) entered Mrs. Kennedy's house. While Harris was in another room, she heard a shot, and when she went into the living room,

she saw McNeil standing over the victim with his penis exposed (R 324). Harris was unavailable for trial, yet the court refused to let Bryant present her statements to Mauge to the jury (R 354). It ruled that they were inadmissible as a statement against Harris' penal interest because Bryant had presented no facts to corroborate their truthfulness.

In Baker v. State, 336 So.2d 364 (Fla. 1976) this court held that statements made against a declarant's penal interest were admissible as an hearsay exception. Later, the evidence code codified that holding as Section 90.804(2)(c) Fla. Stats. (1989) but added the requirement that in criminal cases when the defendant wanted to introduce an exculpatory statement against a third party's penal interest he had to additionally present evidence corroborating the hearsay.

> A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject him to liability or to render invalid a claim by him against another, so that a person in the declarant's position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement. A statement or confession which is offered against the accused in a criminal action, and which is made by a codefendant or other person implicating both himself and the accused, is not within this exception.

See, also, Brinson v. State, 382 So.2d 322, 324 (Fla. 2d DCA 1979); Peninsular Fire Insurance Co. v. Wells, supra, at 53-54; Lambert v. Doe, 453 So.2d 844, 849 (Fla. 1st DCA 1984). The two requirements of this exception to the hearsay rule are (1)

the out-of-court declarant must be unavailable to testify, and (2) the declaration must be contrary to the "interests" of the declarant. Brinson v. State, supra, at 324. In criminal cases, the hearsay must be corroborated only if it is offered by the defendant to exonerate him.

Here, the state never seriously contested that Harris was available for trial (R 960). Bryant had served her three times with subpoenas to appear, but she chose to ignore them (R 961). Likewise, her testimony would have been against her penal interest. She had said in essence that she was in Kennedy's house when Mrs. Kennedy was killed. Such presence during the course of at least a burglary and perhaps a robbery as well could have exposed her to a charge of an aider and abettor to first degree murder under a felony-murder theory. As such, she may have thereby been eligible for a death sentence. Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

The only contested aspect of admitting her testimony was the state's allegation that it was not corroborated (R 335), yet that was not so. Maggie Blackshear testified about what Katherine Anderson, her room-mate and a participant in the murder, had told her within hours and maybe minutes after the crime as well as how she looked. Blackshear also said Anderson had a gun, which the witness took from her and hid (R 965-66). Likewise, Teresa Hampton recounted how Anderson came to Maggie Blackshear's trailer with the gun, trying to sell it to her, and all the while crying and repeatedly saying "I didn't want to do it, He made me do it." (R 974-76) There

was also blood found under Mrs. Kennedy's fingernails that matched that of Richard Glenn and Lewis Clayton, two of the men Anderson claimed had been in Kennedy's house with her (R 691) and who had blood types different than that of Mrs. Kennedy or Bryant. This evidence tended to corroborate Harris' version of what happened.

The facts in Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), provide a good comparison of the corroborating circumstances necessary to give the hearsay statements the "persuasive assurances of trustworthiness." In that case Chambers was accused of committing a murder, but another man, McDonald had confessed to it, and three witnesses were willing to testify that they had heard McDonald make that statement. Before trial, however, he had recanted his testimony, and Chambers could not call him because of the Mississippi voucher rule. He could also not call the three men who had heard McDonald's confession because their testimony was hearsay, even though the statements were against McDonald's penal interest. On review, the Supreme Court held that the Mississippi courts had erred in excluding these statements. Of particular relevance to this case, the court examined the circumstances under which McDonald made his statements and found that they "provide considerable assurance of their reliability.

> First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case-McDonald's sworn

> confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22 caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each.

Id. 301.

The situation in this case has some remarkable similarities to Chambers. Harris made her spontaneous incriminating statements shortly after the murder, and the blood evidence supported Bryant's theory that someone else murdered Mrs. Kennedy. Also, two witnesses essentially corroborated what Harris had told Mauge. Unlike other cases this court has considered, see, Card v. State, 453 So.2d 17 (Fla. 1984), Bryant presented sufficient corroborating evidence to render the hearsay admissible, and the court should have admitted it so the jury could have considered it.

Alternatively Bryant argues that requiring corroboration of statements against penal interest only in criminal cases denies him his right to a fair trial. Chambers established a defendant's general constitutional right to present exculpatory hearsay evidence when it held that Chambers should have been able to show the jury that a third person had committed the murder he had been charged with committing. "[T]he right to present evidence on one's own behalf is a fundamental right basic to our adversary system of criminal justice, and is a part of the `due process of law' that is guaranteed to defendants in state criminal courts by the Fourteenth Amendment

to the federal constitution." Gardner v. State, 530 So.2d 404 (Fla. 3d DCA 1988), citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975);

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). "The purpose [of such evidence] is not to prove the guilt of the other person, but to generate a reasonable doubt of the guilt of the defendant." State v. Hawkins, 260 N.W.2d 150, 158-59 (Minn. 1977).

> In such a situation, the admissibility of testimony implicating another person as having committed the crime hinges on a determination of whether the testimony tends to directly link such person to the crime, or whether it is instead purely speculative. Consequently, where the testimony is merely that another had a motive or an opportunity or prior record of criminal behavior, the inference is too slight to be probative, and such evidence is therefore inadmissible [citations omitted]. Where, on the other hand, the testimony provides a direct link to someone other than the defendant, its exclusion constitutes reversible error. [Citations omitted].

State v. Harman, 270 S.E.2d 146, 150. (W.Va. 1980).

If the Sixth Amendment protects criminal defendants and not civil litigants then the State cannot require a defendant

to show corroborating circumstances before a statement against interest is admitted when no similar obstacle would be placed in the path of a civil litigant who sought to introduce the same evidence. Yet Section 90.804(2)(c), by its express terms, requires a showing of corroborating circumstances only where it is "offered to exculpate the accused". In Peninsular Fire Insurance Co. v. Wells, 438 So.2d 46, 55 (Fla. 1st DCA 1983) (on Motion for Rehearing), the court said:

> Appellant's motion for rehearing suggests that we failed to properly apply Section 90.804(2)(c), Florida Statutes, regarding declarations against interest. Specifically, appellant says that we misapprehended the significance of the following portion of that section: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement." On the contrary, that portion of the statute has no applicability whatsoever to the type situation as that involved sub judice. The above provision contemplates the entirely different situation where a person accused of a crime seeks to exculpate himself by offering statement of a declarant in which the declarant admits the crime.

To require a criminal defendant to show corroborating circumstances before he can present a confession by a third party to the crime for which he is on trial, while a civil litigant who wishes to present a declaration against interest faces no such impediment, violates the fundamental protection of the Sixth Amendment, and creates a constitutionally intolerable double standard. C.f. O'Connell v. State, 480 So.2d 1284, 1287 (Fla. 1985). Corroboration of statements

against a person's penal interest also makes little sense because there is no similar requirement for statements made against a person's pecuniary or proprietary interest.

Significantly, when this court in Baker v. State, 336 So.2d 364 (Fla. 1976) admitted statements against penal interest as a hearsay exception, it relied upon Chambers, but it made no mention of corroboration, and for good reason. Corroboration is an anachronistic requirement similar to other evidentiary rules which have been discarded over the years. See, Marr v. State, 494 So.2d 1139, 1141 (Fla. 1986)(Jury instruction regarding special caution to be given regarding rape victim's testimony discarded as antiquated relic of seventeenth century.) It apparently is a remnant of the evidentiary prohibitions against letting defendants and co-defendants testify and not admitting statements against penal interest. C.f. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Wigmore and McCormick condemned excluding such statements. Wigmore, On Evidence, §1477 (Chadbourne revision)("This barbarous doctrine.") McCormick, On Evidence, §278 (3rd Edition). The presumption justifying this added burden was that the criminally accused would lie to save themselves and their cohorts, and courts should not admit such presumptively tainted statements unless some indicia of reliability were attached to them. That rationale, whatever validity it may have once had, has been discarded in favor of letting juries hear all relevant evidence and determining for themselves who is lying. The requirement

for corroboration of statements against penal interest thus reflects a distrust of the jury's ability to recognize a lie when they hear it. Washington v. Texas, at 22.

In this case the corroboration requirement also has no relevance because Clarence Mauge, a policeman, would have said what Harris told him. Thus, the abstract or general rationale for corroborating evidence has no significance in this case.

Under the facts of this case, the court denied Bryant a fair trial by requiring evidence to corroborate Mary Harris's statement. Therefore, his right to present his defense so the jury could determine where the truth lay must override the mechanistic application of this exclusionary rule. Rock v. Arkansas, 482 U.S. ___, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). Bryant's conviction and death sentence must be reversed, and the case remanded for a new trial.

ISSUE III

THE COURT ERRED IN DENYING BRYANT'S MOTION FOR MISTRIAL AND HIS REQUEST TO INDIVIDUALLY QUESTION EACH JUROR WHEN IT BECAME EVIDENT THAT THE JURY MAY HAVE BASED THEIR SENTENCING RECOMMENDATION UPON EVIDENCE NOT PRESENTED AT TRIAL IN VIOLATION OF BRYANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The trial in this case took place in late November 1989, and during it the court excused the jury for the four day Thanksgiving holiday. On the Friday after Thanksgiving, juror Roach was in her house when she heard a loud explosion that she thought had come from a transformer on a nearby power pole (R 1304). She went into her living room and saw that a window had been blown out. Later she learned that a neighbor heard a screech of tires immediately after the explosion (R 1305). She called the sheriff's office, and by coincidence, one of the courtroom bailiffs responded to the call (R 1294). After surveying the scene, he told her that a hunter had probably accidentally shot a bullet through her window (R 1295).

The guilt phase portion of the trial ended the following Monday and after hearing the closing arguments and being instructed on the law the jury retired to deliberate, and eventually it reached a verdict. As the jurors were about to return to the courtroom to announce its decision, the foreman had opened the door to the jury room but was talking to the jury. One of the jurors, Mrs. Morrow, started crying and saying that she had a baby and a husband that she loved dearly, and she did not want to die (R 1307, 1313). The jury foreman closed the door saying, "We have a problem here we have got to

decide." (R 1307). The foreman told her "You live in the best place in Taylor county not to be affected by [colored people]. . . . I don't think you have anything to be afraid of, as far as them bothering you." (R 1309). Mrs. Roach, in an attempt to comfort Mrs. Morrow, told her about the shooting incident at her home the previous Friday (R 1309-10). It was her effort to show her that it did not have anything to do with the trial and she had not been harmed (R 1309).

Bryant's counsel, as well as the court, heard some of this and the next day, he asked the court to impanel a new jury (R 1282-83). The court denied the motion, but counsel for Bryant persisted, saying, "something has to [be] done." The court agreed only to the extent that it would ask the jury if "anyone [had] a concern that needs to be brought to the court's attention before we proceed?" (R 1287) Before he asked the jury that question, the bailiff told the court about the shooting incident at Mrs. Roach's house the previous Friday. Not withstanding this new information, the court still only asked the jurors the question it had originally posed, to which none of them responded (R 1291). Bryant's counsel, to preserve the record, called the bailiff to take the stand, and he questioned him about the shooting incident (R 1293-96). After this, he asked the court to question Mrs. Roach, and the State agreed (R 1298). The court acquiesced and talked with Mrs. Roach and Mrs. Morrow. It would not, however, talk with the rest of the jury, despite Bryant's counsel's request that he do so (R 1311). The court also refused to replace Mrs. Morrow and

Bryant's motion for a new trial on his guilt because, as he said, "this has just kind of created almost a soap opera situation." (R 1315)

The question thus before this court focuses upon the prejudicial effect the bullet fired through Mrs. Roach's window may have had upon the jury's deliberations. Ever since our judicial system abandoned the ancient methods of trial where jurors were chosen because of their knowledge of a particular case, the recurring problem has been how to insure the jury hears and considers only that evidence which has been filtered through various evidentiary rules. Unless the jury remains "sanitized" any verdict they may reach is presumptively suspect. The jury must remain free of any extraneous influences, and only the force of the evidence presented at trial can sway them. Mattox v. United States, 146 U.S. 140, 148-150, 13 S.Ct. 50, 36 L.Ed. 917 (1895).

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish. . . . that such contact with the juror was harmless to the defendant."

Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1953). The initial burden of showing this prejudice is the defendant's. Amazon v. State, 487 So.2d 8 (Fla. 1986), and in this case, there can be little doubt of the prejudice Bryant may have suffered. Mrs. Morrow was crying about being killed

by Bryant's people when Mrs. Roach tried, in a rather bizarre way, to reassure her by recounting what had happened to her. The other jurors, as defense counsel told the court, may have gotten mad at Bryant and voted against him simply as an act of defiance (R 1315-16).[3] The state recognized the prejudice, and the court also eventually saw the problem (R 1298, 1301). Thus, whatever burden Bryant needed to carry, he has adequately born. The State then had to show the lack of prejudice, and in this case, it had not done so. It did not do so primarily because the court never asked the jurors individually about how Mrs. Roach's disclosure may have affected them.

The American Bar Association has developed standards to guide judges when they face jurors who may have seen or read news accounts of trials they are sitting. If it is determined that material:

> disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. The examination shall take place in the presence of counsel, and an accurate record of the examination shall be kept.

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[3]There was also a racial undertone to this episode by the foreman's reference to Mrs. Morrow living in the best place in Taylor County not to be affected by them, referring to "colored people." (R 1308)

ABA Standards Relating to Fair Trial and Free Press §3.5(f) (1968) (emphasis supplied). Accord, United States v. Herring, 568 F.2d 1099, 1104 (5th Cir. 1978). While the standards relate to the press' influence on the jury, the same procedure should be used whenever there is any possibility of extrajudicial influence exerted on the jury. If there is a reasonable possibility the jury may have been prejudiced, the court should order a new trial.[4]

In this case, the possibility of a personal attack by unknown but very real assailants, or at least the fear of such reprisals, raised the distinct possibility of prejudice. United States v. Perkins, 748 F.2d 1519 (11th Cir. 1984)(New trial required where their is a reasonable possibility of prejudice to the defendant.) In Amazon v. State, supra, a juror had watched a TV news account of Amazon's trial. This court found no prejudice because the juror watched the news with the sound turned off, and it was merely a repeat of what had occurred at trial that day. Also, the footage shown was of a witness who had presented evidence relevant to an issue tangential to Amazon's defense. In short, although this court

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[4]The standard implies that the reasonable possibility of prejudice is an objective standard rather than the subjective beliefs of the jury. Weber v. State, 501 So.2d 1379 (Fla. 3rd DCA 1987) (Prejudice presumed despite jurors' assurances that Weber had been granted a new trial in an unrelated case on a "technicality" would not affect their deliberations in this case.)

found a prima facie case of potential prejudice, the state had carried its burden of rebutting it.

Not so in this case, where some unknown assailant shot a bullet through a window of a juror. The strongest of men and women tremble with justifiable fear for the safety of themselves and their families in such a situation.[5] The potential for prejudice was manifest, yet the court did nothing to determine its extent by questioning the other jurors. It simply dealt with the obvious source and "problem" jurors without considering that other, more composed jurors, may have felt the same way as Mrs. Morrow or may have reacted in silent anger at being intimidated.

Similarly, the court's vague question to the jury as a whole did not clarify the matter. All it asked was "Does anyone have any concern they wish to be brought to the court's attention before we proceed?" (R 1291) There was no response, yet later it was obvious that Mrs. Morrow had serious problems. Thus, here as in other situations, silence was ambiguous. In any event, as the Third District recognized in Weber, ritualistic assurances of impartiality by the jurors were not dispositive of its ability to be impartial, indifferent, and fair. Weber at 1382.

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[5]This court's recent increase in security measures taken for persons entering the supreme court building is a good example.

Thus, the state never carried its burden of rebutting the presumption of prejudice evident here because the court never questioned the remaining jurors. The problem remains of what relief this court should grant. At the least Bryant is entitled to a new sentencing hearing before a new jury, but this court should also remand for a new trial to determine his guilt as well. Something during the jury's deliberations of Bryant's guilt prompted Mrs. Morrow's unjustifiable fear for her safety, yet if she was afraid, other jurors may have had similar concerns, and their vote may have been based on that fear rather than the evidence presented at trial. This court, therefore, should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV

THE COURT ERRED IN FINDING AS AN AGGRAVATING FACTOR THAT BRYANT COMMITTED THIS MURDER FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

The court justified sentencing Bryant to death by finding he had committed the murder to avoid Mrs. Kennedy identifying him (R 317).

> The evidence presented at trial, and relied on in the sentencing proceeding showed that Ms. Kennedy was 67 years old, weighed 90 pounds or less, and knew the Defendant well and had what appeared to have been a cordial relationship. The physical evidence shows the Defendant beat Ms. Kennedy, thereby subduing her sufficiently to apparently remove her clothing and commit Sexual Battery. Having done so, it is clear that the Defendant could have left the scene without further interference form Ms. Kennedy or could have taken any money or other thing of value from her without having to kill her. The evidence further showed that she was killed while lying on the floor, flat on her back, shot from a distance of 6-12 inches. Clearly Bryant kill Ms. Kennedy to make sure she (the only witness) would not be able to identify him. No other conclusion makes sense.

(R 317).

The error in the court's reasoning can be readily seen by simplifying its findings. In essence, it is saying that because the court could not think of any reason why Bryant killed Ms. Kennedy, it was, by default, to avoid arrest. That, reasoning, however, ignores the strict limits this court has applied to this aggravating factor.

In enacting Section 921.141 Fla. Statutes (1988) the legislature intended that the aggravating factor to "avoid

lawful arrest" apply primarily to the killings of police officers. White v. State, 403 So.2d 331 (Fla. 1981). It can also apply to other persons, but to be applied to non law enforcement officials, this court has said the dominant motive for the killing must have been to avoid arrest, Menendez v. State, 368 So.2d 1278 (Fla. 1979), and the proof of the killer's intent must be very strong. Riley v. State, 366 So.2d 19 (Fla. 1979). That someone is dead does not support finding this aggravating factor. Id. Neither does the lack of provocation or the senselessness show that the dominant motive was to avoid arrest. Thus, the state must prove by positive evidence that witness elimination was the primary reason the victim was killed. It cannot be assumed simply because the court could not think of any other reason why the victim may have been killed.

Here, even though Ms. Kennedy knew Bryant, there is at least one other explanation of why he killed her. That is, Bryant's alibi witnesses all said that he was drunk the night of the murder. He was so drunk, in fact, he fell out of his bed twice and did not wake up either time (R 915-16). It is as likely that Bryant killed Ms. Kennedy, not out of any desire to eliminate her as a witness, but simply because he was drunk. Dr. Mendelson, the psychologist who examined Bryant confirmed this theory. He said that because of Bryant's alcohol and drug dependency and his low IQ of 66, his normally docile personality disappeared, he lost his inhibitions, and he could not control his behavior (R 1388). Whatever thinking he could

do was blurred at best (R 1385). That analysis explains better and makes more sense than the court's explanation because until this episode there is absolutely no evidence Bryant was anything other than cordial and respectful to this elderly woman. Whatever his violence may have been in the past, and he had a conviction for only an aggravated assault (R 316-17), he had never shown any towards Ms. Kennedy or anyone else recently. What "other conclusion" makes sense is that Bryant robbed, raped, and killed Ms. Kennedy while drunk, stoned, and stupid. There is no evidence he killed her primarily to avoid her identifying him. Thus, the court erred in finding that he committed this murder to avoid lawful arrest.

ISSUE V

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THEY COULD FIND AS MITIGATION "THAT THE CAPITAL FELONY WAS COMMITTED WHILE BRYANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE, WHICH VIOLATED HIS RIGHT AS PROVIDED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Over defense objections, and for reasons which remain unclear, the court refused to instruct the jury that it could consider, as mitigation, that "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." §921.141(6)(b) Fla. Stats. (1988); (R 1409). This was error because Bryant presented abundant evidence of his emotional impairment that could have supported a finding of this mitigating factor.

The general law on what to instruct the jury is clear. "The defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions." Hooper v. State, 476 So.2d 1253 (Fla. 1985). With regards to requests for instructions on the statutory mitigating factors, this court has held that where the defendant has produced "any" or "some" evidence to support giving the two statutory mental mitigating factors, the trial court should read the applicable instructions to the jury. Smith v. State, 492 So.2d 1063 (Fla. 1986); Toole v. State, 479 So.2d 731 (Fla. 1985). In Smith, this court held that the trial court erred in not reading the instruction regarding extreme emotional disturbance because

Smith had produced some evidence, "however slight," that he had smoked marijuana on the night of the murder. Id. at 1067. In Toole, Toole presented much more evidence of his emotional condition, and the court erred by not giving the instruction on extreme mental disturbance. The refusal to give this guidance to the jury was not harmless because the jury may have recommended life had they received the proper guidance, and such a recommendation, of course, would have been entitled to great weight.

Here, as in Toole, there is enough evidence that Bryant suffered an extreme emotional disturbance to warrant instructing the jury about that statutory mitigating factor. The unrebutted and essentially unchallenged evidence showed that Bryant has been an emotional cripple since childhood. The school system recognized early on that he had emotional problems, and he was placed in a program for the emotionally handicapped.[6] He was also mentally retarded, and two of the

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[6]The criteria for being placed in this program are defined in Section 6(A) - 15.007 of the Florida Administrative Code: (1) An emotional handicap is defined as a condition resulting in persistent and consistent maladaptive behavior, which exists to a marked degree, which interferes with the student's learning process, and which may include but is not limited to any of the following characteristics:

(a) An inability to achieve adequate academic progress which cannot be explained by intellectual, sensory, or health factors;

(b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(c) Inappropriate types of behavior or feelings under normal circumstances;

(Footnote Continued)

teachers Bryant had while he was in school recounted his depressing academic performance. His father shooting Bryant when he was 16 or 17 years old only tragically aggravated these long standing diabilities (R 1382). Until then, he had been making progress (R 1353), but after that, Bryant gave up, quit school, started using drugs and alcohol, and began getting in trouble (R 1382, 1387).[7]

On the night of the murder, he was drunk (R 1009) and may have been using cocaine.[8] When that potent combination was mixed with his very low IQ, there was an abundance of evidence that he was an emotional time bomb waiting to explode.

The trial court, therefore, erred by refusing to instruct the jury that they could consider his extreme emotional disturbance as mitigating a death sentence. See, Mines v. State, 390 So.2d 332 (Fla. 1980).

(Footnote Continued)

(d) A general pervasive mood of unhappiness or depression; or

(e) A tendency to develop physical symptoms or fears associated with personal or school problems.

(2) Criteria for eligibility. Students with disruptive behavior shall not be eligible unless they are also determined to be emotionally handicapped. A severe emotional disturbance is defined as an emotional handicap, the severity of which results in the need for a program for the full school week and extensive support services.

[7]That these evaluations had been made several years earlier should affect only the weight the jury gave this evidence and not had any impact on the court's decision to instruct the jury on the statutory mitigating factor. C.f. Nibert v. State, Case No. 71,980 (Fla. July 26, 1990).

[8]Dr. Mendelson believed he was addicted to cocaine (R 1381).

ISSUE VI

THE COURT ERRED IN IGNORING, IN ITS SENTENCING ORDER, THE WEALTH OF MITIGATING EVIDENCE BRYANT PRESENTED, IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

In sentencing Bryant to death the court found in mitigation only "the relatively low intelligence of the Defendant, yet [it] does not believe this to have affected the Defendant's understanding of what he was doing." (R 318) The court ignored the abundance of other mitigation Bryant presented, and by doing so, it committed reversible error.

This court's recent opinion in Campbell v. State Case No. 72,622 (Fla. June 14, 1990) controls this issue. In that case, this court established guidelines to clarify how trial courts are to treat mitigation.

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. . . . The court must find as a mitigating circumstance each proposed factor hat has been reasonably established by the evidence, and is mitigating in nature . . . The court next must weigh the aggravating circumstances against the mitigating factor and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be support by `sufficient competent evidence in the record.'

Id. at 15 FLW S344 (Cites and footnotes omitted.) Thus, the court must consider in writing every mitigating factor presented by Bryant, and if he had presented evidence to support a finding of certain mitigation the court should have found it. In this case, Bryant presented an abundance of evidence to justify a life sentence.

1. Bryant's mental retardation (R 1352) (See Issue VIII). Without any dispute, Bryant is mentally retarded. That certainly can mitigate a death sentence, see, Penry v. Lynaugh, ___ U.S. ___, ___ S.Ct. ___, 106 L.Ed.2d 256 (1989). Members of this court believe the state cannot constitutionally execute such persons. Woods v. State, 531 So.2d 79 (Fla. 1988).

2. Bryant's alcohol and drug addiction can mitigate a death sentence (R 1381). Campbell, supra, C.f. Kokal v. State, 492 So.2d 1317 (Fla. 1986).

3. Bryant's disadvantaged childhood, especially the physical abuse inflicted upon him by his father is mitigation. After his father shot him, Bryant lost the use of his right arm and gave up on life. That can mitigate a death sentence (R 1382-84). C.f. Perry v. State, 522 So.2d 817 (Fla. 1988).

4. Bryant was emotionally handicapped and had been identified as such since grade school (R 1350). Brown v. State, 526 So.2d 903 (Fla. 1988).

5. At best, Bryant functioned academically on a second or third grade level (R 1368). He cannot read or write (R 1384).

6. He is not a chronically aggressive or hostile person (R 1386-87). Brown, supra.

7. The combination of low IQ, drugs, and alcohol blurred whatever thinking ability he had and removed his normal inhibitions on the night of the murder so that he could not control his behavior (R 1388).

Campbell, besides controlling this case legally, has some compelling factual similarities. In that case, as here, the defendant had presented evidence of his low IQ (in the retarded range), his poor academic skills (he could read on a third grade level), his chronic drug and alcohol abuse, and his abusive childhood. The trial court apparently made no mention of this mitigation in its sentencing order, and that omission prompted this court to reverse for a new sentencing hearing before the trial judge. The trial court in this case, like the trial court did in Campbell, ignored the abundance of mitigating evidence presented. This court, as it did in Campbell, should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE VII

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

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

> Our function in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974).

Menendez v. State, 419 So.2d 312, 315 (Fla. 1982). Thus, this court will compare the facts of the case under consideration with other cases involving similar situations and will decide if a death sentence is warranted. Proffitt v. State, 510 So.2d 896 (Fla. 1987). In this case, the proper cases to compare are those where the defendant has a mental deficiency, especially mental retardation.[9] Those are the appropriate cases because

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

Bryant's mental retardation permeated everything he did, and this case can be understood only in light of that deficiency. Cases involving alcohol and drug dependency in addition to mental deficiencies are also appropriate.

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

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

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

the officer, and during the ensuing struggle, Brown shot the officer once in the arm. He begged for his life, but Brown killed him.

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

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

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

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

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

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

Similarly, in Brown the killing occurred on impulse. Brown had fled from a robbery, but had been caught. Under stress and on impulse, he jumped the officer and killed him. Here, there is no evidence Bryant had carefully plotted his crimes. The killing, like those in Brown and Cochran, occurred while he struggled with the victim, and can only be described as fortuitous or the result of impulsive behavior. Nothing Bryant did after the shooting showed any cunning efforts to make sure the victim was dead or to hide the murder. What Bryant did was an impulsive reaction to a stressful event that he probably did not fully understand. Thus, while this case is

factually different from Livingston, Brown, and Cochran, none of the defendants in these cases deserve a death sentence.

This result becomes more compelling when this case is compared with Nibert v. State, Case No. 71,980 (Fla. July 26, 1990). In that case, Nibert stabbed a drinking buddy 17 times, killing him. In following the jury's death recommendation, the court found that the murder was especially heinous, atrocious, and cruel, and nothing mitigated a death sentence. This court, however, said there was an abundance of unrebutted statutory and non-statutory mitigation which the court should have considered, and if it had properly done so, it would not have imposed the sentence it did. Specifically, the two statutory mental mitigating factors applied. In addition Nibert had been physically and mentally abused for many years as a child, and he felt considerable remorse for what he had done, and since his arrest he had made significant improvement in his life. Finally, the unrebutted evidence established that Nibert had been an alcoholic for a long time, and that when sober he was completely different than when drunk, and that on the day of the murder he had been drinking heavily. In short, Nibert could not control his behavior when he drank.

In this case, the court found several aggravating factors, not found by the court in Nibert, but that does not affect the proportionality review. As this court said in Porter v. State, Case No. 72,301 (Fla. June 14, 1990), 15 FLW S353,

> it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of

> circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

The trial court here, like the court in Nibert, ignored the abundance of mitigation Bryant presented. First, there was uncontradicted expert testimony that Bryant was alcoholic and drug addicted (R 1381). Also, he presented evidence that when he was under the influence of drugs and alcohol, he was a completely different person than when sober (R 1386). He obviously had an abused childhood which was tragically emphasized when his father shot him, virtually rendering his right arm useless (R 1382). So profound was this incident that Bryant never recovered physically or mentally from his father's assault (R 1363, 1382). Because of his arm (and probably also because of his low intelligence), he could never hold a steady job, and he was reduced to mowing lawns for family and friends for the occasional spending money he needed (R 984-85).

The school system recognized his emotional handicap and placed him in special programs in school, and the unrebutted evidence supports the conclusion that when he killed Ms. Kennedy he was under an extreme emotional disturbance. Dr. Mendelson also said Bryant would have "great difficulty" conforming his conduct to the requirements of the law (R 1384-85).

Bryant, unlike Nibert, has expressed no remorse for the killing, but that is understandable because he has, from the very beginning, denied any knowledge of or responsibility for

killing Ms. Kennedy (R 1320). Bryant, with his drug and alcohol soaked brain, which is well below par, probably had blacked out sometime before he killed the victim. Thus, he could feel no remorse for doing something he could not remember doing, and his lack of sorrow should not be significant in this court's proportionality analysis.

Bryant, of course, has a prior conviction for aggravated assault, but the record presented none of the details of that offense, so it does not have much value here. In other cases, in which this court has conducted a proportionality review, it has upheld death sentences where the defendant has a particularly violent past. Freeman v. State, Case No. 72,301 (Fla. June 14, 1990)(prior murder conviction); Lemon v. State, 456 So.2d 885, 888 (Fla. 1984)(prior conviction for assault with intent to commit first degree murder); King v. State, 436 So.2d 50, 55 (Fla. 1983)(prior conviction for manslaughter of girlfriend with an axe.) Here, without the details of Bryant's earlier conviction, this court cannot determine if the murder was just the latest in a series of violent incidents involving essentially the same type of conduct.

In any event, given Bryant's disastrous childhood, his alcoholism and drug dependency, as well as his mental retardation, death is disproportionate to the crime he has committed.

ISSUE VIII

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

To be classified as mentally retarded a person must have a "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior."[10] Robert Bryant is mentally retarded (R 1380-81). He has an IQ of 66,[11] and he presumptively has deficits in his adaptive behaviors (R 1380-81); that is, he has "significant limitations in [his] effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his [] age level and cultural group."[12] As a person with a significantly limited intelligence and

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

[11]Presumptively because Dr. Mendelson, the expert who determined Bryant was mentally retarded, did not articulate what deficits Bryant had. That is not fatal to his conclusion because an expert may give his conclusion without presenting the facts supporting it Section 90.705, Florida Statutes (1989). The state, if it wanted to challenge the basis for the expert's finding could cross-examine him about what deficits in adaptive behavior Bryant had. That the state did not do so in this case can only mean it accepted his finding of Bryant's mental deficiency.

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

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

THE EVOLVING SENSE OF DECENCY

This court has not articulated a different standard for punishments to be cruel and unusual under the state constitution than that established by the United States Supreme Court under the Eighth amendment. See, Gammill v. Wainwright, 357 So.2d 714 (Fla. 1978). This does not mean it cannot do so, and this case presents the opportunity for it to differ from that court, and grant to its citizens greater protection than the United States Constitution guarantees. Under Article I, Section 17 of Florida's Constitution, this court should prohibit executions of mentally retarded persons.[13]

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

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

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

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

When the Supreme Court decided Penry, only one state, Georgia, had prohibited the execution of mentally retarded defendants.[14] Five justices had little problem deciding that

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[14]It had done so in reaction to the execution of Jerome Bowden, a mentally retarded murderer. Georgia to Bar Executions of Mentally retarded Killers, N.Y. Times, April 12, 1988, at A 26, col. 4.

society's standards of decency had not evolved to the point where mentally retarded people were ineligible for execution. Since Penry, Maryland, Tennessee, and Kentucky have also banned executions of the mentally retarded.[15] The federal government also prohibits executing retarded people who violate the federal Anti-Drug Abuse Act of 1988.[16]

The Supreme Court restricted itself solely to state legislative acts said when it measured the evolving standards of decency. That was a departure from what it had done in earlier cases where it had also considered other sources of public opinion. Stanford v. Kentucky, 492 U.S. ___ 109 S.Ct. ___ 106 L.Ed.2d 306 (1989)(Brennan, dissenting.); Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. ___, 101 L.Ed.2d 702 (1988). In Penry several professional and voluntary organizations interested in people with mental retardation, joined together in an Amicus Curiae brief opposing executing the mentally retarded.[17] Also, the American Bar Association opposed

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

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

[17]They were The American Association on Mental Retardation, The American Psychological Association, The Association for Retarded Citizens of the United States, The Association for Persons with Severe Handicaps, The American Association of University Affiliated Programs for the Developmentally Disabled, The American Orhtopsychiatric Association, The New York State Association for Retarded Children, Inc., The National Association of Private Residential Resources, The National Association of Superintendents of

(Footnote Continued)

executing the mentally retarded.[18] Unlike the debate about the death penalty in general, the growing consensus about sparing the mentally retarded from execution has no organized opposition.

This court is in a different analytical position than the U.S. Supreme Court was when it faced this issue. That court could glean the evolving standards of decency from fifty legislatures, not one. The sense of what is evolving in Florida cannot be gauged by examining only what the legislature has done with the same confidence as the U.S. Supreme Court could do by examining fifty legislatures. Thus, this court should look beyond what the legislature has done when it decides whether, under the state constitution, the mentally retarded can be executed.[19]

Although the legislature has not prohibited the execution of the mentally retarded, it has recognized those citizens deserve special attention, and it has singled them out for

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

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

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

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

When polled, the people of Florida strongly support, in the abstract, the death penalty. Yet, by an even larger margin than they support the death penalty, they have also recognized that death is an inappropriate punishment when the defendant is mentally retarded.[20] Also, no one has advocated executing the mentally retarded. This court can only conclude that Florida's evolving sense of decency is clear, and Floridians want to precluded executing mentally retarded persons.

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[20] 71 percent of those polled in Florida opposed executing the mentally retarded while 12 percent had no such opposition. Penry, supra, 106 L.Ed.2d at 288-289.

THE RETRIBUTION ANALYSIS

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

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

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

The desire to strike back at a murderer is a natural part of man, yet in an ordered society, only society inflicts punishment. Otherwise, "[w]hen people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they `deserve,' then there are sown the seeds of anarchy-of self-help, vigilante justice, and lynch law." Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)(Stewart, concurring). By its nature, then, retribution focuses upon the sins of the individual, and only the defendant's personal culpability justifies a death sentence under this rationale. Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). Further, a sentencer can impose death only if the defendant has sufficient moral culpability. Mere acts cannot justify a death sentence. If they could, the Supreme Court would have approved

mandatory death sentences. See, Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 974 (1976).

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

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

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

higher.[21] Those who are mildly retarded (such as Bryant) have an IQ between 50-55 to 70, they usually die in their fifties, and they come from predominantly lower class families. Their mental abilities limit their academic progress, and most can reach only the sixth grade. Typically, they can make change, manage a job, and with some effort or assistance they can plan or budget what they earn.

Bryant fits this classic mold. He dropped out of school officially when he was in the ninth grade (having repeated it three times without ever passing (R 1362)), but practically, he had quit years earlier. He could not read or write beyond a second or third grade level (R 1368). His parents came from the low end of the social-economic spectrum (R 1384), and they probably could not provide him the intellectual stimulation or nutrition necessary to avoid retardation.[22] The father, in fact, probably kept the boy and the rest of his family in a state of perpetual terror by threatening them with guns and eventually shooting Bryant (R 1352, 1382). They also could not

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

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

provide him the additional care and attention he needed.[23] Bryant has held only menial jobs in a saw mill for a short time, which may be because of his shriveled arm rather than his intellectual deficit. Thus, Bryant, like most mildly retarded persons, has the capability to minimally function in a simple world, but he and they also have significant liabilities which cloud this already bleak picture.

Mental retardation is a learning disorder.[24] The mentally retarded are slow learners, but more than that they cannot learn beyond a certain level of abstraction, and what they learn they tend to forget quickly. This disorder has several manifestations:[25]

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

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[23] Id. Raising a mentally retarded child heavily taxes the resources of the best families. At best, Watts' parents had severe problems of their own, and his family life could only have contributed to or created his retardation.

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

[25] Ellis and Luckason, supra, 428-432.

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

THIS CASE

The case against executing the mentally retarded becomes more compelling in this case. In all ways except physically, Bryant remains a child. Like Morris Brown in Brown v. State, 526 So.2d 903 (Fla. 1988), the schools identified Bryant as a child with learning disabilities, and he was placed in classes for the emotionally handicapped (R 1367). Like Jessie Livingston, in Livingston v. State, Case No. 63,328 (Fla. March 10, 1988), 13 FLW 187, Bryant grew up like a weed. He had no morals training, and the people who should have loved and cared for him terrorized the boy (R 1382). His father was alcoholic and sadistic (R 1324, 1382-83). He lived as an animal, in virtual constant fear. Then the crushing tragedy, his father used a shotgun to blow off his arm (R 1324). After that, Bryant

simply gave up on life (R 1387), and he started his decline to where he is today (R 1153).

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

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

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

Even under that "mental retardation plus" standard[26], it would be cruel and unusual punishment to execute Bryant. Therefore this court should reduce Bryant's sentence to life in prison without the possibility of parole for twenty-five years.

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

ISSUE IX

THE COURT ERRED IN ALLOWING THE STATE TO CROSS-EXAMINE BRYANT'S MENTAL HEALTH EXPERT DURING THE PENALTY PHASE OF THE TRIAL REGARDING BRYANT'S SANITY AND THEN ARGUING IT TO THE JURY AS A REASON TO RECOMMEND DEATH, IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

Bryant called Dr. James Mendelson to testify about Bryant's mental condition. He said, among other things, that Bryant was mentally retarded and he met at least one of the two statutory mental mitigating factors (R 1381, 1384-85). Counsel for Bryant never asked the doctor about Bryant's sanity, yet on cross-examination the State extensively questioned him about whether Bryant was sane.

> Q. You also found no evidence of psychotic signs or symptoms.
> A. Correct.
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> Q. Basically, he is not mentally ill, is he?
> A. That's correct.
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> Q. Okay. One of the other things that you were asked to interview or examine the Defendant on was the question of sanity. Is that right?
> A. Sanity at the time of the offense.
> Q. And, in fact, in you examination you could not find any evidence or suggestion that he was insane at the time of this offense, could you?
> A. My response to that, Mr. Phelps, was that there was insufficient evidence to make a conclusion one way or the other. In other words, it is open to doubt as to what his mental status was during the offense, if in fact, he committed it.
> Q. He denied to you that he committed

these offenses.
A. Correct.
Q. And that is part of the reason that you are having trouble answering my question, isn't it?
A. That is part of it, yes.
Q. All right. But is it not true--well, did you not make this statement in your report: "in a hypothetical situation in which Mr. Bryant were proven to be guilty, I would speculate that he probably knew right from wrong at the time of the offense and understood the nature of his behavior?"
A. Yes, I did make that statement.
Q. And assume that this jury last night did return a verdict of guilty of First Degree Murder. Would it then not have to be your opinion, following your report, that you would speculate that he probably knew right from wrong at the time of the offense?
A. Correct.
Q. And that he understood the nature of his behavior?
A. Yes.
Q. In other words, in your opinion, the Defendant knows that if you pull the trigger on a firearm and it is pointed at somebody, somebody is going to get hurt or die.
A. Yes.

(R 1397-99).

Then during the penalty phase closing argument, the state used the evidence regarding Bryant's sanity to argue that because Bryant was sane when he killed Ms. Kennedy, the mitigating factor that he did not have the capacity to appreciate the capacity to appreciate the criminality of his conduct was substantially impaired did not apply.

> And you also heard from the same Dr. Mendelson that the Defendant understood the nature and consequences of the act of pulling a gun, pulling the trigger with it pointed at somebody, and that person being hurt or killed. He understands that. . . . Dr. Mendelson also said that he understood

> the criminality of his behavior. That is, he understood right from wrong. Now, in light of what has, we have just discussed, I ask you, is there any real basis to find a mitigating factor of, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired? An I suggest to you, ladies and gentlemen, that that mitigating factor does not exist to any great extent, because the Defendant does appreciate the consequences of his actions. He does know right from wrong. He does understand the criminality of his behavior.

(R 1417-18).

The State, in short, had Dr. Mendelson say Bryant was sane at the time of the murder, then it argued that because of that, the jury should not give much weight to the mental mitigating factors. The court erred in admitting such evidence and argument, and the scope of the error is so pervasive that Bryant did not have to object to the error to preserve it for this court to review.

In the guilt phase of the trial, Bryant never presented any evidence of insanity. In the penalty phase of the trial, Bryant's sanity was not and could not be an issue. Just as the jury's verdict had foreclosed Bryant arguing any lingering doubt of his guilt, so too the verdict prevented relitigation of his sanity. Burr v. State, 466 So.2d 1051 (Fla. 1985). That is, when the jury found Bryant guilty of first degree murder, they of necessity had to also have found him sane. Burr stands for the proposition that issues resolved in the guilt phase of the trial cannot be relitigated in the penalty

phase. Yet that is precisely what the State did in this case. What is more, it used Dr. Mendelson's testimony as the foundation of its argument that because Bryant was sane, at least one of the mental mitigating factors was inapplicable.[27] Whether the statutory mitigating factors applied to Bryant is arguable, but the state improperly strengthened its claim by asking the jury to use an improper standard to evaluate these mitigating factors.

In Mines v. State, 390 So.2d 332 (Fla. 1980), the trial court rejected the two statutory mental mitigating factors because Mines was sane. This court rejected that reasoning, saying "The finding of sanity, however, does not eliminate consideration of the statutory mitigating factors concerning mental condition." Id. at 337. Likewise, the court in Ferguson v. State, 417 So.2d 631 (Fla. 1980) used the "M'Naghten Rule" in determining that the two mental mitigating factors did not apply. In reversing for resentencing, this court said, "It is clear from Mines that the classic insanity test is not the appropriate standard for judging the applicability of mitigating circumstances under Section 921.141(6) Florida Statutes. Id. at 638.

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[27]The court refused to instruct the jury on the statutory mental mitigating factor, that Bryant committed the murder while under the influence of an extreme mental or emotional disturbance. §921.141(6)(b) Fla. Stats. (1989) (R 1407).

Here, the error is worse than in Mines or Ferguson because the state argued the sanity test to the jury, and it is reasonable to believe that it applied it during its deliberations. It is, at least, not clear beyond a reasonable doubt that they did not. This court, therefore, should reverse the trial court's sentence of death and remand for a new sentencing hearing before a new jury.

ISSUE X

THE COURT DENIED BRYANT A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT WHEN IT REFUSED TO READ TO THE JURY HIS REQUESTED INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE.

The State's case against Bryant is purely circumstantial. The most damning evidence pointing to his guilt was gathered at Ms. Kennedy's house, and that was his fingerprint on a pack of cigarettes, a single strand of hair having characteristics consistent with his, and blood stains consistent with his blood type. Bryant, for his part, presented an alibi defense that he was at home sleeping off a drunk. At the charge conference, counsel for Bryant asked the court to read the old standard jury instruction on circumstantial evidence, but the court refused (R 1083-86), and it erred in so doing.

Although circumstantial evidence can support a conviction by itself, the law recognizes that it has inherent weaknesses, and to prevent it being given too much weight, it has develop special rules governing how convictions relying upon such evidence are reviewed. Jaramillo v. State, 417 So.2d 257 (Fla. 1984). State v. Law 559 So.2d 187 (Fla. 1989). Law is the latest pronouncement which has sought to reconcile the conflicting lines of cases dealing with this evidence. One series, for example, as represented by Heiney v. State, 447 So.2d 210 (Fla. 1984), virtually precludes appellate review of circumstantial evidence. "The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial,

competent evidence to support the jury verdict, we will not reverse." Law, supra, at 188. The other side, as represented by McArthur v. State, 351 So.2d 972 (1977) and Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986) hold that if there is any reasonable hypothesis of innocence unrebutted by the state, the defendant should be granted a judgement of acquittal. Law has sought to reconcile these two conflicting lines, but the message that comes through the cacophony of legal wrangling is that the area is still confusing.

If lawyers are still shouting about how circumstantial evidence should be treated, it only stands to reason that the jury may be equally confused about how to treat this special type of proof. Yet, this court has said that giving it any additional help by way of an instruction would only make matters worse. In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases and the Standard Jury Instructions in Misdemeanor Cases, 431 So.2d 594, 595 (Fla. 1981). Actually, this court did not totally preclude giving such an instruction.

> The elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge, in his or her discretion, feels that such is necessary under the peculiar facts of a specific case. However, the giving of the proposed instructions on reasonable doubt and burden of proof, in our opinion, renders an instruction on circumstantial evidence unnecessary.

Thus, the circumstantial evidence instruction moved from being a standard instruction to be given as a matter of course to

just another instruction to be given if the evidence warranted it for which the law is clear. If there is any evidence to support giving the instruction, the court should give it. See, Hooper v. State, 476 So.2d 1253 (Fla. 1985) (Court should give an instruction on the defendant's theory of defense if he has presented any evidence to support it.) Courts routinely approve the State's request to instructs on the inferences that can be made by the defendant's flight, which is circumstantial evidence. There is, thus, little logic in denying a defendant's request for an instruction on circumstantial evidence in general while granting another request for an instruction on how to consider a special type of such evidence. Silas v. State, 431 So.2d 239 (Fla. 1st DCA 1983).

In this case, the court should have granted Bryant's request for the instruction on circumstantial evidence. This is first of all a capital case in which this court has a special mandate to insure that Bryant received a fair trial and is in fact guilty of the crimes the jury convicted him of committing. Second, as mentioned, the state relied exclusively upon circumstantial evidence to convict Bryant. Finally, the court, in rejecting Bryant's request for the instruction, seemed to take the position that because the requested instruction was no longer a standard, he need not give it (R 1084-86). Thus, the court may have believed it had no discretion but to deny Bryant's request. Because there is no evidence it believed otherwise, this court should reverse Bryant's judgment and sentence because the court failed to

exercise any discretion at all in refusing to consider Bryant's request for a jury instruction on circumstantial evidence. In doing so, it denied him a fair trial as guaranteed by the due process clause of the fourteenth amendment to the United States constitution. Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978).

ISSUE XI

THE COURT ERRED IN DENYING BRYANT'S MOTION FOR A NEW TRIAL AT THE CLOSE OF THE STATE'S ARGUMENT TO THE JURY BECAUSE IT URGED IT TO FIND BRYANT GUILTY BECAUSE CLARENCE MAUGE, A POLICE INVESTIGATOR HAD ARRESTED BRYANT, IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

During the State's final closing argument, it urged the jury to find Bryant guilty because Clarence Mauge, the police officer investigating Ms. Kennedy's death believed he was guilty (R 1148).

> I am not going to ask you to convict Robert Bryant simply because that is the person Clarence Mauge chose to arrest, but it was the Defendant who wanted to bring in all of this extraneous investigation. The purpose of all that was to cloud the issue. However, Clarence Mauge, after this investigation, following up all these leads, what is the conclusion that he necessarily came to? The same one that you have to come to when you look at all this evidence. And that is Robert Bryant, Jr. himself, committed these offenses.

The law in this area is simple, and its application straight forward. The sole purpose of closing argument is to assist the jury in analyzing and applying the evidence adduced at trial. United States v. Dorr, 636 F.2d 117, 120 (5th Cir. 1981). The prosecution may not give his personal opinion regarding the guilt of the defendant because it unfairly lends the sanction of his office to bolster its case. United States v. Phillips, 664 F.2d 971 (5th Cir. 1981). The State also may not vouch for the credibility of its witnesses Jones v. State, 449 So.2d 313 (Fla. 5th DCA 1984), especially when they are policemen. Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984).

In this case, the state strongly suggested that the jury should find Bryant guilty because that is the conclusion Clarence Mauge, the investigating officer reached. That was improper. Grant v. State, 171 So.2d 361 (Fla. 1965); Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968). It was also improper for the State to inject its personal opinion that Bryant was guilty as it did in the first sentence of the quote. Buckhann v. State, 356 So.2d 1327 (Fla. 4th DCA 1978).

Thus, the court denied Bryant a fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution when it denied Bryant his right to a fair trial. Given the highly charged nature of this case, such comments cannot be harmless. Grant, supra. This court should reverse the trial court's judgment and sentence and remand for a new trial.

CONCLUSION

Based upon the arguments presented here, Robert Bryant respectfully asks this honorable court to either: 1. reverse the trial court's judgment and sentence and remand for a new trial, 2. reverse the trial court's sentence and remand for a new sentencing hearing before a new jury 3. reverse the trial court's sentence and remand for resentencing, or 4. reverse the trial court's sentence and remand for imposition of a sentence of life in prison without the possibility of parole for twenty-five years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Richard Martell, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, ROBERT BRYANT, #724476, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 12TH day of September, 1990.

DAVID A. DAVIS