IN THE

SUPREME COURT OF FLORIDA

JAMES A. MORGAN,	)	
Appellant/Cross-Appellee,	)	
v.	)	CASE NO. 75,676
STATE OF FLORIDA,	)	
Appellee/Cross-Appellant.	)	

INITIAL BRIEF OF APPELLANT

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

RICHARD B. GREENE
Assistant Public Defender
Florida Bar No. 265446

Counsel for Appellant/Cross-Appellee

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PRELIMINARY STATEMENT

James Morgan was the Defendant and the State of Florida was the Prosecution in the Circuit Court of the Nineteenth Judicial Circuit of Florida. In the brief, the parties will be referred to by name or as Appellant and Appellee.

The following symbols will be used:

R	Record on Appeal
1SR	First Supplemental Record
2SR	Second Supplemental Record
3SR	Third Supplemental Record
4SR	Fourth Supplemental Record

Additionally, note that the page numbering 1034-1110 are repeated in the transcript. The repeated numbers are designated 1034A-1110A. (They are all in Volume VII.)

STATEMENT OF THE CASE

James Morgan was indicted on September 23, 1977. His conviction was reversed by this Honorable Court in Morgan v. State, 392 So.2d 1315 (Fla. 1981) (Morgan I) due to an unconstitutional bifurcated insanity procedure. This Court again reversed James Morgan's conviction due to the complete prohibition of his insanity defense. Morgan v. State, 453 So.2d 394 (Fla. 1984) (Morgan II). This Court then reversed the conviction due to the exclusion of James Morgan's expert witnesses on the issue of insanity. Morgan v. State, 537 So.2d 973 (Fla. 1989) (Morgan III).

The trial took place on January 22 through February 2, 1990. R 1-1735. James Morgan was convicted of first degree murder. R 1735. The penalty phase was held on February 5, 1990. R 1743-1790. The jury recommended a death sentence by a vote of eight to four. R 1789-1790. The judge imposed a sentence of death. R 1806-1814.

STATEMENT OF THE FACTS

This case involved the death of Gertrude Trbovich on June 6, 1977. The state's case began with witnesses who described the scene. Miles Heckendorn was the technician for the Martin County Sheriff's Office. R 612. He arrived at the home of the deceased at about 7:30 a.m. on June 7, 1977. R 612-613. Deceased was in the kitchen. R 631. A wooden handled serrated knife was on the kitchen floor. R 642-643. He identified a possible bite mark on the deceased's right breast. R 645-646. He obtained fingerprints, footprints, and palm prints from James Morgan. R 677-678. A pen and stationary were on the floor. R 697-698.

Walt Parsons, a former Stuart Police Officer, testified concerning the initial interrogation of James Morgan and other investigation. R 742. He observed footprints in the blood around the deceased's body. R 743. He interrogated James Morgan at his home at 3:30 p.m. on June 7, 1977. R 745-746. James Morgan stated he cut three lawns on June 16, 1977. R 747. He was with his cousin, Robert, and another man named Yawn. R 747. James stated that he'd gone in the home to use the phone. R 747-748.

Dr. John Williams, a dentist, stated he took an impression of James Morgan's teeth and made a plaster cast from these. R 767-768. Dr. Thomas Ford, a dentist, testified that the bite mark on the deceased's breast matched James Morgan's bite mark.

Officer Joanne Waldron identified a crescent wrench that was found with blood on it. R 820-821. She collected a bread knife from the kitchen floor. R 834. She identified blood and saliva samples from James Morgan. R 850-851. The blouse of the deceased

was pulled up. R 855-856. The bra was in the proper position, but it had a cut mark. R 855-857.

The previous testimony of the medical examiner, Dr. Schofield was read. R 881. He identified bruise marks on the front left side of the face and wounds to the ring finger. R 884-885. There were six stab wounds to the right side of the back and on the right breast. R 886. There was a bite mark to the breast. R 886-887. There were fifteen cuts on the left hand that were consistent with defensive wounds. R 889-892. There was bruising of the vagina consistent with insertion of an object. R 893-894. She died by a combination of blows and stab wounds. R 899-900. The doctor said he had "the feeling" that death "probably did not occur immediately". R 900. He had no idea when she lost consciousness. R 900-901. He stated that immediate unconsciousness was possible. R 906. The bruising could have been by an object, finger, or a sexual organ. R 903. There was no proof of sexual intercourse. R 904.

Anthony Laurito testified that James Morgan's footprint is consistent with a footprint at the scene. R 914-918. Daniel Nippes testified as to hair, blood, and fluid comparison. R 920-923. Under the deceased's fingernails were fibers consistent with James Morgan's jacket. R 924-925. There was crushed hair on the wrench consistent with the deceased's hair. R 926-927. He found a droplet of saliva on the external upper pubic region of the deceased which could not be typed. R 929-934. Tommy Moorefield, an FBI fingerprint specialist, found a fingerprint and footprints in the tile which were consistent with those of James Morgan. R 960-964.

Robert Crowder, a former Martin County Deputy Sheriff, interrogated James Morgan on September 10, 1980. R 990. James stated that he was working on the deceased's lawn when he saw a co-worker, Charles Yawn, go inside the house. R 992-993. He stated he went inside and saw a body on the floor and the house was a mess. R 993-994. He said that Charles Yawn held a knife on him and forced him to bite the deceased's breast. R 993-994. He said her pants were down and blouse was up. R 994-995. He said that Charles' forced him to get a towel from the bathroom and clean up the blood. R 995. He washed his hands and feet with a faucet on the side of the house and finished mowing the lawn. R 995. They left the area about 4:00 p.m. R 995-996. He had originally entered the home to use the phone about 3:00 p.m. He was told to re-enter by Charles Yawn about 3:30 p.m. R 996. The state rested and a motion for judgment of acquittal was denied. R 1000-1005.

The defense case consisted of people who knew James Morgan and mental health professionals who evaluated him. These witnesses testified concerning James Morgan's mental state. Billy Joe Mobley had sniffed gasoline fumes with James on a regular basis. R 1026-1027. It caused auditory and visual hallucinations. R 1030-1031. The other lay witness presented by the defense was Alice Morgan, James' mother. R 1160-1161. James was a slow learner in school and was in special classes. R 1160-1162, 1167-1168. He was born on November 28, 1960 and was 16 on June 8, 1977. R 1167. James was physically punished when he drank. R 1163-1164. James saw a psychiatrist in late 1975 and early 1976 as a result of problems in school and emotional problems. R 1168. Ms. Morgan stated that

her son had inhaled gasoline from a very young age. R 1169. She caught him sniffing gasoline on several occasions and saw its effects. R 1169. James experienced visual hallucinations. R 1169. James sniffed gasoline over a long period of time. R 1168-1169. James' father was an alcoholic that was often drunk in James' presence. R 1169.

Three mental health professionals testified for the defense. Dr. Glenn Caddy, a psychologist, testified concerning his evaluations of James Morgan. R 1035-1036. Dr. Caddy was qualified as an expert in the fields of forensic psychology and the use of hypnosis. R 1047. He first examined James Morgan in 1985. R 1048-1049. He reviewed the reports of other mental health professionals and investigative reports of law enforcement. R 1049. He spent 6½ to 7 hours in his initial evaluation of Mr. Morgan. R 1050-1051.

James Morgan performed poorly in school and dropped out at a young age. R 1052-1053. He began sniffing gasoline fumes at age 12 and continued regularly. R 1053-1054. He also began drinking by age 13 and continually increased his drinking as he got older. R 1054. There was a history of alcohol abuse and general chaos in his family. R 1054. Dr. Caddy testified that chronic inhalation of gasoline can cause brain impairment, including memory loss and black outs. R 1055. The immediate effects of inhalation include hallucinations and emotional distancing from events. R 1055. He had to use very simple communication to get through to James. R 1056. Dr. Caddy stated that he had performed an intelligence test, several projective psychological tests, and a comprehensive neuropsychological exam. R 1058-1060.

Dr. Caddy's initial testing of James Morgan indicated "a truly troubled young man." R 1060. He had an I.Q. of 80 which is 20 points below average. R 1060. Dr. Caddy stated:

> We have a person with very poor insight into the world around him, relatively little ability to introspect to take -- to take himself and think about himself in the context of his life and his world. His judgment, his ability to abstract and to reason was poor. His imagination was simplistic and very concrete. He seemed to suffer from an inability to experience a successful or competent fantasy life. He looked in the testing protocol as if he lacked an appreciation of interpersonal relationships, very lacking in talent in any social facilitation or social graces. And I don't mean by that simply manners, I mean the ability to interact socially with another person other than a very, very limited degree was -- was an issue of real limitations to this man's overall interpersonal functions. They're seemed to be an overall sadness in -- his demeanor as he presented himself.

R 1060.

Dr. Caddy testified that James sniffed gasoline and drank alcohol on the date of the offense. R 1066-1067. James initially downplayed his memory of events, until confronted further. R 1065-1066. He then stated that he went in the deceased's house to use the restroom. R 1067. James became convinced that she was going to report him for drinking and that he would be in serious trouble for this. R 1068-1069. James had a spark plug wrench in his pocket and began hitting her with it. R 1069-1070. She had a look of disgust on her face which enraged him and he threw a vase and picked up a knife as she ran. R 1069-1070. Dr. Caddy felt hypnosis could be helpful on the issue of insanity. R 1079-1082.

Dr. Caddy's neuropsychological testing revealed brain dysfunction. R 1077-1078. Dr.Caddy administered 4½ hours of neuropsychological tests to James. R 1077-1079. There were "serious

limitations of brain functioning". R 1078. This dysfunction seemed to be long-standing. R 1078-1079. The impairment could be genetic. R 1078-1079. The finding of brain impairment in the testing was consistent with James' clinical history including school records and family history. R 1082-1083.

Dr. Caddy eventually decided to hypnotize James Morgan after conversations with Dr. Koson, a psychiatrist. R 1080-1081. They participated in the procedure together and both believed that James was responding well to hypnosis. R 1083-1084. Hypnosis is a generally accepted clinical tool. R 1084-1085. The session was not taped. R 1085-1086. James Morgan was able to give more detail about the incident under hypnosis. R 1091-1092. James woke up feeling sick the morning of the incident and was angry with his parents, who made him go to work. R 1095. He sniffed gasoline and drank alcohol that day. R 1094-1095. James went to the deceased's house and was let in to use the bathroom and the telephone. R 1095-1096. He stated that the deceased had a look of disgust on her face that was similar to one his mother had when his father was drunk. R 1095-1096. He could not reach his father on the telephone. R 1096. James saw the woman writing a letter with an expression of disgust and he thought she was writing his family. R 1096. He felt tremendous rage and anger and took the wrench out and began to strike her. R 1096-1097. He then threw a vase at the woman and began stabbing her with a kitchen knife. R 1097. He then pulled up the woman's blouse and bit her breast and pulled down her pants and inserted his hand. R 1098-1099. He briefly attempted to clean up the blood and left the house. R 1099.

Dr. Caddy testified that James was "very immature" even for a 16 year old. R 1096. He was suffering the effects of gasoline fumes and to a lesser extent alcohol. R 1101. He was extremely vulnerable emotionally, due to the events of the day and his prior life history. R 1101-1103. He was experiencing paranoia and extremely poor judgment. R 1101-1102. Dr. Caddy stated that James Morgan was legally insane during the incident. R 1102-1107. He performed tests on James Morgan to determine susceptibility to hypnosis. R 1098A-1099A. The hypnosis session lasted about four hours. R 1107A. Dr. Caddy stated that James Morgan was brain damaged based on his neuropsychological testing. R 1106A-1108A. He stated that James suffered from an isolated explosive disorder. R 1119. This is an impulse control disorder that is affected by alcohol or drugs and can lead a person to a rage reaction or paranoid reaction. R 1124-1125.

The defense also called Dr. Dennis Koson, a board certified forensic psychiatrist. R 1128. He examined James Morgan on April 19, 1985. R 1129. Prior to his examination, he spoke to James' mother and sister about his background and life. R 1136. He reviewed reports of other doctors, and police reports. R 1137. He examined James for about three hours and took a life history and mental status examination. R 1130. James was very dependent on his family and had a constricted social life. R 1131. He had a learning disability and could not read at that time. R 1131. He had also been involved in excessive drinking. R 1131. Dr. Koson testified that inhalation of gas fumes can cause brain damage. R 1131-1132.

Dr. Koson also examined James concerning his mental state on the day in question. R 1132. James was feeling sick and had headaches on the morning of the incident. R 1131-1132. He had been drinking the day before. R 1132. Jim sniffed gasoline and drank the morning of the incident. R 1132. The deceased let James in to use the phone and bathroom. R 1132. She looked at him as though "she were repelled by him." R 1132. He became angry when he could not reach his father on the phone. R 1133. He went into the bathroom and thought he heard Ms. Trbovich mumbling about telling his mother about his drinking. R 1133. He came out and saw her writing at a desk and he thought he heard her say she was writing to his mother. R 1133. He pulled out a wrench from his pocket and began striking her. R 1133. She had a look of disgust like his mother had when his father came home druni. R 1133. He threw a vase at her and stabbed her. R 1133-1136. There was a brief attempt to clean up the blood. R 1134. James had several memory gaps in this interview. R 1134. Dr. Koson stated that James suffered from brain damage. R 1138. He based this on his interview, the materials he reviewed and the testing of Dr. Caddy. R 1138.

Dr. Koson was present when Dr. Caddy performed hypnosis on April 28, 1985. R 1140. Dr. Koson tried to be as unobtrusive as possible during the session, only passing notes to Dr. Caddy. R 1141. Dr. Caddy first tested James to see if could be hypnotized. R 1141-1142. Dr. Caddy was scrupulous in avoiding cuing James during the session. R 1143. James was able to elaborate on his feelings and some of the events during hypnosis. R 1144. He

discussed his headaches and his anger when he could not reach his father. R 1144. The woman then looked at him with the same look of panic and fear as his mother. R 1144. This led to his throwing a vase and stabbing her. R 1114. Dr. Koson testified that James suffered from isolated dyscontrol syndrome and uncontrollable rage. R 1146-1147. He was legally insane. R 1147-1148.

The defense also had the testimony of Dr. Benjamin Center, a psychologist, read to the jury (the witness was deceased). R 1170-1172. Dr. Center has a doctorate in psychology. R 1172-1174. He has taught at Barry College, Florida International University, and Nova University. R 1173-1174. He primarily works in the field of neuropsychology. R 1175. He was declared an expert in the fields of psychology, school psychology, and neuropsychology. R 1177-1178.

Dr. Center examined James Morgan for eight hours on September 11, 1981. R 1181. He did numerous neuropsychological tests on James Morgan. R 1182-1217. The STROP test, a neuropsychological test, indicated possible brain damage in the frontal lobe. R 1185. James' reading and spelling were at the first grade level and his math was at the fifth grade level. R 1186-1187. The reading and spelling scores were consistent with damage to the left side of the brain. R 1187. James could not comprehend a pre-primary story. R 1188-1189. Dr. Center stated that psycholinguistic testing indicated an age of 8, even though James was 20 at the time of the testing. R 1189-1190. Dr. Center's I.Q. testing revealed an I.Q. of 84 which is dull normal and in the bottom 16% of the population. R 1192. Most of the damage was on the left side of the brain,

which affects his ability to understand complex situations, to respond under stress, and to exercise proper judgment. R 1197.

Dr. Center had also reviewed the report of Dr. Thomas, a school psychologist who had tested James in 1973, when he was 12. R 1199-1201. At that time, he scored at the kindergarten level on the reading test and at the second grade level on the math test. R 1199-1201. This was well behind his expected level of development. R 1201. This suggests brain damage. R 1202. Numerous subtests confirmed the diagnosis of brain damage of a type that affects judgment and ability to act under stress. R 1204-1218. The defense then rested and its renewed motion for judgment of acquittal was denied. R 1257-1258.

The prosecution's case in rebuttal consisted of the testimony of Dr. Martin Orne and Dr. Park Dietz, both psychiatrists. Dr. Orne never examined James Morgan. He testified as to his opinion of the hypnosis session. Dr. Orne has conducted substantial research on hypnosis. R 1261-1269. He stated that hypnosis is "usually" valid, although people vary in their ability to be hypnotized. R 1276-1277. He felt the hypnotizability test performed by Dr. Caddy was not valid as he only employed four of twelve subtests. R 1280-1282. Dr. Orne stated that a hypnosis session should be videotaped so others can review it. R 1306-1311. He also feels no one other than the hypnotist and subject should be in the room. R 1312. He said it is unusual for a subject to be hypnotizable at one time and not later. R 1326-1327. Dr. Orne stated he has "no opinion" as to the hypnosis session in 1985

because he was not there and did not see a tape, despite his criticism of some of the procedures involved. R 1327-1328.

Dr. Dietz is a psychiatrist from California who formerly taught at the University of Virginia. R 1385-1387. Dr. Dietz examined Mr. Morgan once in 1990, during the trial. R 1398-1399. He previously reviewed police reports, the testimony of other mental health professionals, and autopsy reports. R 1398-1400. He stated that, although he did not test James, his record review indicated his I.Q. was dull normal and in the bottom 15% of the population. R 1404-1405. Dr. Dietz said that he did not see "clinically significant evidence" of "serious brain damage"; although he could not rule this out. R 1405-1406. He stated he reviewed Dr. Center's testimony "and couldn't tell what he was saying really." R 1408. Dr. Dietz felt that alcohol abuse was not significant to the offense. R 1409-1410. Dr. Dietz testified that although James had repeatedly inhaled gasoline fumes, including the date of the offense, this did not have a significant effect on his behavior. R 1413-1414. He felt the offense was more characteristic of rage than of any sexual motivation. R 1416-1430.

Dr. Dietz explained that the diagnosis of "isolated explosive disorder" had been in the Diagnostic and Statistical Manual of the American Psychiatric Association in 1980 and it was removed in 1987 by a majority vote of a committee. R 1436-1439. He said that James Morgan met the criteria for this diagnosis, but he did not feel it is a valid diagnosis. R 1438-1439. He felt James did not meet the criteria for intermittent explosive disorder as there were no other violent incidents. R 1439-1440. He felt James did not suffer from

psychosis. R 1441-1449. He stated that he felt James Morgan acted out of extreme rage and anger during the incident, but was not legally insane. R 1474-1476. He stated that the rage built up quickly. R 1493. Dr. Dietz testified that James Morgan had been sexually abused by two cousins and an uncle. R 1498. They had forced him to perform oral and anal sex. R 1498-1499. Dr. Dietz also stated that the symptoms which James Morgan described were consistent with regular inhalation of gasoline fumes. R 1499-1500.

Both sides rested and James Morgan's renewed motion for judgment of acquittal was denied. R 1543-1544. The jury returned a verdict of guilt of first degree murder. R 1735.

In the penalty phase, both sides relied on the evidence previously presented. R 1756. The jury recommended the death penalty by a vote of eight to four. R 1790. The judge imposed the death penalty.

SUMMARY OF THE ARGUMENT

1. The prosecutor argued, over objection, an alleged attorney client conversation concerning the insanity defense. No evidence had been introduced to support of this.

2. A statement was introduced, over objection, which was the result of an interrogation while James Morgan's case was on appeal. There was no notice to his counsel.

3. James Morgan was previously acquitted of felony-murder. It was error to allow the state to pursue this theory.

4. The state blocked James Morgan's retention of experts to aid the defense. At the same time, it was allowed to hire any expert it wished without regard to cost.

5. The trial court erred in giving a special jury instruction, over objection, on "irresistible impulse."

6. The state brought out, over objection, statements concerning the facts of the offense, which were garnered during a psychiatric examination. Parkin v. State, 238 So.2d 817 (Fla. 1970).

7. The state brought out, over objection, irrelevant victim sympathy evidence in the guilt phase.

8. A prosecution expert was allowed to testify, over objection, as to the truthfulness of defense evidence.

9. The trial court erred in forcing James Morgan to attempt to be re-hypnotized and allowed the state to put on evidence of this unsuccessful attempt.

10. The trial court forced James Morgan to be examined by a psychiatrist after numerous court appointed experts had examined him. There was no basis for this compelled examination.

11. The record on appeal contains numerous inaudibles. Several of these are prejudicial and reversal is required.

12. The execution of James Morgan would violate Article I, Sections 9 and 17 of the Florida Constitution. James Morgan was 16 at the time of the offense. His execution would truly be "unusual" under Tillman v. State, 591 So.2d 167 (Fla. 1991). No one this young has been executed in Florida since 1954 and anywhere in America since 1959. This Court has never affirmed a death sentence of a person so young in the post-Furman era.

13. The death penalty is disproportionate. There are only two aggravators even arguably present here. There is extensive

mitigation. This case is similar to Livingston v. State, 565 So.2d 1288 (Fla. 1990) which this Court reduced to life.

14. The trial court erred in holding itself bound by the jury's guilt phase verdict to reject statutory and non-statutory mitigators. The trial judge also erred as a matter of law in failing to find age in mitigation.

15. The trial court gave, over objection, the jury instruction found unconstitutional in Espinosa v. Florida, 112 So.2d 2926 (1992). This was prejudicial as the jury's vote was only eight to four. This was one of only two aggravators found by the judge, and there was substantial mitigation introduced.

16. The trial court erred in finding the felony murder aggravator and in instructing the jury on felony-murder as James Morgan had been previously acquitted of felony murder.

17. The prosecutor's penalty phase closing argument was inflammatory and prejudicial.

18. The trial court erred in failing to consider and failing to find unrebutted non-statutory mitigation.

19. The trial court erred in finding the aggravator of "especially heinous, atrocious, or cruel" (HAC).

20. Florida's death penalty statute is unconstitutional.

ARGUMENT

POINT I THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ARGUE ATTORNEY-CLIENT CONVERSATIONS.

The prosecutor in both opening statement and closing argument improperly argued an alleged attorney-client conversation concerning his insanity defense that never came into evidence. This argument was improper as it involved (alleged) facts not in

evidence and penalized James Morgan for exercising his right to counsel. This argument denied James Morgan due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

In opening statement, the prosecutor discusses an interview that Dr. Caddy had with James Morgan. R 596-597. The prosecutor then began to discuss Dr. Caddy's confronting James Morgan concerning the alleged offense. R 596-597.

> (Prosecutor): The defendant stated he had been told by a previous defense counsel that the issue of insanity was crucial to his case and that he should simply present himself not quite forthrightly on the whole matter.
>
> MR. UDELL [Defense counsel]: I would object to that and move to strike that and an instruction to the jury. I don't know of any basis of how the state's gonna get that into evidence and I'd ask you to instruct the jury and I'll make a legal argument later when they attempt to get it into evidence but I'm gonna ask you to instruct the jury at this time that they should disregard anything about what Mr. Barlow just told 'em about what a prior attorney told Mr. Morgan.
>
> THE COURT: I'll sustain that objection. We're getting into a gray area, lets get off that. The objection is sustained.

R 597-598.

Defense counsel's motion for mistrial on this comment was denied. At no time during the trial was any evidence introduced concerning this alleged conversation.

The prosecution again argued this alleged attorney-client conversation in closing argument. The prosecutor argued in closing argument as follows:

> MR. BARLOW [Prosecutor]: Defendant's statement to Dr. Caddy. Had been told by a previous defense counsel that the issue of insanity was crucial to his case and that

> he should simply present himself not quite forthrightly on this whole matter. Insanity defense, he's telling his -- Caddy, look, doctor, it's a bunch of bull. And Caddy still comes in here and tells you that. What's that mean.

R 1711.

Defense counsel again objected to this argument, asked for a curative instruction, and moved for a mistrial. R 1714; 4SR 483. His objection was overruled and his motion was denied. R 1714.

The prosecutor's argument was intentional prosecutorial misconduct. The trial court had previously sustained defense counsel's objection to this same argument. The argument also commented on facts not in evidence. There was no evidence concerning this alleged conversation. This is improper. Coleman v. State, 420 So.2d 354 (Fla. 5th DCA 1982).

It was also an improper use of the exercise of the right to counsel to rebut an insanity defense. In State v. Burwick, 442 So.2d 944 (Fla. 1983), this Court held to be inadmissible,

> evidence of a defendant's post-arrest conduct, including silence and the request to see an attorney after receiving *Miranda* warnings, as it relates solely to the issue of mental condition near the time of the offense when the defendant has asserted the insanity defense and the evidence is presented by the state in rebuttal. 442 So.2d at 945.

This Court went on to state that to penalize a person for exercising his constitutional rights would violate "a fundamental principle of constitutional law." Id. at 947.

This Court revisited this principle in Garron v. State, 528 So.2d 353 (Fla. 1988). In Garron, the following took place:

> During the direct examination of the arresting officers, the prosecutor asked each whether appellant appeared to understand his *Miranda* rights. During direct examination of rebuttal witness, Detective Phillips, the prosecutor

> asked two questions: whether he believed appellant was "coherent," and whether appellant indicated he understood his constitutional rights. Detective Phillips answered yes to both questions. The state contends that this procedure was proper to show appellant's state of mind at the time of the crime in order to rebut the insanity defense.

Id. at 355.

This Court relied on Burwick, supra, and the United States Supreme Court's opinion in Wainwright v. Greenfield, 474 U.S. 289 (1986) to hold this to be reversible error even though it was not a direct comment on the exercise of constitutional rights.

> It is not dispositive that the prosecutor did not expressly comment on the exercise of appellant's constitutional rights. However, when taken in context, it is clear that the questions asked by the prosecutor were intended to at least impliedly be a comment on the invocation of those rights as they relate to appellant's guilt or sanity.

Id. at 355-356.

This Court held that the effect of these questions was to deny the defendant due process by penalizing his exercise of his constitutional rights and held it to be harmful. Id.

This error was prejudicial. James Morgan presented two experts who testified he was legally insane, another expert to support his evidence of brain damage and a learning disability and lay witnesses to support his defense. The invocation of his alleged conversation with an attorney was devastating to this defense. In Garron, supra, this Court held a comment that a defendant "understood his rights" to be harmful error. 528 So.2d 355-356. This Court reached this result even though this Court recognizes that it was only "impliedly" a comment on the exercise of the right. Id. Here, the comment was a direct comment.

The nature of the comment is also far more devastating than in Garron, supra. The prosecutor claimed that an attorney had told James Morgan how important the insanity defense is to his case and told him that he should present himself in a dishonest manner to the mental health experts. This was devastating to the entire insanity defense, the credibility of the defense experts, and the credibility of the defense counsel. This was intentional prosecutorial misconduct as a prior objection had been sustained and no evidence had been introduced to support this. It was done in rebuttal closing argument, when defense counsel had no opportunity to answer the argument. Reversal is required.

POINT II THE TRIAL COURT ERRED IN ADMITTING STATEMENTS MADE BY MR. MORGAN IN VIOLATION OF HIS RIGHT TO COUNSEL AND RIGHT TO REMAIN SILENT.

The prosecution introduced statements from Mr. Morgan in violation of the dictates of United States and Florida Constitutions. The prosecution was allowed to introduce, over objection, statements that were the result of a police interrogation which was conducted while Mr. Morgan was incarcerated and without notice to his counsel. This was highly prejudicial.

The prosecution proffered the testimony of Officer Crowder concerning his interrogation of Mr. Morgan. R 965-988. Mr. Morgan also testified at this hearing. R 978-983. Defense counsel objected to these statements. Officer Crowder testified that Mr. Morgan's parents contacted him and urged him to talk to Mr. Morgan. R 969-970. He interrogated Mr. Morgan on September 10, 1980, after reading him his rights pursuant to Miranda v. Arizona, 86 S.Ct. 1602 (1966). He made no attempt to contact the Office of the

Public Defender in West Palm Beach. R 977. James Morgan testified that his counsel on September 10, 1980 was the West Palm Beach Public Defender's Office. R 979. The trial court made a fact-finding that the West Palm Beach Public Defender was Mr. Morgan's counsel. R 983.

Officer Crowder also testified that Mr. Morgan's family claimed that an attorney named Raymond Ford would be retained _if_ he obtained a re-trial. R 977. He claimed that Mr. Ford had authorized the interrogation. R 975. Mr. Morgan testified that he never met Mr. Ford. R 482. In fact, Mr. Ford never represented Mr. Morgan at any time. Mr. Crowder also testified that the Stuart Public Defender told him that the case was on appeal and that he thought (correctly) that the West Palm Beach Public Defender was representing Mr. Morgan. R 975. Despite this, he never made an attempt to contact the West Palm Beach Public Defender. R 976-977.

Officer Crowder testified that Mr. Morgan told him that he was working on the lawn crew with Charles Yawn and Robert Fritcher on the day of the incident. R 992. He used the phone at the deceased's house and then left. R 993. He claimed James Morgan told him that he came back in the house and it was a mess. R 993. He claimed that James told him that the woman was already dead and that Charles Yawn held a knife on him and forced him to bite the woman's breast and to clean up the blood with a towel. R 994-995.

Once a person has been formally charged and has counsel appointed it is a violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution to deliberately

attempt to obtain a statement. Massiah v. United States, 84 S.Ct. 1199 (1964); United States v. Henry, 100 S.Ct. 2183 (1980); Edwards v. Arizona, 101 S.Ct. 1880 (1981); Maine v. Moulton, 106 S.Ct. 477 (1985); Michigan v. Jackson, 106 S.Ct. 1404 (1986); Traylor v. State, 596 So.2d 957 (Fla. 1992); Peoples v. State, ___ So.2d ___, 17 F.L.W. S713 (Fla. Nov. 25, 1992). The statements should have been suppressed and their admission violated Mr. Morgan's right to remain silent, right to counsel and due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitutions and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

The error was prejudicial in both phases. The prosecution emphasized this statement in its closing argument. The prosecutor argued:

> Defendant's story to Chief Deputy Crowder September the 10th, 1980, a real turn around, ladies and gentlemen. Now the defendant's memory all of a sudden is wonderful, he has a great memory now. Defendant's memory suddenly is better but he has a new story, a new gory story. Think about this. Is this a sane man coming up with different stories telling to different people trying to fool those people or is this an insane man. Remember what Chief Deputy Crowder tells you. The story seems rehearsed in his professional experience as a law enforcement officer, that the defendant was very deliberate, deliberate and careful in telling this story. Defendant gave a -- the story a great deal of thought. Defendant was not ranting or raving. Act of a sane man, act of a sane man concealing, hiding, deceiving, deceiving every single person he has touched in this case, deceiving, hiding, lying.
>
> His story to Detective Crowder is that when he enters the house -- he didn't see the model -- he tells Detective Crowder when he enters the house he sees the whole place is a mess. We know from the photographs and we know from the model, another lie. He says that this Charlie guy pulls a knife and puts it up to this throat and makes him come in and bite the victim's breast. You have to remember the time this was given in 1980 now he knows

> what the evidence is against him and now he's gotta justify how the FBI can put his ten bloody footprints underneath and around the victim's body in her blood. How can he justify that, I can't argue against the footprints so I'm gonna have to say someone forced me to do it, someone forced my footprints to get on that blood and get in that kitchen and someone forced my teeth down on her breast ripping the skin on her breast. That's what he's claiming. He has to justify the evidence after all these years. Doesn't that take a person to think about what the evidence is and then apply a new story to it.

R 1644-1646.

This Court should reverse for a new trial, as error was prejudicial. Assuming, arguendo, that this Court finds the error harmless as to guilt, it was clearly harmful as to penalty. This improper evidence which allowed the prosecution to portray Mr. Morgan as calculating and cunning could have easily tipped the balance towards death, as the jury vote was close. See Omelus v. State, 584 So.2d 563, 567 (Fla. 1991).

POINT III THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FELONY MURDER AS HE HAD BEEN PREVIOUSLY ACQUITTED OF FELONY MURDER.

James Morgan has been previously acquitted of felony-murder as the trial judge made a specific fact finding that the evidence is "insufficient" to support any theory of felony-murder. The principles of double jeopardy, collateral estoppel, and res judicata forbid any prosecution on this theory. The trial court's instruction on felony murder at the current trial denied James Morgan due process of law pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In Morgan I, defense counsel moved for a judgment of acquittal as to both felony-murder and premeditation. Morgan I, Record at

410-414. The trial court specifically found that there was a prima facie case of premeditated murder. The trial judge then stated:

> "I do not think that there is a prima facie case of felony-murder." (Emphasis supplied). Morgan I, Record at 413.

The trial judge reiterated his finding that the evidence was insufficient for any theory of felony-murder when he orally pronounced sentence.

> And it's apparent that the aggravating circumstances set forth in Section 921.141(5) subsections A through G inclusive are not applicable to this case. As I indicated earlier there's insufficient evidence to establish that the defendant was engaged at the time in the commission of any of the crimes set forth in Subsection D. And the other circumstances in Subsection A through G are clearly inapplicable.
>
> (Emphasis supplied) Morgan I, Record at 744.

The trial court's written findings of fact also reflect a finding of legal insufficiency as to this circumstance.

> Aggravating circumstances as set forth in § 921.141(5), subsections (a) through (g) inclusive, are not applicable to this case. There is insufficient evidence that the Defendant was engaged at the time in the commission of any of the crimes set forth in subsection (d) and the other circumstances in subsection (a) through (g) are clearly inapplicable.
>
> Morgan I, Record at 172.

Here, the trial court instructed the jury on a felony-murder theory of prosecution. R 1716-1720. The prosecution specifically argued felony-murder. R 1625-1627, 1637-1638, 1708. This issue is controlled by Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989). In Delap, supra, the Court held that the judge's reference at sentencing to the fact that he found the evidence "insufficient to support a felony-murder basis for conviction" at guilt phase

constituted an acquittal of felony-murder. Id. at 311-312.[1] The Court in Delap held that this was an acquittal and double jeopardy barred reprosecution on felony-murder. Id. at 312-314.

James Morgan's conviction for first degree murder must be reversed, as the jury may have relied on felony murder.

> "With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict." Mills v. Maryland, 108 S.Ct. 1860, 1806 (1988). Accord Zant v. Stephens, 462 U.S. 862, 889-85 (1983); Yates v. United States, 354 U.S. 298 (1957); Stromberg v. California, 283 U.S. 359, 367-368 (1931).

The prosecution affirmatively argued felony-murder as a theory of guilt. The defense presented extensive evidence of insanity as well as evidence of intoxication. The jury may well have rejected insanity but felt that James Morgan lacked the mental state for premeditation. A new trial is required.

POINT IV THE TRIAL COURT ERRED IN ALLOWING THE STATE STANDING TO OPPOSE DEFENSE COUNSEL'S RETENTION OF PSYCHIATRISTS AND IN NOT ALLOWING MR. MORGAN TO RETAIN EXPERTS.

This issue involves two independent errors. First, the trial court erred in allowing the prosecution to oppose Mr. Morgan's motion to appoint Dr. Pincus and Dr. Lewis, after the County Attorney had stipulated to the motion and the judge was prepared to grant it. The judge's denial was only based on the prosecutor's opposition. The second error involves the judge's refusal to appoint Dr. Pincus, Dr. Lewis, or Dr. Vallely or any mental health expert requested by the defense. These errors denied James Morgan

[1] The trial judge in James Morgan's first trial is the same judge as in the Delap case, Judge Trowbridge.

the due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution. These errors were prejudicial. This is especially true, as the prosecution retained a "national name" expert solely to attack hypnosis and another "national name" expert to testify concerning Mr. Morgan's mental state. The prosecution did this without any court approval, opportunity for the defense to object and without any regard to cost. (The County ended up paying almost $45,000 to the prosecution's experts, quadruple what Dr. Caddy and Dr. Koson were paid.) R 2310-2313, 2322-2323, 2323-2327, 2328-2329.

A. <u>State interference with the right to mental health experts and the right to an adequate defense</u>.

Mr. Morgan filed a Motion for the appointment of Dr. Jonathan Pincus and Dr. Dorothy Lewis as mental health experts to "aid counsel for the Defendant". R 1859-1860. He attached the reports of Dr. Pincus, Dr. Lewis and their associates. R 1861-1884. Dr. Lewis is a Professor of Psychiatry at New York University Medical School and Dr. Pincus is a Professor of Neurology at Yale University Medical School. They evaluated James as part of a study of death sentenced juveniles. This study was presented to the American Academy of Child and Adolescent Psychiatry and published in the May, 1988 edition of the <u>American Journal of Psychiatry</u>.

A hearing was held on this motion. 3SR 6-12. The County Attorney was present and had no objection to the appointment of these experts. 3SR 6-7. His only concern was that there be some reasonable limit on the fees of the experts. 3SR 6-7. The trial judge was prepared to grant the motion and wanted to know what the

defense and county thought was a reasonable limit on fees. 3SR 7. The prosecution then objected and the motion was denied. 3SR 8-12.

Mr. Morgan then filed an Amended Motion for Appointment of Mental Health Expert, in which he requested the appointment of either Dr. Pincus or Dr. Lewis. R 1905-1907. The State objected to this motion and the judge denied it. R 43-47. However, the judge stated that he would appoint an additional mental health expert and urged the parties to agree on a name. R 47. Mr. Morgan then filed a motion to appoint Dr. Pincus or Dr. Vallely, a neuropsychologist from Jacksonville. R 1950-1951. Mr. Morgan brought the motion before the Court once again. R 51-58. Defense counsel pointed out he had had proposed two names, Dr. Pincus and Dr. Vallely (a neuropsychologist from Jacksonville) and that the prosecutor had vetoed both ideas. R 51-58. The judge and the State both attempted to limit the choice to either the local area or the State of Florida. The judge stated that he would ultimately chose the expert if the parties could not agree. R 58. The judge ultimately chose a Dr. MacMillan, who did not testify. R 1954.

It is improper for the state to interfere with an indigent defendant's retention of experts. In Ake v. Oklahoma, 105 S.Ct. 1087 (1985) the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment guarantees indigent defendants the right to meaningful access to expert assistance, if that expert assistance is relevant to a defense. The Court's language in Ake makes it clear that the hearing should be ex parte.

> "When the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent."

Id. at 1095-1096. Several courts have held that Ake requires an ex parte hearing on the need for a defense expert. Brooks v. State, 385 S.E.2d 81 (Ga. 1989); McGregor v. State, 733 P.2d 416 (Okl.Cr. 1987); McGregor v. State, 754 P.2d 1216 (Okl.Cr. 1988); Washington v. State, 800 P.2d 252 (Okl.Cr. 1990). The Court in Brooks pointed out the danger of forcing the defendant to reveal his theory of the case to the prosecutor. 385 S.E. 2d at 84. In United States v. Meriweather, 486 F.2d 498, 505-507 (5th Cir. 1973) the Court held that it is error to allow the prosecution to be present and to oppose the application of subpoenas for an indigent defendant. It stated:

> "When an indigent defendant's case is subjected to pre-trial scrutiny by the prosecutor, while the monied defendant is able to proceed without such scrutiny, serious equal protection questions are raised."

Id. at 506. The same sort of equal protection problems exist when the prosecutor can determine whether the defense receives a mental health expert and who that expert is.

Florida Statutes and caselaw also support the idea that only the County Attorney has standing to object to a defense request for funds for experts. Fla. Stat. 27.54(3) provides that the county is responsible for the costs of pre-trial consultation with experts, in Public Defender cases, with the County having the right to contest the reasonableness of these fees. Fla. Stat. 27.34(2) establishes the same provisions for State Attorneys. Only the

County Attorney has standing to contest the of retaining of an expert by a Public Defender's Office or a State Attorney's Office.[2]

This Court's opinion in State v. Hamilton, 448 So.2d 1007 (Fla. 1984), also supports the idea that the State does not have standing to contest the retaining of a defense expert. In Hamilton, this Court held that defense counsel does not have to reveal the basis of his belief that his client may be incompetent or insane in order to have a mental health expert appointed pursuant to Fla.R.Crim.P. 3.216(a). The Court stated:

> in many instances the basis for the request for such an expert is founded on communications between the appointed lawyer and his client. Any inquiry into those communications would clearly violate the basic attorney-client privilege. Any inquiry into counsel's basis to believe that his indigent client is incompetent to stand trial or was insane at the time of the offense also impermissibly subjects the indigent defendant to an adversary proceeding concerning issues which may be litigated in the trial of the case. No solvent defendant would be subjected to this type of inquiry or proceeding.
>
> 448 So.2d at 1008-1009.

It is a violation of the attorney-client privilege and the right to effective assistance of counsel to allow the State to oppose a motion for a defense expert.

The Court's giving the State standing to oppose the motion was prejudicial. The County had no opposition to the motion. 3SR 6-7. The County's only concern was that a reasonable limit be

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[2] See Garner v. State, 445 So.2d 413 (Fla. 4th DCA 1984) (County is liable for costs of pre-trial consultation of experts by Public Defender's Office were "witnesses were expert and useful to the defense" and the County agreed their fees were reasonable. The Court reached this result even though there had been no judicial pre-approval of these experts).

imposed on the fees. 3SR 7. The trial court was about to grant the motion before the prosecution intervened. 3SR 7.

The State's argument contained both factual and legal misrepresentations. The prosecution tried to turn this into a motion for the appointment of experts under 3.216(d) (appointment of court experts, after a notice of insanity is filed). 3SR 8-12. There is nothing in the motion to invoke this rule. The original motion asked for the appointment of experts to aid the defense. This misrepresentation led to the argument that there had already been two experts appointed under this rule and there could only be one other expert and that the expert must be "disinterested". 3SR 8-12.[3] The State's participation was prejudicial error.

The trial court also erred in denying James Morgan's motion for appointment of Dr. Pincus and Dr. Lewis. It violates due process to deny "substantial equivalence" between the prosecution and an indigent defendant in resources. In Ake, supra, the United States Supreme Court reaffirmed a long line of cases which held that an indigent defendant has a right to the tools necessary for "a fair opportunity to present his defense". 105 S.Ct. 1092-1093. However, the Court went further than these prior decisions and discussed the balancing of the interests of the State and an indigent defendant. Id. at 1093-1095. The Court stated:

> "A State may not legitimately ascertain interest in maintenance of a strategic advantage over the defense if

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[3] The State also made a factual misrepresentation when it claimed that Dr. Pincus and Dr. Lewis had been retained by the Capitol Collateral Representative (CCR) to work on his case. In fact, they evaluated Mr. Morgan as part of a study of juveniles on death row and the CCR has never represented James Morgan.

> the result of that advantage is to cast a pall on the accuracy of the verdict obtained."

Id. at 1094. In Thornton v. State, 339 S.E.2d 240 (Ga. 1986) the Georgia Supreme Court held that an indigent is entitled to the appointment of an expert "whose experience, at a minimum, is substantially equivalent that of the state's expert witness." (Emphasis supplied) Id. at 241. The Court further held:

> In making such an appointment, the court should follow a defendant's preference, if, in its discretion, such appears to be appropriate as to qualifications, availability, cost to the public, and other pertinent factors.

Id. at 241, fn. 2.

The Florida Courts have also recognized the concept of substantial equivalence of resources between the prosecution and an indigent defendant. In Sawyer v. Board of County Commissioners, 596 So.2d 475 (Fla. 2d DCA 1992), the Court recognized the "mutuality concept" between a defendant and the prosecution in deciding to give an acquitted defendant costs that the prosecution could have taxed against him if he was convicted. This Court also relied, in part, on the resources which the state used in deciding that a case was "extraordinary" in order to exceed the fee cap. Makemson v. Martin County, 491 So.2d 1109, 1111 (Fla. 1986).

James Morgan was denied "substantial equivalence" of experts and resources both procedurally and substantively. Procedurally, the difference is obvious. The prosecution was able to retain one expert from California and one from Pennsylvania without an opportunity for the defense to object and without prior court approval. Whereas, the defense had to notice the State, and obtain

Court approval. Indeed, the State had veto power over the defense choice of experts, even when the County agreed.

This one-sided procedure resulted in substantive prejudice to Mr. Morgan's insanity defense and to his case for mitigation. The prosecutions's experts had two advantages over Mr. Morgan's experts in the eyes of the jury. (1) Mr. Morgan's experts relied on hypnosis as a diagnostic tool, which became a side issue of the case, and could have led the jury to discount their testimony. (2) The State's experts appeared to have more impressive credentials. The granting of the defense motion to retain Dr. Pincus and Dr. Lewis would have solved these problems.

In 1985, when they examined James Morgan, Drs. Caddy and Koson used hypnosis as a diagnostic tool. There were no restrictions at that time on the testimony of a previously hypnotized witness. Because of the subsequent controversy about the testimony of a previously hypnotized witness, the State was allowed to turn a major focus of the case into an attack on hypnosis. The prosecution was able to retain Dr. Martin Orne whose entire testimony consisted of an attack on the hypnotic procedures. He became an expert witness on the issue of insanity even though he had never examined James Morgan. Drs. Pincus and Lewis did not utilize hypnosis. R 1861-1884. The granting of the motion at issue would have provided Mr. Morgan with expert testimony which was not sidetracked by the issue of hypnosis.

Mr. Morgan was also denied "substantial equivalence" in terms of how the experts appeared to the jury. This Court has recognized that the "impressiveness" of an expert's credentials may affect a

case. Henry v. State, 574 So.2d 66, 70 (Fla. 1991). The defense witnesses who testified as to insanity were practicing mental health professionals in South Florida. However, they had no particularly striking academic or research credentials. R 1036-1037, 1128. The prosecution's retained experts went on at length about their papers and positions. R 1260-1261, 1385-1396. Dr. Caddy and Koson's testimony may have carried less weight with the jury due to they fact that they appeared to have less impressive credentials than the State's experts even though they may have more experience as practicing forensic mental health experts. The appointment of Dr. Lewis and Dr. Pincus would have allowed for "substantial equivalence". Dr. Pincus is a Professor of Neurology at Yale Medical School and Dr. Lewis is Professor of Psychiatry at New York University Medical School and have published extensively. Indeed, their study of Mr. Morgan was for an article published in an academic journal.

It was error to allow the State to interfere with Mr. Morgan's retention of experts and it also error to deny the motion. These errors were prejudicial as to guilt and independently prejudicial as to penalty. Reversal is required.

POINT V THE TRIAL COURT ERRED IN GIVING A SPECIAL JURY INSTRUCTION ON IRRESISTIBLE IMPULSE.

The trial court gave a special jury instruction, over defense objection, concerning "irresistible impulse." This special jury instruction was improper in two respects. (1) To the extent it was a correct statement of the law it was an unnecessary repetition of matters already covered by the Standard Jury Instruction. (2) It was written in such a way as to be confusing to the jurors on other

issues, especially the issue of premeditation. The giving of this instruction was prejudicial and denied James Morgan due process of law pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida onstitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The prosecution requested the following jury instruction.

> Irresistible impulse is not recognized in Florida as an excuse for an unlawful act.

R 2108.

Defense counsel objected to this instruction. R 1575-1576. Defense counsel pointed out that the instruction was unnecessary as it was already covered by the Standard Jury Instruction and that it would be confusing to the jury. R 1575-1576. The trial court gave the instruction. R 1593-1594, 1724.

To the extent this instruction was a correct statement of the law, it was already covered by the Standard Jury Instruction. The Standard Jury Instruction (given to the jury) state:

> Unrestrained passion or ungovernable temper is not insanity, even though the normal judgment of the person be overcome by passion or temper.

R 1723.

This instruction adequately stated that an action based on an irresistible impulse is not legal insanity. "Unrestrained passion or ungovernable temper" is functionally equivalent to an "irresistible impulse." The special jury instruction unduly emphasized a portion of the insanity instruction which was favorable to the state's position over the rest of the instruction. This undue emphasis was prejudicial to James Morgan. Beckham v. State, 209 So.2d 687 (Fla. 2d DCA 1968). In Beckham, supra, the Court

reversed for a new trial due to the trial court's repetition of the manslaughter instruction even though the instruction was legally correct.

The instruction also had a reasonable likelihood of confusing the jury on the issue of premeditation. There is one significant difference between the special jury instruction and the standard instruction. The standard instruction tells the jury that "unrestrained passion or ungovernable temper is not <u>insanity</u>." The special jury instruction says that an "irresistible impulse is not recognized in Florida as an <u>excuse</u> for an unlawful act." The standard jury instruction correctly tells the jury that the mental state, in question, is not <u>insanity</u>. The jury is still free to consider this mental state on the issue of degree of murder.

In contrast, the special jury instruction tells the jury that the mental state is not an "excuse." It is highly likely that the jury would incorrectly apply this beyond the question of insanity to the question of the degree of the homicide. The chance of misapplying this instruction is increased by the fact that the special jury instruction was given at the conclusion of the insanity instruction and immediately preceding the voluntary intoxication instruction. R 1593-1594.

The reasonable likelihood that the jury would misunderstand the special instruction to apply to premeditation is prejudicial. An action based on an irresistible impulse would not be a premeditated act. Premeditation requires reflection and deliberation. <u>Sireci v. State</u>, 399 So.2d 964, 967 (Fla. 1981); <u>Tien Wang v. State</u>, 426 So.2d 1004, 1005 (Fla. 3d DCA 1983); <u>Owen v. State</u>, 441

So.2d 1111, 1113 (Fla. 3d DCA 1983). The concept of irresistible impulse is contrary to premeditation.

POINT VI THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO ELICIT STATEMENTS MADE DURING A PSYCHIATRIC EXAMINATION.

The trial court allowed the prosecution to elicit and argue an inflammatory statement allegedly made by James Morgan to a court-appointed psychiatrist, Dr. Vaughn. Neither Dr. Vaughn, nor James Morgan, testified during the trial. These were prejudicial statements concerning the alleged facts of the incident. This evidence violated a line of cases prohibiting psychiatrists from eliciting incriminating statements from a criminal defendant. Parkin v. State, 238 So.2d 817 (Fla. 1970); Jones v. State, 289 So.2d 725 (Fla. 1974); McMunn v. State, 264 So.2d 868 (Fla. 1st DCA 1972); Curtis v. State, 589 So.2d 956 (Fla. 3d DCA 1991). This evidence violated Mr. Morgan's rights to remain silent and to due process of law pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution.

James Morgan made a pre-trial motion to exclude the statement made to Dr. Vaughn that "I must kill her." R 2000-2001. Initial argument was held on this issue and the trial court reserved ruling. 1SR 130-132. A second hearing was held. R 540-566. The statements were made by James Morgan during a 1981 examination by a court-appointed psychiatrist, Dr. Vaughn. R 546. He was never warned of his right to remain silent or other rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). R 541-542. The statements were made while under hypnosis. Defense counsel pointed out that this statement was elicited in violation of James Morgan's self-

incrimination rights and cited McMunn, supra. R 552-553. The trial court denied the motion to exclude this statement and gave defense counsel a standing objection. R 561-566.

The state brought these statements out through its cross-examination of Dr. Caddy. R 1067-1068. It again brought this testimony out during its direct examination of Dr. Dietz. R 1464. Defense counsel objected, moved to strike the testimony, and moved for mistrial. His objections were overruled and his motions were denied. R 1479-1485. He renewed his prior objections to this testimony and also objected on hearsay and confrontation clause grounds. R 1479-1485. The state argued this statement in closing argument. R 1710-1711. Defense counsel renewed his prior objection and moved for mistrial, and requested a curative instruction based on these arguments and evidence. R 1710-1711, 1714, 4SR 483.

This Court stated in Parkin, supra:

> The Court and the state should not in their inquiry go beyond eliciting the opinion of the expert as to sanity or insanity, and should not inquire as to information concerning the alleged offense provide by a defendant during his interview.
>
> 238 So.2d at 820.

In McMunn, supra, the defendant was charged with first degree murder and filed a notice of insanity and moved for a mental examination. 264 So.2d at 869. The Court appointed two psychiatrists to examine him. The prosecution called one of the psychiatrists and asked him about the defendant's statements about the offense. Id. at 869-870.

The Court stated:

> The privilege against self-incrimination is chiseled into the jurisprudence of our State and Nation. The defense

> of insanity is as fundamental a right on the part of a defendant as is a plea of not guilty. Scienter must be proved by the State and it is elementary that an insane person is incapable of formulating scienter.... A psychiatrist should testify as to his conclusions regarding a defendant's sanity, but to allow a psychiatrist to testify as to incriminating statements made to him by a defendant in the course of his examination of such defendant, would transgress the defendant's constitutional guarantee against self-incrimination.

Id. at 870.

The rationale of McMunn applies here. The state was allowed to bring out an incriminating statement given to a court-appointed psychiatrist. As in McMunn, the state used the statement to prove the element of intent. This violated the teaching of this Court in Parkin and its progeny, as well as the prohibition against self-incrimination embodied in the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution.

The admission of this evidence was also improper hearsay and a violation of the confrontation clauses of the United States and Florida Constitutions. Fla. Stat. § 90.802; Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 2, 9, 16, and 17 of the Florida Constitution. Neither Dr. Vaughn nor James Morgan testified in this case.

This statement was prejudicial. It is the only direct evidence of premeditation in the entire case. This is why the prosecution emphasized it and specifically connected it to premeditation. R 1710-1711. All of the circumstantial evidence was equally consistent with a second degree murder (a depraved mind regardless of human life). The defense experts testified that James Morgan was insane. The prosecution's expert stated that his condition was consistent with "unrestrained passion or ungovernable

conduct." R 1491. The admission of this statement was prejudicial both on the question of sanity and as to the degree of the offense.

Assuming, arguendo, this Court finds this evidence harmless as to guilt; it was harmful as to penalty. The penalty vote was close and there was substantial mitigation. This was the only direct evidence of any intent to kill.

POINT VII THE ADMISSION OF IRRELEVANT EVIDENCE DESIGNED SOLELY TO CREATE SYMPATHY FOR THE DECEASED DENIED MR. MORGAN DUE PROCESS.

The prosecution introduced, over objection, in the guilt phase, irrelevant evidence designed solely to win sympathy for the deceased. This denied James Morgan due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution. A new trial is required.

The prosecution moved to introduce the transcript of the prior testimony of Ed Matthews, a neighbor of the deceased. R 809. Defense counsel objected to parts of the transcript that were irrelevant and were solely designed to create sympathy. R 811. The trial court overruled and counsel was given a standing objection. R 811-812. These materials came into evidence. R 813-818.

Evidence designed to create sympathy for the deceased is reversible error. Jones v. State, 569 So.2d 1234 (Fla. 1990); Rowe v. State, 120 Fla. 649, 163 So. 22 (1935); Ashmore v. State, 214 So.2d 67 (Fla. 1st DCA 1968); Hathaway v. State, 100 So.2d 662 (Fla. 3d DCA 1958). In Jones, supra, this Court condemned this type of evidence and stated:

> "A verdict is an intellectual task to be performed on the basis of the applicable law and facts.... The law

> insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented." Id. at 1239.

The evidence objected to in this case is exactly the type of evidence which is designed to play on emotion without having any relevance to the issues at hand. The prosecutor brought out that the victim was a widow. R 810-813. He then asked:

> Q (Prosecutor): I see. Is she a pretty nice person, sir? How would you describe her?
>
> A She was a very lovely religious lady, very conscientious, very -- and she had a limited income. She still maintained herself well and the house well and the grounds well and she was a beautiful lady.
>
> R 812-813.

It may well have pushed the jury to avenge this "lovely, religious widow", who was a "beautiful lady" rather than to focus on James Morgan's substantial evidence of insanity. A new trial is required as in Rowe, supra, Ashmore, supra, and Hathaway, supra.

Assuming, arguendo, this Court finds this evidence harmless in the guilt phase it is independently prejudicial in the penalty phase. Jones, supra. The jury vote was only eight to four. This error was harmful in the penalty phase.[4]

POINT VIII THE TRIAL COURT ERRED IN ALLOWING A PROSECUTION WITNESS TO TESTIFY CONCERNING THE TRUTHFULNESS OF A DEFENSE WITNESSES.

This issue involves the prosecution calling an expert witness to testify concerning the truthfulness of critical defense evidence. This denied James Morgan due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9,

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[4] See Omelus v. State, 584 So.2d 563, 567 (Fla. 1991) (recognizing eight to four vote in holding error not harmless).

16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The prosecution called Dr. Martin Orne as an expert witness on hypnosis. He critiqued the hypnotic session administered by Mr. Morgan's experts. At one point during his direct examination the following colloquy occurred:

> Q [Prosecutor] Is there any reason to believe that the 1985 hypnotic session should be relied upon for its truth?
>
> DEFENSE COUNSEL: Objection, that's not for him to answer that.
>
> THE COURT: I'll sustain the objection.
>
> Q [Prosecutor] Is there any reason to believe that the defendant's performance and story in the 1985 hypnotic session that came through Dr. Caddy and Dr. Koson should be accepted as the truth.
>
> DEFENSE COUNSEL: The same objection.
>
> THE COURT: I'll take that answer. Go ahead, answer the question.
>
> A No, there's no reason but it's -- you -- you can never take the hypnotic statement as truth because hypnosis does not lead to truth The whole concept that hypnosis leads to truth is wrong. The likelihood of honest answering is better if the patient is not hypnotized.
>
> R 1328-1329.

It is error to allow one witness to comment on the credibility of another witness. Mosley v. State, 569 So.2d 832 (Fla. 2d DCA 1990); McKinney v. State, 579 So.2d 393 (Fla. 3rd DCA 1991); Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984). (All reverse for a new trial.) In Tingle v. State, 536 So.2d 202 (Fla. 1988) this Court recognized that this rule also prohibits an expert witness from commenting on the credibility of a witness. Id. at

204-205. See also United States v. Azure, 801 F.2d 336 (8th Cir. 1986).

The rule of Tingle, supra, includes expert testimony which indirectly comments on a witness' credibility. Weatherford v. State, 561 So.2d 629, 633-634 (Fla. 1st DCA 1990); Page v. Zordan By And Through Zordan, 564 So.2d 500, 501-502 (Fla. 2d DCA 1990).

In Erickson v. State, 565 So.2d 328, 330-331 (Fla. 4th DCA 1990) the court condemned the use of expert psychiatric testimony concerning the credibility of the accused. The court stated:

> It is also well established that expert testimony may not be offered to vouch for the credibility of a witness. *Tingle v. State*, 536 So.2d 202, 205 (Fla. 1988); *Kruse v. State*, 483 So.2d 1383 (Fla. 4th DCA 1986) *dismissed*, 507 So.2d 588 (1987). It logically follows that expert testimony should not be allowed in a criminal trial to attack the credibility of the accused, who has a right not to become a witness in the first place.

Id. at 331.

Here, the prosecution called an expert witness who directly commented on the truthfulness of James Morgan's statements under hypnosis. This violated Tingle. It also violated the principle that it is improper to call one expert to state his opinion of another expert. Nowitzke v. State, 572 So.2d 1346 (Fla. 1990). James Morgan called Dr. Caddy and Dr. Koson as expert witnesses on insanity. Dr. Caddy conducted the hypnotic session and Dr. Koson was present at the session. R 1080-1104. Both of them relied, in part, on the hypnotic session (including James' statements under hypnosis) for reaching their conclusion that Mr. Morgan was insane. R 1080-1104, 1137-1151. The testimony of Dr. Orne that Mr. Morgan's statements and conduct under hypnosis were not believable was devastating. A new trial is required. Assuming, arguendo,

this Court finds this error harmless in the guilt-innocence phase it is independently prejudicial in the penalty phase. This testimony was prejudicial in terms of the judge and jury's evaluation of mental mitigating factors. This was an important part of Mr. Morgan's case for a life sentence.

POINT IX THE TRIAL COURT ERRED IN FORCING MR. MORGAN TO ATTEMPT TO BE RE-HYPNOTIZED AND ALLOWING THE PROSECUTION TO PUT ON EVIDENCE CONCERNING THIS SESSION.

Mr. Morgan was forced to be re-hypnotized years after the incident and years after the original hypnosis session. The prosecution was then allowed to put on expert testimony concerning the inability of Mr. Morgan to be hypnotized at the second session and to comment that this meant that it was unlikely that the original session was valid. This was prejudicial error.

Mr. Morgan was originally hypnotized on April 28, 1985 as a diagnostic technique by a mental health professional. R 1080-1081, 1069A. This Court reversed due to the refusal to allow Mr. Morgan's expert witnesses to testify concerning the issue of sanity. Morgan v. State, 537 So.2d 973 (Fla. 1989).[5]

The judge granted a motion to compel re-hypnosis over defense objection. R 1885-1889, 2230-2251, 3SR 12-31. Mr. Morgan filed a Motion for Reconsideration of the prior ruling. R 1908-1909. This motion was denied. R 28-43. He was forced to submit to an unsuccessful attempt to re-hypnotize him on November 6, 1989, with prosecutors and police officers present and with the session being videotaped. R 604-605, 1104-1105A, 1108-1110.

[5] The trial court had refused to allow the experts to testify as they had used hypnosis.

This Court stated:

> The use of hypnosis is an evolving issue and, clearly, some safeguards are appropriate to help assure reliability in the courts. We find it appropriate in the future, when hypnosis may be used to refresh a defendant's memory or by an expert witness to facilitate a medical diagnosis, that reasonable notice be given the opposing party. Additionally, the hypnotic session should be recorded to ensure compliance with proper procedures and practices. At this time we recede from *Bundy II* only as it pertains to the defendant as a witness.

537 So.2d at 973 (emphasis supplied).

This Court stated that it is appropriate to allow the presence of the opposing party and taping in the future. It violates the ex post facto clauses of Article I, Section 10 and Article X, Section 9 of the Florida Constitution and Article I, Section 10 of the United States Constitution to apply this to Mr. Morgan. It denies Mr. Morgan due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17.

The only guidance out of this Court was Bundy v. State, 455 So.2d 330 (Fla. 1984) (Bundy I), when James Morgan was originally hypnotized. This Court held the hypnotized testimony to be admissible and did not impose any restrictions on the admissibility of the testimony of a previously hypnotized witness. The unforeseeability of the future restrictions on hypnosis was implicitly recognized by this Court in Spaziano v. State, 489 So.2d 720 (Fla. 1986). In Spaziano, this Court rejected a claim of ineffective assistance of counsel for failure to challenge the admissibility of hypnotized testimony prior to Bundy v. State, 471 So.2d 9 (Fla. 1985) (Bundy II). This Court rejected the idea that this was a foreseeable change in the law. Id. at 721.

The basic unfairness of applying the requirement of re-hypnosis, with the prosecution's attendance and videotaping is demonstrated by this Court's opinion in Bundy II. In that case this Court prohibited hypnotically refreshed testimony prospectively only. Id. at 18. This Court based it's decision on the fact that this was an "unforeseen change in the law" and on the fact that there had been reliance on the old standard. Id. These same reasons apply to Mr. Morgan's case. At the time that Mr. Morgan's expert witness decided to hypnotize him, there was no indication that this would result in him being forced to be re-hypnotized with videotaping and the presence of the prosecution.

The compelled re-examination of Mr. Morgan also violated his right to remain silent and attorney-client privilege, pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. In essence, Mr. Morgan was compelled to make a statement for the prosecution, which was used against him as an unforeseen consequence of the earlier use of a diagnostic technique. He was given no warnings concerning his right to remain silent. See Estelle v. Smith, 101 S.Ct. 1866 (1981).

Assuming, arguendo, this Court feels it is appropriate to apply this new rule retroactively to Mr. Morgan, he would also urge this Court to reconsider whether to apply this rule to hypnosis performed for diagnostic purposes. In this Court's opinion in Morgan, supra, it recognized that the use of hypnosis is a medically approved diagnostic technique and that this use is different from its use to refresh the recollection of a fact witness.

> Even without the *Rock* decision, we would conclude that expert testimony in this instance must be allowed. The issue is not whether Morgan's hypnotic statements are reliable testimony to prove the truth of the matter asserted. Rather, the question is limited to whether mental health experts can testify about Morgan's sanity if their opinion is based in part on information received from hypnotic statements obtained through a medically approved diagnostic technique. The evidence sought to be presented here is distinguishable from that of the *Bundy* cases or the *Rock* case. In *Bundy I* and *Bundy II*, the state sought to introduce statements from hypnotic sessions as direct evidence to prove the truth of the matter by refreshing a witness's recollection. In *Rock*, the defense attempted to present direct evidence to prove the truth of the matter asserted by refreshing the defendant's recollection....
>
> Courts cannot establish accepted medical practices; they can only ensure that accepted methods are properly utilized. We conclude that, even without the United States Supreme Court *Rock* decision, Morgan should have been permitted to introduce conclusions drawn from medically accepted techniques. Here, his mental health experts were effectively barred from using medically accepted procedures to diagnose him. If courts seek medical opinions, they cannot bar the medical profession from using accepted medical methods to reach an opinion.
>
> 573 So.2d at 976.

This portion of the opinion is inconsistent with the next section of the opinion which imposes such severe restrictions on the use of hypnosis as a diagnostic tool. The requirement of videotaping and prosecution presence is inconsistent with the confidentiality requirement of Fla.R.Crim.P. 3.216. This rule allows defense counsel to obtain a confidential expert to freely explore possible issues of insanity and/or mental mitigating circumstances. This Court should reverse for a new trial.

POINT X THE TRIAL COURT ERRED IN FORCING MR. MORGAN TO BE EXAMINED BY A PSYCHIATRIST RETAINED BY THE PROSECUTION.

Mr. Morgan was compelled to be examined by a prosecution psychiatrist after several court appointed psychiatrists had

examined him. This was reversible error. The trial court granted a motion to compel examination over defense objection. R 275-309, 2026. Both sides stated at the hearing that James Morgan had been examined by several court appointed doctors. R 275-309. The prosecution's expert, Dr. Dietz, ultimately examined James Morgan and was the key prosecution expert on the issue of sanity, the primary issue in the guilt phase. R 1384-1543.

Appellant recognizes that this Court stated in Henry v. State, 574 So.2d 66 (Fla. 1991) that it is proper to require a defendant to be examined by a prosecution retained psychiatrist. Id. at 70. Appellant would ask this Court to reconsider its statements in Henry. It must be noted that these statements are perhaps the slimmest of all precedent. This portion of the opinion was adopted by a four to three vote.[6] Additionally, the defendant in Henry received a new trial as only three members of the court agreed to affirm the conviction. It is questionable whether Henry is precedent.

The premise which underlies the reasoning of Henry is incorrect. The reasoning of Henry is based on an analogy to the right of a party in a civil case to seek a medical examination pursuant to Fla.R.Civ.P. 1.360. This is a faulty analogy for several reasons. In a criminal case there is a right to remain silent pursuant to the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution. Estelle v. Smith, 101 S.Ct. 1866 (1981); Traylor v. State, 596 So.2d 957 (Fla.

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[6] See Payne v. Tennessee, 111 S.Ct. 2597, 2610-2611 (1991) (Recognized that the fact that a case was "decided by the narrowest of margins" is a factor in whether to overrule the case).

1992). There is no such right in civil cases.[7] Secondly, in a criminal case involving an insanity defense Fla.R.Crim.P. 3.216 requires the court to appoint two or three experts to examine the defendant on sanity, upon motion of either party. There is no analogous provision in the Civil Rules. This provision allows fair access to evidence concerning the defendant's mental state. Thirdly, in the civil context there is specific authorization, by rule, to have retained experts conduct an evaluation. In the criminal context there is no such authorization. See State v. Smith, 260 So.2d 489, 491 (Fla. 1972). (Holding that a trial court had no authority to compel an eyewitness to submit to an eye exam, even though the State's case depended on eyewitness testimony.)

The Henry opinion leaves open several questions. First, it does not say if there are any limits to the number of retained mental health experts that the defendant can be forced to be examined by. Most importantly, it does not say by what standard the trial judge is to rule on the motion for compelled exam.

Assuming, arguendo, that there is no per se bar to a compelled examination, Appellant would urge this Court to adopt a test requiring "extreme and compelling circumstances" in order to compel an exam. This is the rule that several district courts of appeal have adopted in terms of a compelled (physical or mental) examination of a complaining witness in a sexual battery case. State v. Coe, 521 So.2d 373 (Fla. 2d DCA 1988); State v. LeBlanc, 558 So.2d

[7] See Hickson v. State, 589 So.2d 1366 (Fla. 1st DCA 1991) (Holding that the Fifth Amendment precludes a compelled examination of a defendant, even where that defendant is planning to introduce an expert as to the "Battered Spouse Syndrome").

507 (Fla. 3d DCA 1990); Dinkins v. State, 244 So.2d 148 (Fla. 4th DCA 1971). These courts adopted this position even though the complaining witness had no Fifth Amendment protection and the witness' psychological or physical state is relevant.

The prosecution did not lay a proper predicate under this standard. It merely asserted a generalized right to the exam under a theory of "equal access". R 275-309, 2026. The prosecutor admitted at the hearing that Mr. Morgan had been compelled to be examined by three court appointed doctors. (Drs. Goren, Cheshire, and Mortimer). R 291-293. Mr. Morgan was also compelled to be re-hypnotized, in the presence of the prosecution.

An analysis of the caselaw under the "extreme and compelling circumstances" test demonstrates that the prosecution did not meet this standard. In State v. LeBlanc, supra, the Court quashed an order compelling an alleged victim of sexual abuse to be evaluated by a psychologist selected by the defense. The Court noted that a compelled psychological exam is a significant invasion of privacy. 558 So.2d 507 (Fla. 3d DCA 1990). The Court also relied, in part, on the fact that the children had been previously evaluated by a court appointed psychologist, in a dependency proceeding and had videotaped interviews and that the videotape and the expert's reports were available to the defendant. In State v. Drab, 546 So.2d 54 (Fla. 4th DCA 1989) the Court quashed an order compelling a physical exam of an alleged sexual battery victim, relying on the fact that the victim had previously voluntarily had a physical exam. In State v. Farr, 558 So.2d 437 (Fla. 4th DCA 1990), the Court quashed an order for a compelled physical exam of

an alleged sexual battery victim where she had previously been voluntarily examined. Here, there had been compelled exams by three court-appointed experts. The prosecution had deposed them. Some had also testified in one of the previous trials. Additionally the prosecution had deposed Mr. Morgan's experts and had their testimony from the prior trial. Finally, Mr. Morgan was compelled to be re-hypnotized in the presence of the prosecution and on videotape. The prosecution had access to all this material. The prosecution fell far short of establishing "extreme and compelling circumstances" as explained in LeBlanc, supra, Drab, supra, and Farr, supra.

Assuming, arguendo, this Court adopts the "good cause" of Fla.R.Civ.P. 1.360, the prosecution failed to meet this standard. In Martin v. Tindell, 98 So.2d 473 (Fla. 1957) this Court held that it was proper for a judge to deny a defendant's motion for a physical exam of the plaintiff in a personal injury case. Id. at 475. This Court relied on the fact that the defendant had full access to the hospital reports and medical records of the treating physicians. Id. The Court held that due to this liberal access a compulsory physical examination was not warranted. Id. In Schottenstein v. Schottenstein, 384 So.2d 933 (Fla. 3d DCA 1980) the Court struck down an order for psychological evaluations for the minor children in a divorce proceeding due to the children being upset after visits with their father. Id. at 936. The emphasized the right "to be free from a compulsory mental examination" and held that the "good cause" requirement had not been met. See also Schlagenauf v. Holder, 85 S. Ct. 234 (1964) (reversing an

order for medical exams and stating that "mental and physical examinations are only to be ordered upon a discriminating application" of the "good cause" requirements of Federal Rule of Civil Procedure 35). Here, the moving party had far greater access to the opposing party's medical/psychological condition than in Martin v. Tindell, supra. Even under the "good cause" standard it was error to compel James Morgan to be examined. This order denied Mr. Morgan due process of law pursuant to Article I, Sections 2, 9, 16, 17, and 23 of the Florida Constitution, the Florida Rules of Criminal Procedure, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT XI THIS CASE MUST BE REVERSED FOR A NEW TRIAL DUE TO AN INCOMPLETE RECORD ON APPEAL.

Numerous aspects of the current record are inaudible. The inaudibles often occur at crucial places in the transcript, including several in a discussion about shackling. Improper shackling is reversible error. Bello v. State, 547 So.2d 914, 918 (Fla. 1989); Elledge v. Dugger, 823 F.2d 1439, 1450-1452 (11th Cir. 1987). These inaudibles are prejudicial to counsel's ability to properly brief the issues in this case and deny Mr. Morgan due process of law and the effective assistance of counsel pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

An appellant has a right to a complete record on appeal. Lipman v. State, 428 So.2d 733, 737 (Fla. 1st DCA 1983); Loucks v. State, 471 So.2d 131, 132 (Fla. 4th DCA 1985). This is especially true in a capital case. Delap v. State, 350 So.2d 462, 463 (Fla.

1977); § 921.141, Florida Statutes (1987); Rule 9.140(f). If it is impossible to obtain a complete record for appellate review, reversal is required. Felton v. State, 534 So.2d 911 (Fla. 3d DCA 1988); Yancy v. State, 267 So.2d 836 (Fla. 4th DCA 1972).

A review of the existing record demonstrates that substantial inaudibles remain. Page 100 of the Record consists of a completely inaudible bench conference. 4SR 23. Inaudible bench conferences are a serious defect in the record. Attorneys often come to the bench to make objections and motions (such as a motion for mistrial) outside of the hearing of the jury. Indeed, this is the most common reason for a bench conference. Page 104 contains another bench conference that remains substantially inaudible. 4SR 23. A bench conference at 106 remains partially inaudible.

Page 107 contains two bench conferences. One remains completely inaudible. 4SR 23. Additionally, one bench conference is partially audible. 4SR 23. It now reads as follows:

> 107 - ... shackled -- (inaudible) -- without the jurors seeing him -- (inaudible) -- he wasn't in Martin County -- (inaudible) -- Sheriff of Indian River County -- (inaudible) -- THE COURT: -- Order -- (inaudible) -- THE CLERK: Rick, she can't hear you. THE COURT: I don't now how we are going to do it. MR. UDELL: Can we remove them all for now? Bring him in here -- (inaudible) -- MR. BARLOW: We would have to send the jurors out. THE COURT: Huh? MR. BARLOW: We would have to send the jurors out -- (inaudible) -- THE COURT: All right.
>
> 4SR 23.

The parties disagreed on the remand as to whether James Morgan had leg braces on or waist chains on. 4SR 673-674. However, they both agreed that there had been some form of restraints.

The confusion in this record concerning the shackling and/or leg braces on Mr. Morgan is prejudicial. This alone is grounds for

reversal due to an inadequate record. It is clear that shackling a defendant without a showing of necessity is reversible error. Bello, supra; Elledge, supra. Due to an inadequate record, we will never know how James Morgan was restrained and what objections or motions were made concerning this.

The remaining inaudible at page 510 is severely problematic. 4SR 132. A potential juror indicates he has knowledge of the incident. R 508-509; 4SR 132. The following then occurs:

> (The bench conference having been concluded the proceedings continued in open Court as follows:)
>
> THE COURT: Sir, in an abundance of caution I am going to excuse you from further service. I hope you don't take this personally because I was kind of looking forward to your service but I think you will probably understand.
>
> MR. LAMPE: -- (inaudible) --
>
> THE COURT: Please don't because right now is a kind of delicate situation but I would like to talk to you some time later after the case.
>
> MR. LAMPE: Yes sir.
>
> R 509-510; 4SR 132.

This juror may have begun to say something prejudicial, in front of the entire panel, concerning his knowledge of the case. This deficiency in the record is prejudicial.

Portions of the trial itself remain inaudible. Dr. Center was a key defense witness on the issue of James Morgan's brain damage. A portion of his testimony remains inaudible on the issue of brain damage. R 1212; 4SR 341. A portion of the cross-examination of prosecution witness Martin Orne remains inaudible. R 1344; 4SR 368, 712-713. On two occasions a portion of the defense counsel's comments during the charge conference remain inaudible. R 1459,

1580; 4SR 396-397. There are still inaudibles remaining in pre-trial motion hearings. 1 SR6, 16, 37, 64, 75, 76, 81, 83, 90-01, 104; 4SR 505. The remaining deficiencies in the record are substantial. The issue of shackling is important as it is an issue that often constitutes reversible error. Bello, supra; Elledge, supra.

Shackling constitutes reversible error if done over objection and without a showing of necessity. It is clear that James Morgan was shackled. There is no way of knowing whether there was an objection or a showing of necessity. The fact that numerous bench conferences are inaudible is also prejudicial. Bench conferences normally concern objections, motions, and legal issues. We will never know what legal issues were discussed at these bench conferences. These missing portions require reversal.

POINT XII THE EXECUTION OF JAMES MORGAN WOULD VIOLATE THE FLORIDA AND UNITED STATES CONSTITUTIONS AS HE WAS 16 AT THE TIME OF THE OFFENSE.

This case involves an issue of first impression before this Court. Whether it violates Article I, Sections 9 and 17 of the Florida Constitution to execute a person who was 16 at the time of the offense? In LeCroy v. State, 533 So.2d 750, 758 (Fla. 1988) this Court held that "there is no constitutional bar" to impose the death penalty on a person who was 17.[8] However, this Court made clear that it was not reaching the question of whether the death penalty was barred at a lower age. An analysis of this

[8] LeCroy seems to be dealing with the Eighth Amendment as it consistently discusses "cruel and unusual punishment."

Court's decisions demonstrates that it is a violation of the Florida Constitution to execute a 16-year-old.

James Morgan made a pre-trial motion to prohibit the application of the death penalty to him as he was 16 at the time of the offense. R 1973, 1SR 101-103. The prosecutor stipulated that he was 16 and the trial court so found. R 1810; SR 101. James Morgan's motion was specifically made in reliance on the Florida Constitution. 1SR 101-103. The trial court denied the motion and ultimately imposed the death penalty. 1SR 103, R 1806-1814.

This Court's analysis of Article I, Section 17 shows that the execution of a 16 year old violates the Florida Constitution. In Tillman v. State, 591 So.2d 167 (Fla. 1991) this Court emphasized the fact that Article I, Section 17 of the Florida Constitution prohibits "cruel or unusual punishment". Id. at 169. It noted the distinction to the Eighth Amendment to the United States Constitution which only prohibits "cruel and unusual punishment". It went on to hold that if a death sentence is unusual it violates the Florida Constitution. In Tillman, the sentence was reduced to life imprisonment as the record was not sufficiently complete to perform proportionality review. Id. at 169. This Court stated that proportionality review is required by Article I, Section 17 of the Florida Constitution, even thouth it is not required by the Eighth Amendment. See Pulley v. Harris, 465 U.S. 37 (1984).

Tillman, supra, represents a part of a broader line of cases in which this Court has analyzed criminal law issues under the Florida Constitution and has held that the Florida Constitution provides broader protections than the United States Constitution.

Wright v. State, 586 So.2d 1024 (Fla. 1991); Walls v. State, 580 So.2d 131 (Fla. 1991); Burr v.State, 576 So.2d 278 (Fla. 1991).[9] Traylor v. State, 596 So.2d 957, 961 (Fla. 1992) explains the reasoning behind this development. The Court noted that: "State courts and constitutions have traditionally served as the prime protectors of their citizens' basic freedom." Id. at 961.

> When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein. We are similarly bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy.
>
> Id. at 962-963.

This Court went on to describe the function of the Declaration of Rights in Article I:

> The text of our Florida Constitution begins with a Declaration of Rights -- a series of rights so basic that the framers of our Constitution accorded them a place of special privilege. These rights embrace a broad spectrum of enumerated and implied liberties that conjoin to form a single overarching freedom: They protect each individual within our borders from the unjust encroachment of state authority -- from whatever official source -- into his or her life. Each right is, in fact, a distinct freedom guaranteed to each Floridian against government intrusion. Each right operates in favor of the individual, against government.
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> Id. at 963.

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[9] Recent commentors have urged this Court to use Article I, Section 17 to define death penalty jurisprudence. The State Constitution's Cruel or Unusual Punishment Clause: The Basis For Future Death Penalty Jurisprudence in Florida, 20 F.S.U. Law Review 229 (1992).

The execution of a 16 year old is "unusual" and in violation of Article I, Section 17.[10] Tillman, supra. Black's Law Dictionary defines "unusual" as "uncommon, not usual, rare." The execution of a 16 year old fits any of these definitions. The "unusual" nature of such a death sentence can be seen in Florida, nationally, and internationally. In interpreting the Florida Constitution, the experience of Florida is the most important consideration. The unusual nature of this sentence in Florida can be seen in three respects; actual executions, death sentences affirmed on direct appeal, and death sentences imposed at the trial level. No one under 17 has been executed in Florida since 1954. Appendix. It has been 38 years since anyone as young as James Morgan was executed. His execution would be a throwback to a different era. In 1954, Florida was a segregated state, interracial marriage was against the law, indigent defendants were denied the right to counsel, the death penalty applied to rape, and our death penalty statute was an unconstitutionally standardless statute. This is the sort of justice we will be returning to if this Court is to approve the execution of James Morgan. An event that occurs every 38 years is certainly "unusual" by anyone's standard.

A review of appellate decision shows that, in the post-Furman era, this Court has never affirmed a death sentence of a person under 17. See Morgan I, II, and III; Vasil v. State, 374 So.2d 465 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979); Simpson v. State, 418 So.2d 984 (Fla. 1982); Ross v. State, 386 So.2d 1191

[10] The sentence is also "cruel" as it involves the needless infliction of suffering with no deterrent value.

(Fla. 1980). This is a strong indicator of the unusual nature of such a penalty. If this Court were to affirm Mr. Morgan's death sentence, he would be the only person to have his sentence affirmed at such a young age.

The rarity of such a sentence is also shown by the number of death sentences imposed on persons under 17. Since 1977, the death penalty has been imposed on only two persons of this age (James Morgan and Jerome Allen). Appendix. An event that occurs twice in 15 years must be considered unusual.

The execution of a person under 17 is also rejected both nationally and internationally. No one in the United States of this age has been executed since 1959. Appendix. This is a strong indicator that the American people have rejected the concept of executing persons under 17. An event that has not happened in 33 years must be considered unusual.

The rejection of the death penalty for those under 17, nationally and internationally, is also shown in other respects. Thirty American states and the Federal Government prohibit the execution of a 16-year-old. Stanford v. Kentucky, 109 S.Ct. 2969, 2983 (1989) (dissenting opinion of Justices Brennan, Marshal, Blackmun, and Stevens). Many other American states have never sentenced anyone to death of this age. Appendix. The vast majority of nations also reject the execution of a 16 year old. Id. at 2985-2986. Prominent national organizations have also taken this position; such as the American Bar Association, the National Counsel on Juvenile and Family Court Judges, the National Commis-

sion on Reform of the Federal Criminal Laws, and the National Parents and Teachers Association. Id. at 2985.

This Court's experience with the death penalty for sexual battery is analogous to the experience with the death penalty for persons under 17. The Florida capital felony statute provides for death as a possible punishment if a person over 18 sexually batters a child under 12. Fla. Stat. § 794.011. Between 1975 and 1981 six persons were sentenced to death for this offense. Appendix. In 1981, this Court held that the death penalty for this offense violated the Cruel and Unusual clause of the Eighth Amendment. Buford v. State, 403 So.2d 943, 950-951 (Fla. 1981). Presumably the Court found it unusual as the Federal Constitution requires both findings. The Court noted that it had not reached the issue previously as it had always reversed on other grounds.

A comparison of the death penalty for 16-year-olds with that for capital sexual battery reveals an even stronger case that the penalty is unusual. The death penalty was imposed for sexual battery on a child approximately once a year during the six years prior to this Court's opinion in Buford. By contrast, the death penalty has been imposed on only two people under 17 during the last 15 years. Thus, in terms of rate of imposition the death penalty for persons under 17 is far more unusual. This Court has reversed all the death sentences for persons under 17 just as it did for cases involving sexual battery upon a child. Although this Court acted under the Eighth Amendment in Buford, an even less stringent showing is required to show a violation of Article I, Section 17 as noted in Tillman.

The logic of Tillman compels this Court to take the next step and declare the death penalty unconstitutional for persons under 17 as it did for sexual battery upon a child in Buford. No one has been executed for this offense in Florida since 1954. The death penalty for persons under 17 is part of an era which our judicial system has rejected. The death penalty for persons who are under 17 at the time of the offense violates Article I, Section 17.[11]

POINT XIII DEATH IS DISPROPORTIONATE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1989).

> Death is a unique punishment in its finality and its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.
>
> State v. Dixon, 283 So.2d 1, 7 (Fla. 1973).

Here, death is clearly disproportionate. This Honorable Court has described James Morgan as follows:

> Morgan was sixteen years old at the time of the incident, of marginal intelligence, unable to read or write, had sniffed gasoline regularly since he was four, and was described as an alcoholic. Morgan v. State, 537 So.2d 973 (Fla. 1989).

[11] James Morgan would also argue that this penalty is violative of the Eighth and Fourteenth Amendments to the United States Constitution. The United States Supreme Court rejected this issue in Stanford v. Kentucky, supra. However, the concurring opinion of Justice O'Connor was the controlling vote. Justice O'Connor explicitly left this issue open for reconsideration with the passage of time. 109 S.Ct. 2980-2982. No one under 17 has been executed for 33 years in the United States. This constitutes an implicit rejection of the death penalty for 16-year-olds. This penalty violates the Eighth Amendment and Article I, Section 17.

It would be disproportionate to execute him in light of these facts and other mitigating evidence. This is especially true in light of the fact that there were only two aggravating circumstances even argued by the prosecution.

There are several mitigating circumstances which mandate life. Perhaps the most important mitigating circumstance is James Morgan's age. Appellant has argued elsewhere that it violates the Florida and Federal Constitutions to execute a 16 year old. Regardless of this Court's disposition of that issue, the age of 16 is a very strong mitigating factor.[12] The United States Supreme Court has stated "the chronological age of a minor is itself a mitigating factor of great weight." Eddings v. Oklahoma, 455 U.S. 104, 116 (1989). The strength of this mitigator is shown by the general rejection of the death penalty for 16 year olds. Even if this Court does not reject the death penalty for 16 year olds in toto it must recognize this is an extraordinarily weighty mitigator which calls for the imposition of a life sentence in all but the rarest of cases.

The power of age 16 as mitigating is shown by the fact that this Court has recognized that far older ages can be mitigating. See Thomas v. State, 456 So.2d 454 (Fla. 1984) (20); Oat v. State, 446 So.2d 90 (Fla. 1984) (22). In Smith v. State, 492 So.2d 1063 (Fla. 1986) this Honorable Court held it to be error to refuse a jury instruction on age as mitigation in a case involving a 20 year

[12] The Court has recognized since Dixon that it is the weight of the aggravating and mitigating circumstances not merely their number. Dixon, supra at p. 10.

old. Id. at 1067. If ages such as 20 or 22 can be mitigating then the age of 16 must be an extremely weighty mitigator.

The second mitigating circumstance is James Morgan's dull-normal intelligence. James' I.Q. was well below normal for his age, which placed him in the bottom 16% of his age group in intelligence. R 1060; 1404-1405. This is both a separate mitigating circumstance and it strengthens the mitigating circumstance of youth. In Meeks v. State, 336 So.2d 1142, 1143 (Fla. 1976) it was recognized that dull-normal intelligence would make an age of 21 mitigating. When he was tested at age 20, he had a psycho-linguistic age of 8. Dull-normal intelligence in a 16 year old is a powerful mitigating circumstance. James Morgan has neither the judgment that life experience brings, nor the judgment that average intelligence brings.

James Morgan's extreme immaturity and sheltered early life is also a significant mitigating factor. Dr. Caddy described James as "very immature" even for his age. R 1096. In Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1990) this Court found a death sentence disproportionate in part because "Livington's youth, inexperience and immaturity also significantly mitigate his offense." James Morgan has the same combination except that he is even younger than Livingston (16 instead of 17).

James Morgan had a learning disorder that caused him to have problems in school, including placement in slow learning classes. It ultimately caused him to drop out of school very young. R 1131, 1160-1162, 1167-1168, 1185-1189, 1199-1202. At age 20, he was still testing at the first grade level in reading and spelling and

in the fifth grade level in math. R 1199-1201. Being a slow learner, is a recognized mitigating circumstance. Neary v. State, 384 So.2d 881, 886-887 (Fla. 1980).

James Morgan had regularly inhaled gasoline, to the point of intoxication, since he was very young and had inhaled gasoline on the date of the incident. R 1026-1027, 1169. The prosecution's expert corroborated this. R 1413-1414. It was undisputed that inhaling gasoline fumes can cause auditory and visual hallucinations; long term use can cause brain damage. R 1131-1132. James had begun drinking when he was 13 and continually increased his drinking as he got older. R 1054. This Court has recognized that long term use of intoxicants is a mitigating factor. Livingston, supra, at 1292; Nibert v. State, 574 So.2d 1059 (Fla. 1990).

James was almost completely lacking in judgment and reasoning ability. Dr. Caddy described him as follows:

> We have a person with very poor insight into the world around him, relatively little ability to introspect to take -- to take himself and think about himself in the context of his life and his world. His judgment, his ability to abstract and to reason was poor. His imagination was simplistic and very concrete.
>
> R 1060.

This testimony was never rebutted and is consistent with a 16 year old with dull-norm I.Q. who had inhaled gasoline fumes for years.

James also suffered from a lack of even rudimentary interpersonal and social skills. Dr. Caddy stated that:

> He looked in the testing protocol as if he lacked an appreciation of interpersonal relationships, very lacking in talent in any social facilitation or social graces. And I don't mean by that simply manners, I mean the ability to interact socially with another person other than a very, very limited degree was -- was an issue of real limitations to this man's overall interpersonal

> functions. There seemed to be an overall sadness in --
> in his demeanor as he presented himself.

R 1060.

The trial judge found the statutory mental mitigating circumstance of extreme mental or emotional disturbance pursuant to Florida Statute 921.141(6)(f). This weighs in the balance.

There was unrebutted evidence that James Morgan had been sexually abused. R 1498-1499. Dr. Dietz, the prosecution's expert testified that two cousins and an uncle had forced him to perform oral and anal sex. R 1498-1499. The state is bound by its own evidence. D.J.S. v. State, 524 So.2d 1024 (Fla. 1st DCA 1987); Hodge v. State, 315 So.2d 507 (Fla. 1st DCA 1975); Weinstein v. State, 269 So.2d 70 (Fla. 1st DCA 1972). There was a history of alcohol abuse and general chaos in his family. R 1054. His father was an alcoholic. R 1169. Being a victim of child abuse is a recognized mitigating factor. Livingston, supra; Nibert, supra.

James Morgan had no other violence in his background. Dr. Dietz,the prosecution's expert, testified that James Morgan did not meet the criteria of "intermittent explosive disorder" due to his lack of other violence. R 1436-1440. This established the non-statutory mitigating circumstance of lack of prior violence. Perry v. State, 522 So.2d 817, 821 (Fla. 1978).

This is an offense with little or no premeditation. It was corroborated by all experts that James was having an uncontrollable rage reaction. R 1066-18; 10700; 1094-11102; 1107-1125; 1132-1134; 1144-1151; 1413-1414; 1416-1430; 1474-1476, 1492-1493. Dr. Dietz, the prosecution's expert stated that James' conduct was consistent with "unrestrained passion or ungovernable conduct." R 1492. This

Court has recognized that if the "killing, although premeditated, was most likely upon reflection of a short duration." This is a significant mitigator. Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986). See also Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985).

The strong evidence of organic brain impairment must be considered.[13] Dr. Center had the most complete background in neuropsychology and performed the most complete testing. He had a doctorate in psychology. R 1173-1174. He studied with Dr. Ralph Reitan, one of the originators of the Halstead-Reitan neuropsychological batteries. R 1175. This has been one of the most widely recognized neuropsychological batteries for many years. Filskov and Boll, Handbook of Clinic Neuropsychology, p. 577-607 (1981). Anastasi, Psychological Testing p. 474-477 (5th Edition 1982). Dr. Center had also studied with Dr. Golden, one of the leading experts on the Luria-Nebraska battery of neuropsychological tests. See Handbook of Clinical Neuropsychology, supra, at 608-642, Psychological Testing, supra at 474-476. Dr. Center examined James Morgan for eight hours, on neuropsychological issues, and gave him a full battery of neuropsychological tests. R 1180-1218. He reviewed the report of a school psychologist. R 1199-1201. He stated that all of the testing was consistent with brain impairment, predominately on the left side of the brain. R 1185, 1197. He also testified that the brain damage was of a type that affected James' ability to understand complex situations, to respond

[13] The mitigation previously discussed is unrebutted. Appellant would argue that the evidence of brain damage is also substantially unrebutted. Assuming, arguendo, that this Court feels Dr. Dietz testimony is in rebuttal to the existence of brain damage; the better evidence supports brain damage.

appropriately under stress, to understand problems and to exercise proper judgment. R 1197, 1204-1218. Dr. Caddy performed neuropsychological tests on James and his tests also showed brain damage. R 1106-1108.

The prosecution's expert, Dr. Dietz, differs in some respects concerning the issue of brain damage. He stated that he did not see "clinically significant evidence" of "serious brain damage" although he could not rule this out. R 1405-1406. Dr. Dietz stated that he had read Dr. Center's testimony and "couldn't tell what he was saying really". R 1408. Dr. Dietz performed no significant neuropsychological tests. The only testing he performed which related to brain impairment were brief oral memory tests and to have James make a copy of a drawing. R 1406.

This Court can consider the evidence of brain impairment in the proportionality analysis in two ways: (1) Appellant would argue that the evidence of brain damage is essentially unrebutted. Although Dr. Dietz stated that he did not see "clinically significant evidence" of "serious brain damage" he specifically said he could not rule out brain damage. Dr. Dietz did not do the full neuropsychological testing done by Dr. Center and Dr. Caddy. Thus, the evidence is essentially unrebutted. (2) Assuming, arguendo, this Court feels there is some conflict in the evidence; it must consider the fact that the overwhelming weight of the evidence supports brain impairment. Dr. Center was a neuropsychologist by specialty. He had studied with the originators of two of the most widely used neuropsychological batteries; the Nebraska-Luria and Halstead-Reitan tests. He spent eight hours examining James Morgan

as to neuropsychological issues. His finding of brain impairment was consistent with Dr. Caddy's conclusion. Dr. Dietz is not a neuropsychologist or neurologist and performed only brief memory and copying tests as part of an overall mental status exam. He admitted that his limited testing could not rule out brain damage. This Court must consider the significant evidence of brain damage in the proportionality balance.

The strong mitigating factors, most notably the age of 16, must be weighed against two relatively weak aggravating circumstances.[14] The first aggravating circumstance found by the judge is that the capital felony occurred during an enumerated felony pursuant to Florida Statute 921.141(5)(d). The underlying felony aggravator is the weakest aggravating circumstance of all, as it is inherent in every felony-murder prosecution. This Court has implicitly recognized this in Rembert v. State, 445 So.2d 337, 340-341 (Fla. 1984) wherein this Court reduced a death sentence to life imprisonment where the underlying felony is the only aggravator, even though there were no mitigating circumstances and the jury recommended death. This Court has consistently reduced to life cases where the underlying felony is the only aggravating circumstance even though the jury recommended death. Proffitt v. State, 510 So.2d 896 (Fla. 1987); Caruthers v. State, 485 So.2d 496 (Fla. 1985); Menendez v. State, 419 So.2d 312 (Fla. 1982).

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[14] Appellant has separately argued that these aggravators should not apply. Of course, if either aggravator is rejected, life is clearly mandated. See Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989) (Death sentence will not be affirmed based on one aggravator unless little or nothing in mitigation).

The other aggravating circumstance found by the judge is the "heinous, atrocious, and cruel" (HAC) aggravator. This is a weak aggravator in the present case. In Amazon v. State, 487 So.2d 8, 13 (Fla. 1986) this Court held that the aggravating circumstance of heinous, atrocious, or cruel carries less weight if the homicide is committed "in an irrational frenzy". The defense experts testified that James was insane. The prosecution's expert testified that James was acting in a rage reaction consistent with "unrestrained passion or ungovernable conduct". R 1492. Thus HAC must be given less weight as in Amazon, supra.

The proportionality balance mandates life. There are two relatively weak aggravating circumstances; one of which is inherent in all felony-murders and one which must be given less weight. This must be weighed against two statutory mitigating circumstances, one of which is very strong (the age of 16) and extreme mental or emotional disturbance, R 2279-2280, as well as several non-statutory mitigating circumstances. This Court's cases mandate a life sentence.

Livingston, supra, involves a case which is more aggravated and less mitigated than the current case and this Court reduced the sentence to life despite a death recommendation from a jury. In Livingston, the defendant was convicted of burglary, grand theft, first degree murder, attempted first degree murder, and displaying a weapon during a robbery. Id. at 1288. James was convicted of only first degree murder. Livingston's case involved two separate incidents; a burglary and grand theft at noon; and an armed robbery, first degree murder, attempted first degree murder and

display of a weapon during a robbery at 8 p.m. on the same day. Id. at 1289. James Morgan's case only involves one criminal incident that was described by everyone as rage with little or no premeditation. The far greater planning and higher level of criminal intent in Livingston is evident in several ways. There is no doubt that Livingston intentionally armed himself with a firearm (a lethal weapon), whereas Morgan involves a work tool. It is significant that Livingston attempted to murder a second person and it was only by chance that he did not. Id. at 1289, 1292. As this Court noted, Livingston killed one victim and then said: "I'm going to get the one in the back [of the store]" and then shot at another person. Id. at 1292. Livingston is more aggravated than this case.

In Livingston the trial court found three aggravating circumstances; this Court struck one; leaving two valid circumstances, during an enumerated felony and prior violent felony. In Jim Morgan's case, the prosecution only sought two aggravating circumstances; during an enumerated felony and heinous, atrocious, or cruel. The enumerated felony aggravator is the same in both cases. In Jim Morgan's case HAC must be weighed less because the offense was an irrational frenzy. In contrast, the prior violent felony aggravator in Livingston is an extremely strong one. In Livingston, there was evidence of opportunity for reflection and a conscious attempt to murder a second person. (It was chance that a second person did not die.) Although there are two aggravators in both cases; the aggravators in Livingston carry more weight.

The mitigation in Appellant's case is also stronger than in Livingston. In Livingston, supra, the trial judge found one statutory mitigating circumstance (age of seventeen) and one non-statutory mitigating circumstance. ("Livingston's unfortunate home life and rearing"). Id. at 1292. In the present case, there is one statutory mitigating found by the judge (extreme mental or emotional disturbance) and another powerful mitigator (age of 16). James Morgan has two statutory mitigators as opposed to Livingston's one and the age mitigator is stronger.

In Livingston, this Court went beyond the judge's findings and weighed several non-statutory mitigating circumstances, not found by the trial judge. Id. at 1292. An analysis of these circumstances reveals similar and even stronger mitigation in this case. In Livingston, the Court found childhood physical abuse, in this case there is unrefuted evidence of sexual abuse. In Livingston, this Court found that "Livingston's youth, inexperience, and immaturity also significantly mitigate this offense." Id. These factors are even stronger here. Livingston involves "reduced intellectual functioning". Id. Here, it is undisputed that James has a well below normal I.Q. and there is strong evidence of brain damage. Livingston involves long-term substance abuse as does this case (sniffing gasoline). In addition, this case involves two very strong non-statutory mitigating circumstances conspicuously absent in Livinqton. (1) James Morgan has no other incidents of violence. (2) The offense here was committed in a rage with little or no premeditation. These are extremely important non-statutory mitigating circumstances. A life sentence is required.

This Court's opinions in Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988) and Wilson v. State, 493 So.2d 1019 (Fla. 1986) also support a life sentence. Both of these cases are far more aggravated than the present case; yet this Court reduced them to life.

In Fitzpatrick, the trial court found five aggravators. This Court did not strike any of them. The Court reviewed the mitigating evidence (noting the mental health evidence) and reduced the sentence to life. The Court stated:

> Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer. We do not believe that this is the sort of "unmitigated" case contemplated by this Court in Dixon. Indeed, the mitigation in this case is substantial. 527 So.2d at 812.

James Morgan is an actual child with well below normal I.Q.; it is undisputed that this case involved a rage with little or no premeditation, and there is also substantial mitigation (sexual abuse, long-term gasoline sniffing, strong evidence of brain impairment, and prior non-violence). This case is far less aggravated than Fitzpatrick and involves equally strong mitigation.

In Wilson, supra, the trial court found three aggravating circumstances and no mitigating circumstances. Id. at 1023. This Court struck one of the aggravating circumstances. This left the aggravating circumstance of "heinous, atrocious, or cruel" and prior violent felony with no mitigating circumstances. Id. at 1023. This Court reduced the sentence to life imprisonment relying, in part, on the fact "that the killing, although premeditated, was most likely upon reflection of a short duration." Id. at 1023. This Court took this action even though there were no mitigating circumstances and the offense involved a first degree

murder, a second degree murder, and an attempted first degree murder and (as Justice Ehrlich noted in dissent) Wilson "had a history of violent criminal behavior." Id. at 1024.

The present case is less aggravated and more mitigated than Wilson. Both have the HAC aggravator. The only other aggravator in this case is the underlying felony aggravator, perhaps the weakest of all; whereas Wilson involves extremely strong facts for the prior violent felony aggravator. (An additional second degree murder and attempted first degree murder). This case also involves limited, if any, reflection. Additionally James Morgan's case has two statutory and numerous non-statutory mitigating circumstances in contrast to Wilson. This Court's opinions in Fitzpatrick, Wilson, and Livingston require a life sentence.

POINT XIV THE TRIAL COURT USED THE WRONG LEGAL STANDARD IN REJECTING MITIGATING CIRCUMSTANCES AND FAILED TO FIND MITIGATING CIRCUMSTANCES WHICH MUST BE FOUND AS A MATTER OF LAW.

The trial court used the wrong legal standard in rejecting both statutory and non-statutory mitigating circumstances. The trial court used the jury's rejection of the insanity defense in the guilt phase to reject the statutory mitigating circumstance pursuant to Fla. Stat. 921.141(6)(f).[15] He relied on the jury's rejection of the voluntary intoxication defense to reject the non-statutory mitigating circumstances of alcohol abuse and the inhalation of gasoline fumes. The judge relied on a series of improper factors to reject age as a mitigating circumstance.

[15] The capacity of the defendant to appreciate the criminality of his conduct or to conform to the requirements of law was substantially impaired.

Additionally, in the present case this mitigating factor must be found as a matter of law, as James Morgan was only 16 at the time of the offense. The imposition of a life sentence or at the least a resentencing is required. Mines v. State, 390 So.2d 332, 337 (Fla. 1980); Ferguson v. State, 417 So.2d 639, 644-645 (Fla. 1982).

The trial court made the following finding of fact.

> Section 921.141(6)(f). 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.
>
> The trial jury found and this court is bound by and agrees with that finding that the defendant did not suffer from a mental infirmity, disease or defect which caused the defendant not to know what he was doing or its consequences, or that he did not know that it was wrong. This comports with all the reasonable medical and psychological testimony in the case. Factually, the defendant's conduct during the attack itself during his extended effort to cause her death despite her valiant defense, his cleanup efforts at the victim's home on himself and on his bloody clothes indicated that he appreciated the criminality of his conduct and wanted to cover it up.
>
> The court rejects this claimed mitigating circumstance.

(Emphasis supplied) (R 2280).

The trial court's error here was even more egregious than that found to require resentencing in Mines and Ferguson. In both of those cases the trial court improperly relied on the sanity standard to reject mental mitigating circumstances. In those cases, the judge made his own independent determination of the evidence, even though under the wrong legal standard. Here, the judge was not only operating under the wrong legal standard, he explicitly stated that he was "bound by" the jury's rejection of insanity in the first phase. There was no independent determination by the judge and use of the wrong legal standard. The

requirement of independent evaluation of the aggravating and mitigating circumstances by the trial court is one of the fundamental requirements of our statute. State v. Dixon, 283 So.2d 1, 8 (Fla. 1973); Ross v. State, 386 So.2d 1191, 1197-1198. Mr. Morgan presented extensive mental health testimony. The trial court's failure to exercise independent judgment or to use the proper standard is prejudicial.

The trial judge improperly relied on the jury's guilt phase verdict to reject non-statutory mitigating circumstances.

> Defendant inhaled gasoline fumes and consumed alcohol before the killing. This matter was, by defendant's request, submitted to the jury by the Supreme Court Standard Jury Instruction regarding Voluntary Intoxication and the jury obviously found that he had not consumed sufficient alcohol or sniffed sufficient gasoline fumes to prevent him from forming a specific intent, if they found him guilty of First Degree Premeditated Murder. If the claim is that because of continued and heavy daily use, his brain would be damaged. Dr. Dietz testified to achieve that condition, the brain would show evidence of lead poisoning and other visible symptoms. There were none visible to Dr. Dietz. There was no credible evidence of such continued, concentrated use (except from his cousin) of gasoline fumes inhalation and certainly not from alcohol. This non-statutory mitigating circumstance is rejected.

R 2882.

Once again, the trial court improperly relied on the jury's guilt phase verdict to reject a mitigating circumstance. He confused the legal standard for a defense to first degree murder due to voluntary intoxication with the lower standard to form a mitigating factor due to substance abuse. This is akin to the error of applying the sanity standard to the statutory mental

mitigating circumstances condemned in Mines and Ferguson. It fails to perform the independent review required by Dixon and Ross.[16]

This error was prejudicial. The abuse of alcohol or other intoxicants is a mitigating factor. Wright v. State, 586 So.2d 1024, 1031 (Fla. 1991); Stevens v. State, 552 So.2d 1082, 1086 (Fla. 1989); Buford v. State, 570 So.2d 923, 925 (Fla. 1990). There was uncontradicted evidence that James Morgan had inhaled gasoline since he was very young and had inhaled it on the day of the incident. R 1026-1027, 1169. This Court described James Morgan:

> Morgan was sixteen years old at the time of the incident, of marginal intelligence, unable to read or write, had sniffed gasoline regularly since he was four, and was described as an alcoholic. Morgan v. State, 537 So.2d 973 (Fla. 1989).

The trial court relied on the jury's verdict in rejecting the non-statutory mitigating circumstance that this was an homicide that was not highly premeditated. The trial court stated:

> Defendant suffers from "Sudden Rage." The jury rejected this claim and defense and the Court has similarly rejected this alleged mitigating circumstance. Whether it is designated "Isolated Explosive Disorder" or "Intermittent Explosive Disorder", there is no credible expert evidence upon which this Court can rely to mitigate or excuse the defendant's conduct in this case. The best that can be said for the defendant is that he was angry. This ... circumstance is rejected.
>
> R 2282-2283.

Once again, the trial court improperly relied on the jury's guilt phase verdict to reject mitigation. The trial court's statement that the jury rejected a "defense" can only mean the jury's rejection of insanity. This error was harmful. It was

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[16] The reliance was particularly misplaced here as the jury was instructed on premeditated murder and felony murder and there is no indication which one the jury found. R 1714-1720, 2112.

corroborated by all experts that James was having an uncontrollable rage reaction. R 1066-18; 1070; 1094-1102; 1107-1125; 1132-1134; 1144-1151; 1413-1414; 1416-1430; 1474-1476; 1492-1493. Dr. Dietz, the prosecution's expert stated that James' conduct was consistent with "unrestrained passion or ungoverned conduct." R 1492. This is a mitigator. Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985).

The trial court also used the wrong legal standard and ignored the unrebutted evidence to reject age as a mitigator. The trial court stated:

> Section 921.141(6)(G). The age of the defendant at the time of the crime.
>
> g. The defendant was 16 years 7 months old at the time of the offense. Age is a mitigating circumstance "when it is relevant to defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences following from them." Eutzy v. State, 485 So.2d 755 (Fla. 1984). Here, the defendant had an IQ of between 79 and 84 which Dr. Dietz classified as dull-normal. Dr. Dietz' opinion was that at all times before, during and after the killing, defendant knew what he was doing, knew it was wrong and tried to cover his crime up with lies and several different versions along with claimed losses of memory. Applying the Eutzy test, age is not properly a mitigating circumstance.
>
> Incidentally, Justice O'Connor has observed that Florida clearly contemplates the imposition of capital punishment on 16-year-olds in its juvenile transfer statute. Stanford v. Kentucky, 106 L.Ed. 306 (1989).
>
> The Court rejects this mitigating circumstance.

R 2280-2281.

The trial court made four errors here. First, he took a section out of Eutzy out of context. Second, he again erroneously relied on the sanity standard. Third, he misapplied the evidence to the law. As a matter of law, age must be mitigating in a 16

year old. Fourth, the judge confused the issues of whether a 16 year old is legally eligible for the death penalty with the issue of whether it is a mitigating.

In Eutzy this Court made its comments about mental and emotional maturity in the context of rejecting age as a mitigator for a 43 year old. 458 So.2d at 759. These comments were not designed to require anything more than age alone to find this mitigator in a 16 year old. It was error to take this quote from Eutzy about a 43 year old and apply it to a 16 year old.

The trial court once again relied on the sanity standard to reject a mitigator. The reliance on James Morgan "knowing what he was doing" and "knowing it was wrong" is once again a reference to the sanity standard. Assuming, arguendo, this Court feels it is not an explicit reliance on the sanity standard, it is still an improper attempt to precondition the age mitigator. The age mitigator must be given "independent mitigating weight" regardless of the presence or absence of mental health or other mitigating factors. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

The trial court erred in failing to find age in mitigation. In most American states and in most countries, imposing the death penalty on a 16 year old is prohibited. Florida has not executed a 16 year old since 1954. This Court has never affirmed the death sentence of a 16 year old in the post-Furman era. Clearly, the age mitigator was intended to apply to 16 year olds. This Court has recognized that far older ages can be mitigating. See Thomas v. State, 456 So.2d 454 (Fla. 1984) (20); Oat v. State, 446 So.2d 90 (Fla. 1984) (22). In Smith v. State, 492 So.2d 1063 (Fla. 1986),

this Honorable Court held it to be error to refuse a jury instruction on age as mitigation in a case involving a 20 year old. Id. at 1067. If ages such as 20 or 22 can be mitigating then the age of 16 must be an extremely weighty mitigating factor. In Livingston, supra, this Court relied in part on the fact that the defendant was 17 to reduce the sentence to life. 565 So.2d at 1292. The United States Supreme Court has stated "the chronological age of a minor is itself a relevant mitigating factor of great weight" (emphasis supplied). Eddings v. Oklahoma, 455 U.S. 104, 116 (1989). 16 clearly qualifies for this mitigator.

Assuming, arguendo, that the age of 16 alone does not qualify for the age mitigator and that some other indicator of mental or emotional immaturity is required, then James Morgan still qualifies. The trial court somehow used James Morgan's dull-normal I.Q. to find that he did not qualify for the age mitigator. However, this Court has recognized that dull-normal intelligence would even make the age of 21 qualify for this mitigator. Meeks v. State, 336 So.2d 1142, 1143 (Fla. 1976). There was also unrebutted testimony that James was "very immature" for his age. R 1096. He also suffered from a learning disorder. He clearly qualifies, even if some other sign of immaturity is required.

Finally, the trial court also seemed to confuse the issue of legal eligibility for the death penalty with age as a mitigator. This is the only explanation of the trial court's discussion of Stanford.

The trial court's reliance on the wrong legal standard as to both statutory and non-statutory mitigating circumstances and the

failure to find the age mitigator is harmful error. The age mitigator, the mental mitigator, and the issue of intoxication were crucial issues in mitigation. The serious errors of law require a life sentence or at least resentencing.

This Court has consistently held that if a trial court's sentencing order is fatally defective the sentence must be reduced to life. This Court stated:

> A trial judge's justifying a death sentence in writing provides "the opportunity for meaningful review" in this Court. *State v. Dixon*, 283 So.2d 1, 8 (Fla. 1973) *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974); *Van Royal v. State*, 497 So.2d 625 (Fla. 1986). Specific findings of fact must be made, *Van Royal*, and the trial judge must "independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed." *Patterson v. State*, 513 So.2d 1257, 1261 (Fla. 1987) (emphasis omitted).

Bouie v. State, 559 So.2d 1113, 1116 (Fla. 1990).

The requirement of independent weighing of aggravating and mitigating circumstances was violated here. The judge explicitly considered himself bound by the jury's guilt phase verdict in order to reject substantial mitigating evidence. This combines two errors: the failure to independently weigh the evidence along with employing the wrong legal standard. Additionally, the trial court employed the wrong legal standard, as well as being incorrect, in refusing to find age as a mitigator. An order is "fatally defective" if it uses the wrong standard of proof on aggravating circumstances. Scott v. Dugger, 604 So.2d 465 (Fla. 1992); Carter v. State, 560 So.2d 1166, 1169 (Fla. 1990). The trial court's failure to use independent judgment as to mitigators and the use

of the wrong legal standard as to mitigators renders this order fatally defective. The imposition of a life sentence is required.

Assuming, arguendo, this Court feels that the imposition of a life sentence is not required, a resentencing is clearly required. Mines, supra; Ferguson, supra. There are only two aggravators in this case. The use of the wrong legal standard as to several mitigators and the substantive failure to find the age mitigator require resentencing at the least.

POINT XV THE TRIAL COURT ERRED IN OVERRULING MR. MORGAN'S OBJECTION TO AN UNCONSTITUTIONAL JURY INSTRUCTION ON THE AGGRAVATING FACTOR OF "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL".

Mr. Morgan's jury was given the same jury instruction on the aggravating factor of "especially heinous, atrocious, or cruel" which the United States Supreme Court found to be unconstitutional in Espinosa v. Florida, 112 S.Ct. 2926 (1992). This unconstitutional instruction was given to Mr. Morgan's jury over his specific objection that the instruction was unconstitutional under Maynard v. Cartwright, 486 U.S. 356 (1988). The giving of this instruction was prejudicial, as this was one of only two aggravating factors which the prosecution even argued, the jury's vote was only 8 to 4, and there was substantial mitigation presented (some of which was unrebutted). This instruction renders his death sentence violative of both the Florida and Federal Constitutions.

Mr. Morgan's jury was instructed on this aggravating circumstance as follows: "That the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel." R 1785, 3SR 97. This is the jury instruction which the United States Supreme Court found to be unconstitutional in Espinosa, supra.

Trial counsel objected to this instruction as unconstitutionally vague and cited Maynard, supra. R 1743-1744. The trial court overruled the objection and gave the instruction. R 1744, 1785.

This instruction was harmful. This was one of only two aggravating factors sought by the prosecution. R 1757. The prosecutor described this aggravator in the unconstitutional language of the jury instruction ("especially wicked, evil, atrocious, or cruel"). R 1757. The thrust of the prosecutor's closing argument on the aggravators dealt with this aggravating circumstance, with only brief mention of the other aggravating circumstance (during a felony). R 1762-1768. He argued this factor in the highly charged, emotional language of the unconstitutional jury instruction. He constantly stressed the "evilness" or "wickedness" of the offense. R 1757, 1764, 1765, 1766, 1768. Of course, every first degree murder is "wicked" and "evil". This is precisely why this instruction could lead the jury to impose the death penalty in every case. The prosecutor repeatedly stressed the vague, emotional language of the instruction. This could well have affected the jury both in whether to find this aggravator and/or in how much weight to give this aggravator if found.[17]

The fact that the prosecution only sought two aggravators and that substantial mitigating evidence was introduced also demonstrates the harm of this instruction. This Court has consistently held that if there is only one aggravator a death sentence is disproportionate unless there is "little or nothing in mitigation".

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[17] See Omelus v. State, 584 So.2d 563, 566-567 (1991) (Erroneous instruction on this aggravating factor harmful, in part, due to the State's emphasis on the aggravator in closing argument.)

Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989). This aggravator was essential to even establish a possibility of the death penalty.

The harm from the instruction was also demonstrated by the closeness of the jury's vote. The jury only recommended death by a vote of eight to four. R 1789-1790. Omelus, supra.

POINT XVI THE TRIAL COURT ERRED IN FINDING THE FELONY-MURDER AGGRAVATOR AND IN ALLOWING THE JURY TO CONSIDER THIS AGGRAVATING CIRCUMSTANCE AS JAMES MORGAN HAD PREVIOUSLY BEEN ACQUITTED OF FELONY MURDER.

James Morgan has been previously acquitted of felony-murder as the trial judge made a specific fact finding that the evidence is "insufficient" to support any theory of felony-murder at guilt phase or to find the felony-murder aggravator in Morgan v. State, 392 So.2d 1315 (Fla. 1981) (Morgan I). (The felony-murder aggravator is embodied in Fla. Stat. 921.141(5)(d).) James Morgan was acquitted of any felony-murder theory and the principles of double jeopardy, collateral estoppel, and res judicata forbid the use of felony-murder as an aggravating circumstance. Delap v. Dugger, 890 F.2d 285 (11th Cir 1989). The use of this aggravator violates Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In Morgan I, defense counsel moved for a judgment of acquittal as to both felony-murder and premeditation. Morgan I, Record at 410-414. The trial court specifically found that there was a prima facie case of premeditated murder. The trial judge then stated:

> "I do not think that there is a prima facie case of felony-murder." (emphasis supplied). Morgan I, Record at 413.

The trial judge reiterated his finding that the evidence was insufficient for any theory of felony-murder when he orally pronounced sentence. Morgan I, Record at 766. The trial court's written findings of fact also reflect a finding of legal insufficiency as to this circumstance. Morgan I, Record at 172. On three separate occasions the trial judge found the evidence to be legally insufficient for felony-murder or the felony-murder aggravator.

The trial judge instructed the jury on the felony-murder aggravator. R 1785. He found this aggravator as one of only two aggravators. R 2278. This issue is controlled by Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989). In Delap, supra, the Court held that the judge's reference at sentencing to the fact that he found the evidence "insufficient to support a felony-murder basis for conviction" at guilt phase constituted an acquittal of felony-murder. Id. at 311-312.[18] The Court went on to hold that the principles of double jeopardy, collateral estoppel and the Eight Amendment forbade the use of the felony-murder aggravator. Id. at 314-318.

This error is prejudicial. The elimination of this aggravating circumstance leaves only one aggravating circumstance. This Court has long held that if there is only one aggravator death is disproportionate unless there is virtually nothing in mitigation. Songer v. State, 544 So.2d 1010; Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984). In Rembert, this Court reached this result even though the trial judge

[18] It is interesting to note that the trial judge in James Morgan's first trial is the same judge as in the Delap case, Judge Trowbridge.

found on mitigating circumstances. 445 So.2d at 340-341. Here, the trial court clearly found a mitigating circumstance. Additionally, the age mitigator must be found as a matter of law. Death is disproportionate. A life sentence is required.

Assuming, arguendo, this Court feels that death is not disproportionate without this aggravator, at least a jury resentencing is required. The jury vote for death was only eight to four. There were only two aggravators even argued by the prosecution. Substantial mitigation was presented.

POINT XVII THE PROSECUTION'S PENALTY PHASE CLOSING ARGUMENT WAS IMPROPER AND INFLAMMATORY AND REQUIRES REVERSAL.

The prosecutor made numerous improper and inflammatory arguments in his penalty phase closing argument. These arguments included lack of remorse, attempting to mislead the jury that the sanity standard applied to mental mitigating factors, using a mitigating factor in aggravation, arguing sympathy for the deceased, and diluting the jury's sense of responsibility for their penalty verdict. These improper arguments denied James Morgan due process of law pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The prosecutor was allowed to argue lack of remorse over objection. The prosecutor made the following argument:

> When he made that statement when being questioned about the well being, health and position of Mrs. Trbovich he said I don't know.

R 1760.

Defense counsel's objection, request for a curative instruction, and motion for mistrial were all overruled. R 1760, 4SR 463.

It was "clearly improper" argument concerning lack of remorse. See Pope v. Wainwright, 496 So.2d 798, 802-803 (Fla. 1986).

The prosecutor also argued the sanity standard controlled one of the mental mitigating factors. He stated:

> The second mitigating circumstance the court will instruct you that you may consider in this case is the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law, that it was substantially impaired. Basically, ladies and gentlemen, that's the issue you decided last week, the one of insanity. Basically was the defendant able to know what he was doing was right from wrong and was he able to conform his conduct of being right and wrong. You wisely spoke to that last week and you decided what the issue was on his insanity versus sanity and you decided that based on the facts and circumstances that the State proved to you throughout the last two weeks the defendant was sane, he know right from wrong and he knew the consequences of his conduct in this case when he killed, he brutalized, he beat, he stabbed and he sexually assaulted Mrs. Trbovich.

R 1759.

The prosecutor again argued this same misstatement of the law.

> When the mitigating circumstances are argued to you and they argue that this is a man who didn't have the capacity to appreciate and know that he was committing a criminal act and didn't understand his conduct and wasn't able to conform it. You, ladies and gentlemen, I submit when you go back and say, wait a minute, we decided that issue last week when we decided the sanity and insanity issue.

R 1761.

He urged the jury to reject this mitigator based on the wrong legal standard. Mines v. State, 390 So.2d 332, 337 (Fla. 1980); Ferguson v. State, 417 So.2d 639, 644-645 (Fla. 1982).

The prosecutor also used a mitigating circumstance in aggravation and impeached his own witness. He argued:

> He's [James Morgan] conniving that he comes up with a story to Dr. Dietz after twelve and a half years that he was sexually abused by an aunt or an uncle or someone

> along those lines. Now that's important, ladies and gentlemen, that he comes up with that story at the end. Because, No. 1, it shows he's of the same mind that he was then and he's concealed all of the evidence. But what's very important is that the defense may argue that other elements of his character are not worthy of the death penalty. But that's an element that's extremely important because it shows that that is the same person that existed twelve and a half years ago in concealing and hiding and trying to pull the wool over everybody's eyes. That's the sort of defendant was have.

R 1768.

The issue of sexual abuse had been presented through the prosecution's own expert, Dr. Dietz. R 1498-1499. Child abuse is recognized mitigation. Livingston v. State, 565 So.2d 1288 (Fla. 1990). The prosecution's own expert testified that he felt James Morgan was truthfully recounting being sexually abused by an uncle and a cousin. There was an improper attempt to turn a mitigator into a non-statutory aggravating circumstance and an improper attempt to impeach his own witness. Poitier v. State, 303 So.2d 409, 410-411 (Fla. 3d DCA 1974).

The prosecutor argued sympathy for the deceased. He described her as a "66-year-old widow" and a "66-year-old widow" killed in her own home. R 1763, 1765. The prosecutor improperly denigrated the jury's role in the process by repeatedly describing their role as advisory, without any explanation that it carries great weight. R 1757, 1758, 1761, 1764, 1766. This is improper. Mann v. Dugger, 844 F.2d 1446 (11th Cir. en banc 1988).

The improper argument in this case was prejudicial. Arguments concerning lack of remorse and sympathy for the deceased are especially likely to influence a jury in a case such as this, involving an elderly widow. The argument concerning the jury

relying on their rejection of insanity, to reject a statutory mental mitigator was devastating. James Morgan had put forward a strong case of insanity. It was essential to his penalty phase defense that the jury understood that they can consider his mental problems as mitigating, even if they do not rise to the level of insanity. This confusion could also lead the jury to ignore the evidence of gasoline inhalation and brain damage as both relate to the impairment of his capacity to conform his conduct to the requirements of law. The fact that the jury may well have been misled by this argument is demonstrated by the fact that the judge, in his sentencing order, did precisely what the prosecutor argued. The judge found that he was "bound" by the jury's rejection of insanity to reject this mitigator. R 2280. If a veteran trial judge, educated in the law, was persuaded by this argument, it is highly likely that a jury of laypeople would also be persuaded. These arguments were prejudicial. This is especially true given the jury's close vote of eight to four. Omelus v. State, 584 So.2d 563, 566-567 (Fla. 1991). A jury resentencing is required.

POINT XVIII THE TRIAL COURT ERRED IN FAILING TO CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES SUPPORTED BY THE EVIDENCE AND IN FAILING TO FIND NON-STATUTORY MITIGATING CIRCUMSTANCES WHICH WERE UNREBUTTED.

The trial court failed to consider certain non-statutory mitigating circumstances which are evident from the record and failed to find other non-statutory mitigating factors which are supported by unrebutted evidence. The current order violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution. Resentencing is required.

A trial court's duty to evaluate mitigation is clear.

> 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, is it truly of a mitigating nature. *See Rogers v. State*, 511 So.2d 526 (Fla. 1987) *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence.

Campbell v. State, 571 So.2d 415, 419 (Fla. 1991).

This Court has also made it clear that:

> "The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor."

Maxwell v. State, 603 So.2d 490, 491 (Fla. 1992).

The trial court failed to consider several non-statutory mitigating factors which were was unrebutted. These include (1) James Morgan's learning disability; (2) His lack of prior violence; (3) The fact that this is an offense with little or no premeditation; (4) James' extreme immaturity and sheltered early life; and (5) His lack of rudimentary social skills.

It is undisputed that James Morgan had a learning disorder that caused him to have tremendous problems in school, including placement in slow learning classes. It caused him to drop out of school very young. R 1131, 1160-1162, 1167-1168, 1185-1189, 1199-1202. At the time of the offense, he could not read or write. At age 20, he was still testing at the first grade level in reading and spelling and in the fifth grade level in math. R 1199-1201. Being a slow learner, is a recognized mitigating circumstance. Neary v. State, 384 So.2d 881, 886-887 (Fla. 1980).

It was unrebutted that James Morgan had no other violence in his background. Dr. Dietz, the prosecution's expert, testified that James Morgan did not meet the criteria of "intermittent explosive disorder" due to his lack of other violence. R 1436-1440. This established the non-statutory mitigating circumstance of lack of prior violence, which this Court has relied on. Perry v. State, 522 So.2d 817, 821 (Fla. 1978).

It was undisputed that this was an offense with little or no premeditation. It was corroborated by all experts that James was having an uncontrollable rage reaction. R 1066-18; 1070; 1094-11102; 1107-1125; 1132-1134; 1144-1151; 1413-1414; 1416-1430; 1474-1476, 1492-1493. Dr. Dietz, the prosecution's expert stated that James' conduct was consistent with "unrestrained passion or ungovernable conduct." R 1492. This Court has recognized that if the "killing, although premeditated, was most likely upon reflection of a short duration" is a mitigator. Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985).

James Morgan's extreme immaturity and sheltered early life is a significant mitigating factor. Dr. Caddy described James as "very immature" even for his age. R 1096. There was no testimony rebutting this. In Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1990), this Court found a death sentence disproportionate in part because "Livingston's youth, inexperience and immaturity also significantly mitigate his offense."

James also suffered from a lack of even rudimentary interpersonal and social skills. Dr. Caddy stated that:

> He looked in the testing protocol as if he lacked an appreciation of interpersonal relationships, very lacking in talent in any social facilitation or social graces. And I don't mean by that simply manners, I mean the ability to interact socially with another person other than a very, very limited degree was -- was an issue of real limitations to this man's overall interpersonal functions. There seemed to be an overall sadness in -- in his demeanor as he presented himself.

R 1060.

The trial court's failure to consider (and to find) these five non-statutory mitigating factors is prejudicial. The evidence of these factors is unrebutted. Resentencing is required.

The trial court also erred in rejecting several of the non-statutory mitigating circumstances which it did consider. The trial court found the underlying facts concerning two non-statutory mitigating factors and then rejected them. It stated:

> The circumstances of the defendant's young childhood, which were detailed as medical history to one of the testifying doctors, which indicated that his father drank heavily and beat his wife in front of the defendant. This "history" recitation was not tied up medically, psychologically, or any other fashion to the defendant so as to be helpful to the Court and jury. This non-statutory mitigating circumstance is rejected.
>
> Defendant was sexually abused as a child. This late disclosure, for the first time (12½ years after the murder) was made to Dr. Dietz but defendant told the Doctor he remembered noting concerning the killing. There is absolutely no showing, and Dr. Dietz has so testified, that if he had been sexually abused as a child, it accounted in any way for the brutal attack here. This non-statutory mitigating circumstance is rejected.

R 2282.

The trial judge found the underlying historical facts for two separate mitigating circumstances. He found "that his father drank heavily and beat his wife in front" of James as a child. Parental alcohol abuse and disruptive family life is a recognized mitigating

factor. Campbell, supra, at 419, n.4; Hegwood v. State, 575 So.2d 170, 173 (Fla. 1991). Being a victim of child abuse is recognized as a mitigating circumstance. Campbell, supra, at 419, n.4; Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988) (citing cases). The trial court erred in not finding these facts as mitigating.

The trial court erred in failing to find James Morgan's inhalation of gasoline and/or alcohol consumption as a mitigating factor. The prosecution's own expert, Dr. Dietz, testified that he had consumed alcohol and inhaled gasoline on the day of the offense. R 1409-1414. Dr. Dietz testified that Mr. Morgan inhaled gasoline on many occasions (seeing snakes or serpents). R 1412-1413. The trial court erroneously rejected the inhalation of gasoline and use of alcohol on the date of the offense due to the jury's guilt phase verdict. Use of alcohol and inhalation of gasoline on the date of the offense is a mitigator. Smith v. State, 492 So.2d 1063, 1067 (Fla. 1986); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985); Masterson v. State, 516 So.2d 256, 268 (Fla. 1987).

James' long-term inhalation of gasoline is a mitigating factor. The trial court rejected this because Dr. Dietz testified that he did not see lead toxicity sufficient to cause brain damage. R 2282. The trial court ignored extensive testimony showing brain damage from defense experts Dr. Center and Dr. Caddy. R 1106-1108, 1173-1218. The trial court overstated Dr. Dietz' testimony. Dr. Dietz stated that he did not see "clinically sufficient evidence" of "serious brain damage" although he specifically stated that he could not rule out brain damage. R 1106-1108. Regardless of

whether James Morgan's long-term inhalation of gasoline had caused brain damage it must be considered in mitigation. It was undisputed that this was done regularly and to the point of hallucinations. Long-term use of intoxicants is a recognized mitigator. Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990); Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989).

The trial court erred in rejecting find brain damage as a mitigator. The trial court made the following findings:

> The defendant asserts that he is brain-damaged or brain-impaired because of the low IQ between 79-84 and being in the dull-normal range. Dr. Dietz, a medical doctor, reviewed neurological reports and decided that there was no clinically significant evidence of serious brain damage and that the defendant at best suffered minor brain damage. Dr. Dietz also reminded the Court that defendant taught himself to read and write while in prison. His medical opinion was that defendant was judge "dumber than others" but that his IQ was within "normal" limits.
>
> This non-statutory mitigating circumstance is rejected.

R 2281-2282.

The trial court misperceived the evidence of brain damage. The claim of brain damage is not based on James' dull-normal IQ. It is based on the neuro-psychological tests performed by Drs. Center and Caddy. Dr. Dietz stated that he could not rule out the existence of brain damage. Thus, the evidence of some level of brain damage remains unrebutted. The trial court erred in failing to find this mitigator.

The trial court's order is substantially deficient. There was unrebutted evidence of recognized mitigators which the trial court did not consider. The trial judge erred in failing to find other

unrebutted mitigators. These errors individually and cumulatively require resentencing. Campbell, supra; Maxwell, supra.

POINT XIX THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE OF ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The trial court erred in finding the aggravating circumstance that the homicide was especially heinous, atrocious, or cruel (HAC) pursuant to Fla. Stat. 921.141(5)(H). The reliance on this aggravator violates Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The trial court erred in three respects. It ignored the requirement of an intent to make the offense extraordinarily painful. Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990); Espinosa v. Florida, 112 S.Ct. 2926 (1992). There was no showing that the deceased did not immediately lose consciousness. Herzog v. State, 439 So.2d 1372 (Fla. 1982). It erred in considering after death activity in deciding whether this offense is HAC. Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990); Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975).

The trial court's order relied on the fact that there were multiple wounds. R 2278-2279. However, it ignored the lack of evidence of any intent to make this offense extraordinarily painful. In Porter, supra, the Court struck a finding of HAC and stated:

> This record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful.
>
> Porter, supra, at 1063 (emphasis supplied).

Here, the evidence does not support a finding of intent. It was undisputed that James Morgan inhaled gasoline and drank alcohol on the date of the incident. R 1026-1027, 1169, 1413-1414. The defense experts testified that James Morgan was insane during the offense. The prosecution's expert stated that James' actions were consistent with "unrestrained passion or ungovernable conduct." R 1492. There was no showing of intent to be "extraordinarily painful." Thus, HAC must be struck. The elimination of HAC leaves the underlying felony as the only aggravating circumstance. This Court has consistently held that a death sentence will not be affirmed based on one aggravator unless there is little or nothing in mitigation. There was substantial mitigating evidence. A life sentence is required.

There is no showing that the deceased did not immediately lose consciousness. The medical examiner testified that he had no way of knowing whether the deceased immediately lost consciousness upon the first blow. R 900-901. This Court has consistently required a conscious victim to find this aggravator. Herzog v. State, 439 So.2d 1372 (Fla. 1983); Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989). This requires the striking of HAC.

Assuming, arguendo, that this Court finds the evidence supports a finding of HAC, this aggravator must be given less weight. If the offense is committed "in an irrational frenzy" this aggravator must be given less weight. Amazon v. State, 487 So.2d 8, 13 (Fla. 1986). This is a perfect description of this case.

The trial court also erred in relying, in part, on after death activity to find this aggravator. The trial court concluded its findings on this aggravator with the following statement:

> The scene of the living room and kitchen was a bloody, gory scene that defendant sought to clean up after the attack but failed. Defendant went back to finishing the cutting of the victim's lawn.

R 2279.

This is an improper reliance on after death activity. Jones, supra; Halliwell, supra. The trial court's erroneous findings on this aggravator require the imposition of a life sentence, or at least, a resentencing.

POINT XX FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

The operation of section 921.141, Florida Statutes is violative of the Eighth and Fourteenth Amendments.

1. The jury

a. Standard jury instructions

i. Heinous, atrocious, or cruel

The jury instruction on this aggravator has been held to be unconstitutional. Espinosa v. Florida, 112 S.Ct. 2926 (1992). This assures its arbitrary application, in violation of the dictates of Maynard v. Cartwright, 108 S.Ct. 1853 (1988).

ii. Cold, calculated, and premeditated

This standard instruction simply tracks the statute.[19] Since the statutory language is subject to a variety of constructions,

[19] The instruction is: "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." This instruction and the others discussed in this section are taken from West's Florida Criminal Laws and Rules 1990, at 859.

the absence of any clear standard instruction ensures arbitrary application.[20] Since CCP is vague on its face, the instruction based on it is too vague to provide the proper guidance.

iii. Felony murder

The standard jury instruction on felony murder does not serve the limiting function required by the Constitution and arbitrarily creates a presumption of death for the least aggravated form of first degree murder. It applies an aggravating circumstance to every first degree felony murder. The instruction turns the mitigating circumstance of lack of intent to kill into an aggravating circumstance. Hence, the instruction violates the state and federal constitutions. Zant v. Stephens, 462 U.S. 862, 867 (1983).

b. Majority verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate due process. See Johnson v. Louisiana, 406 U.S. 356 (1972), and Burch v. Louisiana, 441 U.S. 130 (1979). The same principle applies to capital sentencing so that our statute is unconstitutional because it authorizes a death verdict on the basis of a bare majority vote.

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional. In deciding Cruel and Unusual Punishment claims, the Court will look to the

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[20] See Rogers v. State, 511 So.2d 526 (Fla. 1987) (condemning prior construction as too broad).

practice of the various states. Only Florida allows a death penalty verdict by a bare majority.

c. Advisory role

The instructions do not inform the jury of the importance of its penalty verdict. Caldwell v. Mississippi, 472 U.S. 320 (1985).

2. The trial judge

The trial court has an ambiguous role in our system. It is largely bound by the jury's penalty verdict under Tedder v. State, 322 So.2d 908 (Fla. 1975). However, it is considered the ultimate sentencer so that jury errors in reaching the penalty verdict can be ignored. These problems prevent evenhanded application.

Our law does not require special verdicts as to theories of homicide and aggravating and mitigating circumstances. The judge has no clue which factors the jury considered or how it applied them, and has no way of knowing whether the jury acquitted the defendant of premeditated murder (so that a finding of cold, calculated and premeditated murder would be improper), or whether it acquitted him of felony murder (so that a finding of killing during the course of a felony would be inappropriate).[21] Similarly, if the jury found the defendant guilty of felony murder, and not of premeditated murder, application of the felony murder aggravating circumstance would fail to serve to narrow the class of death eligible persons. Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

3. Appellate review

a. Aggravating circumstances

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[21] See Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) (double jeopardy precluded use of felony murder aggravating circumstance where defendant was acquitted of felony murder at first trial).

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious, or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death eligible persons, or channel discretion. The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting). As to CCP, compare Herring with Rogers v. State, 511 So.2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Herring). As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts).[22]

Similarly, the "great risk of death to many persons" factor has been inconsistently applied and construed. Compare King v. State, 390 So.2d 315, 320 (Fla. 1980) (aggravator found where defendant set house on fire; defendant could have "reasonably foreseen" that the fire would pose a great risk) with King v.

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[22] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L. Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases WIthout Making it Smaller, 13 Stetson L. Rev. 523 (1984).

State, 514 So.2d 354 (Fla. 1987) (rejecting aggravator on same facts).

The "prior violent felony" circumstance has been broadly construed in violation of the rule of lenity. A strict construction would be that the circumstance should apply only where the prior felony conviction (or at least the prior felony) occurred before the killing. The cases have instead adopted a broad construction, ruling that the factor applies even to contemporaneous violent felonies. Lucas v. State, 376 So.2d 1149 (Fla. 1979).

The "under sentence of imprisonment" factor has similarly been construed in violation of the rule of lenity. It has been applied to persons who had been released from prison on parole. See Aldridge v. State, 351 So.2d 942 (Fla. 1977). It has been indicated that it applies to persons in jail as a condition of probation (and therefore not "prisoners" in the strict sense of the term). See Peek v. State, 395 So.2d 492, 499 (Fla. 1981).

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So.2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[23] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

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[23] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 907, 926 (1989).

b. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[24] cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

[24] Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

CONCLUSION

For the foregoing reasons, Mr. Morgan's conviction must be reversed, and his sentence of death vacated or reduced to life.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Richard B. Greene
RICHARD B. GREENE
Assistant Public Defender
Florida Bar No. 265446

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier and to STEVEN M. GOLDSTEIN, Esq., Special Counsel, Volunteer Lawyers' Resource Center, Inc., 805 North Gadsden Street, Tallahassee, Florida 32303-6313 by U.S. Mail, this 11th day of December, 1992.

Richard B. Greene
Of Counsel