IN THE

SUPREME COURT OF FLORIDA

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

# REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS



ARGUMENT

## AUTHORITIES CITED

## 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:

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|---|---|
| AB | Answer Brief of Appellee |
| IB | Initial Brief of Appellant |
| 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.)

Appellee originally filed a notice of cross-appeal. However, it did not brief any of these issues. This is solely a Reply Brief and is the final brief in the case.

## STATEMENT OF THE CASE AND FACTS

Appellee's "brief overview" of the testimony relevant to insanity is incomplete. Dr. Orne did not say that the hypnosis session was "a completely unreliable source of information." AB 3. The following colloquy took place between the prosecutor and Dr. Orne:

> Q (Prosecutor) Based on your knowledge of the facts in this case, watching the testimony of Dr. Koson and Mr. Caddy, do you have an opinion of whether or not there was a hypnotic session in this case in 1985?
>
> A (Dr. Orne) No, I do not have an opinion because we have no data which allows me to make an opinion.

R 1327.

Appellee's description of "the rather incredible nature of the defendant's insanity defense" is an improper editorial comment. AB 3. This comment is false. The defense presented two mental health experts, Dr. Caddy and Dr. Koson, who testified that James Morgan was legally insane. The prosecution presented only one expert, Dr. Dietz, to state that he was sane. The prosecution presented no additional testimony concerning James Morgan's mental state. The defense presented substantial additional testimony concerning James Morgan's underlying mental problems.

The defense had the testimony of Dr. Benjamin Center, a psychologist, read to the jury (the witness was deceased). R 1170-1172. Dr. Center examined James Morgan for eight hours on September 11, 1981. R 1181. He did numerous neuropsychological tests. 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. 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.

Numerous subtests confirmed the diagnosis of brain damage of a type that affects judgment and ability to act under stress. R

1204-1218. Lay 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. Alice Morgan, James' mother, testified that James was a slow learner in school and was in special classes. R 1160-1162, 1167-1168. James saw a psychiatrist in late 1975 and early 1976 as a result of problems in school and emotional problems. R 1168. She caught him sniffing gasoline on several occasions and saw its effects. R 1169. James experienced visual hallucinations. R 1169. James' father was an alcoholic that was often drunk in James' presence. R 1169.

Appellee's "overview" is also somewhat misleading in that it leaves the impression that Drs. Caddy and Koson rely solely on the hypnotic session for their diagnosis. This is incorrect. Dr. Caddy 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. 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. Dr. Caddy stated that he had performed an intelligence test, several projective psychological tests, and a comprehensive neuro-psychological exam.

R 1058-1060. 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. The finding of brain impairment in the testing was consistent with James' clinical history including school records and family history. R 1082-1083.

The defense also called Dr. Dennis Koson, a board certified forensic psychiatrist. R 1128. 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. 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.

## ARGUMENT

Appellant will rely on his Initial Brief herein for Points I, VI, X, XI, XVI, XVII, XIX and XX.

## 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 admission of the testimony in this case was in violation of the dictates of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Law enforcement interrogated James Morgan without notice to counsel. Officer Crowder testified that Mr. Morgan's parents contacted him and asked 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. 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. This is a police initiated interrogation without notice to counsel.

Appellee claims that the admission of this testimony was harmless error due to the cross-examination of Dr. Caddy. AB 22. However, this is very different in impact from Detective Crowder's testimony. This cross-examination consisted of the prosecution summarizing the alleged statement to Dr. Dibbe and then Dr. Caddy confirms he read it in Dr. Dibbe's report. R 1065A. The entire exchange consists of less than half a page in the transcript.

The testimony of Officer Crowder was far more detailed and contained substantial information not contained in the affirmative

answer to the prosecutor's leading question. Officer Crowder testified for seven pages concerning this statement. R 990-997. A few excerpts from Officer Crowder's testimony indicate how much more substantial it was than the brief reference on cross-examination.

> Basically I asked him what it was he wanted to tell me concerning the day in question when Mrs. Trbovich had been murdered. He told me that on that day he was working with a subject by the name of Charles Yawn and a subject by the name of Robert Fritcher. They were working on the same truck for the lawn service that Mr. Morgan was employed with which I believe belonged to his father. On the afternoon of the day in question after lunch they went to the neighborhood where Mrs. Trbovich lived and he mentioned three yards that they had to take care of there that day, the Hipson residence, the Gray's residence and the Trbovich residence. He advised me that he was operating the riding lawn mower and that Charles Yawn and Robert Fritcher were using the push mowers to trim out the edges of the yard I suppose. He said that Robert Fritcher began at the Hipson residence and he and Charles Yawn went to the Gray's residence. After he finished at the Gray's residence he went to the Hipson residence to see what was taking Robert so long. He said he asked Robert what was taking him so long and Robert did not answer him so he then proceeded over to Mrs. Trbovich's residence. He said when he went to Mrs. Trbovich's it did not look to him as though he lawn needed to be mowed so he went to the door and knocked and Mrs. Trbovich came to the door and he asked if he could use the telephone. He said she let him in and put the telephone on a table and he called to speak to his mother or father and he got no answer. He said he thanked Mrs. Trbovich for the use of the phone and then he left. She followed him out to the door. At that point he decided he would go ahead and mow the lawn anyway. He said he went back to where the riding mower was, he changed the blade on the lawn mower, put gas and oil in it and then he started the lawn mower up and proceeded to go and mow Mrs. Trbovich's lawn. He said after about the second or third trip around the lawn Charles Yawn came out of the house and told him that Mrs. Trbovich needed some help moving boxes so he shut the mower down and went over to the door of the house and sat down. At that point he said Charles told him to go inside. He said when he stepped inside into the hall area he looked and he could see a table over -- turned over, the place was a mess as he put it and there were papers all over, notebook papers....

He stepped in the house and he said that it was all messed up as he put it, the table was knocked over and there were papers on the floor. He said he turned around and Charles Yawn was holding a knife on him and Charles pushed him on into -- into the house and he said at that point he saw Mrs. Trbovich's body on the floor in the kitchen. I believe he said she was leaning against the cabinets, laying down leaning up against the cabinets. At that point he said Charles to him to do what he told him to do or he would kill him. He said at that time Charles told him to bite Mrs. Trbovich on the breast. In later questioning about this I asked him to describe the condition of the body and he said she was on the floor somewhat up against the cabinets, her pants were pulled down and her blouse was pulled up and her body was exposed from the knees to the breasts. He said he -- he bit Mrs. Trbovich on the breasts and then Charles told him to go to the bathroom and get a towel and wipe up the blood. He said at that time he did what Charles told him, he got a towel, he thought it might've been a washcloth, he went back and wiped the blood and then Charles told him to stand up and he said he did that and Charles told him again that if he told anyone about this he would kill him and he told him to go out in the yard and finish mowing the lawn. James then said he went out of the house, Charles followed him to the -- followed him out of the house, he went over and started up the lawn mower and began to mow and as he looked around he said he (bleep in the tape) Charles turning around to go back into the house. He had gone on around to the other side of the house where the garage is and there's a faucet on the side of the house and he said he washed his feet and his knees and his hands at that faucet and he finished mowing the lawn. When he finished he went to look for Robert and Charles and they were raking one of the yards, he didn't specify which yard, and he went to get a rake to help them -- to help them finish raking and Charles told him to pick up the piles, and I'm assuming he's talking about piles of grass in the yard that they had raked, which he did. And then they loaded up the equipment and left the area when they'd finished the work ...

That was basically the -- the gist of the scenario. I asked him about weapons and I asked him again about the condition of Mrs. Trbovich's body and he described it as -- as I had previously testified and he said that there was a great deal of blood all over it and it looked as though she had been stabbed. I asked him about weapons, did he see other weapons, club, so on and so forth, and mentioned the possibility of a wrench and he said that he had a wrench in his pocket which he kept for changing the lawn mower blades. I asked him if he had seen the

wrench in the house that day and he said he did not see the wrench in the house that day.

Q Did you question him as to whether he saw any blood on this Charles Yawn person?

A Yes, I did. I asked him if he had observed any blood on Charles and he said that he did not see any blood on Charles, however, he added that he was not looking all that much at Charles' clothes, he was looking at Charles' face mostly and he described that Charles had some type of horrible look on his face.

Q A horrible look on Charles' face?

A Right. I think the words he used was like something you'd see in a horror movie.

Q If I could have one moment, Your Honor. At the conclusion of -- you were speaking to the defendant, did you ask him whether or not everything he told you was the truth and the whole truth?

A Yes, I did.

Q What did the defendant tell you?

A He said that it was.

R 992-997.

Officer Crowder's testimony contains numerous matters not in the brief cross. It mentions the other man working on the lawn, Robert Fritcher. It describes the three other yards mowed earlier. It describes the fact that he had a riding mower and the others had regular mowers. It describes the fact that he went to the deceased's door, used the phone, and began mowing. It describes changing the blade on the mower. It gives substantial detail as to the disheveled nature of the house. It describes the position of the body in the house. It states that the deceased was naked from the knees to the head. It describes cleaning up the blood with towels. It states that Charles told him he would kill him if he told anyone. It describes finishing mowing the lawn. It

describes washing off blood in a faucet outside the house. It describes raking up the lawn and loading the equipment. It describes James' denial of weapons, but admitting that he had a wrench. It describes there being no blood on Charles, but that he had a look on his face like "a horror movie." None of this was in the brief cross-examination of Dr. Caddy. R 1065.

This level of detail gave the statement more impact than the brief cross-examination of Dr. Caddy. The Crowder testimony brought out several crucial matters such as the deceased's nudity, cleaning up the blood, Charles' having no blood on him and that he had a look "like in a horror movie." This was extremely prejudicial. Officer Crowder's testimony was a direct recounting of James Morgan's statement. The cross of Dr. Caddy involved a hearsay recounting of another doctor's interview. Thus, Crowder's testimony had far more impact.

The importance of this statement to the prosecutor is shown by the prosecutor's emphasis on this statement in closing argument.

> 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.

Appellee has failed to meet its burden in showing the admission of this evidence to be harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

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

Appellee asserts that the trial judge, in the first trial, did not find the evidence legally insufficient to support felony-murder. A review of the record indicates that he did. 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.

The trial court ruled that there was insufficient evidence of felony-murder at the judgment of acquittal. At the oral pronouncement of sentence it again found the state had not proved the existence of an underlying felony and reiterated that it had previously made this finding.

Appellee attempts to distinguish this case from Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989), with the fact the jury in Morgan I was given a felony-murder instruction; whereas the Eleventh Circuit found that the jury in Delap I was not. A review of the charge conference indicates that the trial judge felt that he had to give the entire standard instruction on first-degree murder even though he had found the evidence to be legally insufficient. The following is the discussion at the charge conference concerning felony-murder:

> MR. MIDELIS (Prosecutor): May I interject something? Does the Court going to read all of the first paragraph your honor, in the first degree? In other words, is the Court going to include as is included in the first paragraph felony murder doctrine?
>
> THE COURT: I think you have to do that because when you get around to manslaughter you have to exclude murder. And there's no way to define manslaughter without defining murder whether it's applicable or not. So, I think --

Morgan I, Record at 417.

The trial court mistakenly felt that it must give the entire standard instruction. Additionally, there was no definition of any underlying felony. This is required in a felony-murder prosecution. Franklin v. State, 403 So. 2d 975 (Fla. 1981).

Appellee ignores the trial court's comment "there is insufficient evidence" in arguing that the trial court was not making a ruling. AB 25. In Delap, both the Eleventh Circuit and the District Court stated that use of the term "insufficient" is a "legal term of art" indicating a legal conclusion tantamount to an acquittal. Delap, supra, at 310, 311. Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981) ("In the criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt.")

Appellee correctly points out that there was no objection in the current trial. AB 24. Double jeopardy is fundamental error, that can be raised at any time. Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); State v. Johnson, 483 So. 2d 420, 422-423 (Fla. 1986); Watson v. State, 608 So. 2d 512, 513 (Fla. 2d DCA 1992); Arnold v. State, 578 So. 2d 515 (Fla. 4th DCA 1991).

Appellee argues that somehow Schad v. Arizona, ___ U.S. ___, 111 S.Ct. 2491, ___ L.Ed.2d ___ (1991), overrules Delap. Schad dealt solely with the issue of whether the Due Process Clause of the United States Constitution requires a unanimous verdict as to premeditation or felony-murder. It has nothing to do with double jeopardy.

Appellee's argument based upon Schad fundamentally misconceives the Double Jeopardy Clause. The Double Jeopardy Clause embodies the principle of collateral estoppel. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Ashe holds that:

> when an issue of ultimate fact has been determined ... that issue cannot again be litigated.
>
> 397 U.S. at 443.

Double jeopardy applies when there is

> a resolution, correct or not, of some or all of the factual elements of the offense charged.
>
> United States v. Martin Linen Supply, 430 U.S. 564, 571, 97 S.Ct. 1349, 1355, 51 L.Ed.2d 642 (1977).

Thus, you can be acquitted of underlying facts; even if not acquitted in toto, of the offense charged.

Appellee cites no cases for the argument that a person can not be acquitted of felony-murder. Several courts have explicitly held that a person can be acquitted of one theory of first-degree murder, without being acquitted of first-degree murder in toto. Delap, supra; Wilson v. Dugger, 665 F.2d 118 (7th Cir. 1981); Commonwealth v. Fickett, 403 Mass. 194, 526 N.E.2d 1064 (1988); Huffington v. State of Maryland, 302 Md. 184, 486 A.2d 300 (1985).

James Morgan was acquitted of felony-murder. Reversal 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.

Appellee ignores the fundamental inequity here. The prosecution was allowed to hire whatever experts it wished at county expense; without regard to cost or location, and without any opportunity for the defense to object. Defense counsel's choice of experts was subject to a veto by the prosecutor even after the county attorney had agreed to the appointment and the judge was prepared to grant the motion. This denied James Morgan due process of law and equal protection pursuant to the Florida and Federal Constitutions. It also subjects him to an unconstitutional punishment in violation of the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution.

Appellee attempts to misstate Appellant's argument. AB 28. Appellant is not arguing that an indigent should have unlimited experts' testimony. Appellant is arguing that James Morgan should have the same procedural rights to obtain experts as the prosecution. The state should not be given veto power over defense experts, when the defense is not even given an opportunity to object to defense experts and where the state was allowed to hire any experts it wished without court approval or without regard to cost.

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

Appellee asserts that Dr. Caddy and Dr. Koson's testimony was not consistent with McNaughten. AB 29. This is simply false. Dr.

Caddy was specifically asked about the two prongs of the McNaughten test and specifically stated that James Morgan met the test of legal insanity under both prongs. R 1105-1107. Dr. Koson was asked similar questions and also stated that James Morgan was legally insane under both prongs of McNaughten. R 1145-1148.

Appellee makes no attempt to explain why the Standard Jury Instructions do not cover the prosecutor's concern. The Standard Jury Instruction (given to the jury) states:

> 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."

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 insanity." The special jury instruction says that an "irresistible impulse is not recognized in Florida as an excuse for an unlawful act." The standard jury instruction correctly tells the jury that the mental state, is not insanity. 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.

Appellee also argues that this issue is harmless because there is overwhelming evidence of felony-murder, with burglary as an underlying felony. This Court has specifically rejected this "overwhelming evidence" analysis in terms of determining harmlessness. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986).

It is rather curious that Appellee argues that there was overwhelming evidence of burglary as a theory of felony-murder. The first judge who tried this case found the evidence to be legally insufficient to even go to the jury on felony-murder. See Point III. The prosecution in this case has never charged James Morgan with any underlying felony as a substantive offense. As defense counsel pointed out during the charge conference, no one had ever suggested burglary as a theory of felony-murder in any of the three prior trials. R 1555. The judge in the first two trials did not find the underlying felony aggravating circumstance. Morgan I, Record at 744; Morgan II, Record at 1190. No judge has ever found burglary as an underlying felony for purposes of the underlying felony aggravating circumstance. Morgan III, Record at 390; R 2278. No one else considers this evidence "so overwhelming."

Additionally, it must be noted that this instruction could also affect the jury on burglary as a theory of felony-murder. Burglary is a specific intent crime. L.S. v. State, 464 So. 2d

1195 (Fla. 1985). This instruction was given immediately prior to the voluntary intoxication instruction. There was evidence concerning James Morgan's inhaling gasoline fumes as an intoxicant. This instruction may well have also confused the jury on the issue of intent for burglary as a theory of felony-murder.

This instruction was prejudicial error. A new trial is required.

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

Appellee asserts that there is no objection to this testimony. AB 33. The prosecutor begins to discuss having Mr. Mathews' testimony admitted from a prior trial. The following took place:

> MR. UDELL (Defense Counsel): -- give me an opportunity to see this because apparently I had (indiscernible) No. 1 and No. 3. There are some things that had I been counsel at the time this was tried would have objected to. Now I'm not sure whether or not we're allowed to raise an objection at this point that Mr. Morgan's prior counsel didn't. All of his testimony about is she nice, she's a pretty nice person, she's a lively religious lady, very conscientious. I'm sure Mrs. Trbovich was all of these things but I don't see how they're relevant. I'm gonna ask at this time that part of this be stricken and why don't we just for the record state which parts, page 932 as it appears in the transcript from the -- the trial from which this is taken, lines 22 through 25. Page 933 as it appears in this transcripts, lines 1 through 3, she still maintained herself well, the house well, the grounds well, she's a beautiful lady. Again, I'm sure she was every one of these things but we'd object to them as being totally irrelevant.
>
> THE COURT: Well, note your objections in the record but I of course take not of the fact that the defendant was represented at that time by counsel and this was the testimony and we're going -- if we're gonna doctor it to the extent of hopscotching around, then I think we're gonna destroy the effect of it. I understand that we don't want to present to the jury the fact that it was another jury but I -- I don't want to destroy the effect of the substance of the testimony. Now counsel may have had some particular purpose for not objecting, I -- I

don't know, I have no idea. But your objection is noted and your objection is overruled.

MR. UDELL: Okay, thank you, Judge.

THE COURT: All right.

MR. UDELL: So I don't have to objection again?

THE COURT: Yes, yeah, but your objection is overruled.

MR. UDELL: Thank you, Judge.

R 811-812.

This issue is clearly preserved.

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

Appellee asserts that there was no objection to this testimony. AB 33. 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.

This issue is clearly preserved.

Appellee asserts that this testimony was a comment on James Morgan's credibility. This is also improper. Erickson v. State, 565 So. 2d 328 (Fla. 4th DCA 1990). In Erickson, supra, a psychiatrist examined the defendant and testified that the defendant had been untruthful during the psychiatric interview. Id. at 330. The Court held this to be error and 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.

Regardless of whether the comment is considered to be concerning the credibility of James Morgan or Dr. Caddy, it is harmful error. In truth, the testimony was designed to attack the credibility of James Morgan and Dr. Caddy. This is error. Erickson, supra; Tingle v. State, 536 So. 2d 202 (Fla. 1988); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990). The error here was harmful in both phases as it impacted on the jury's consideration of the insanity defense and mental mitigation.

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.

Appellee briefly asserts that the trial court did not err in this issue. AB 35. Appellant will rely on his Initial Brief as to the error.

Appellee's primary claim is one of harmless error. AB 35-36. However, the error here cannot be considered to be harmless beyond

a reasonable doubt. The 1989 compelled attempt to re-hypnotize was critical in Dr. Orne's critique. A portion of Dr. Orne's direct examination reveals this:

> Q (Prosecutor) Based on your knowledge of the facts in this case, watching the testimony of Dr. Koson and Mr. Caddy, do you have an opinion of whether or not there was a hypnotic session in this case in 1985?
>
> A (Dr. Orne) No, I do not have an opinion because we have no data which allows me to make an opinion.

R 1327.

He was then asked about the tape of the 1989 session:

> Q (Prosecutor) Dr. Orne, would you be able to show this jury specific examples where Dr. Caddy failed to meet safeguards, failed in certain aspects of hypnosis, by showing them some tapes and making certain points on the tape from the 1989 session?
>
> A (Dr. Orne) Yes, we -- we could do that. I think it's -- in some ways I don't think it is -- it should be clear by now that the whole notion that you can use hypnosis to get a truth is in error and I think that that -- even if it were done well, even if it were done properly, the only things which we could do excluding, we could exclude the likelihood of faking which we can't do here because it's done and because the subject wasn't even hypnotized. We -- we find we can say that the subject when Dr. Caddy worked with him in 1985, that he hypnotized him according to Dr. Caddy. Now by the way, it is very, very rare that a subject who is highly hypnotizable in 1985 becomes unhypnotizable in 1989 because hynotizability is a stable attribute much like intelligence.
>
> Q So Dr. Caddy's position that the defendant passed with flying colors in 1985 but was not able to be put under hypnosis in 1989 is contrary to what information and knowledge and studies that you have?
>
> A It is contrary to what one would expect. Now in fact, give that hypnosis in 1985 may not have been such a deep hypnosis because we -- the tests used are totally worthless in terms of assessing hypnotizability. I -- I again, am lost in making any kind of sensible conclusion and I just want to emphasize that. It is -- in a life situation you almost never find a subject who is highly hypnotizable and then loses that ability.

R 1329-1330.

The failure to be hypnotized in 1989 was the only concrete evidence that Dr. Orne could point to as to whether James Morgan had been hypnotized in 1985. The compelled 1989 session can not be held to be harmless beyond a reasonable doubt.

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.

Appellee urges this Court to rely on the concurring opinion of Justice O'Connor in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (Fla. 1989), to decide the issue of 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. AB 37. Appellee then states:

> There is no logical distinction between the provisions of the Federal and Florida prohibition against cruel and unusual punishment.

AB 37.

This argument, which is Appellee's entire argument on this issue, is tenuous given the fact that the Federal and Florida Constitutions are worded differently. The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishment." Article I, Section 17 prohibits "cruel or unusual punishment." 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.

The argument that we should slavishly mimic the Federal courts in interpreting the Florida Constitution has been explicitly rejected by this Court.

> Federal and state bills of rights thus serve distinct but complementary purposes. The federal Bill of Rights facilitates political and philosophical homogeneity among the basically heterogeneous stated by securing, as a uniform minimum, the highest common denominator of freedom that can prudently be administered throughout all fifty states. The state bills of rights, on the other hand, express the ultimate breadth of the common yearning for freedom of each insular state population within our nation. Accordingly, when called upon to construe their bills of rights, state courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law.
>
> When called upon to decide matters of fundamental rights, Florida 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.
>
> Traylor v. State, 596 So. 2d 957, 962-963 (Fla. 1992) (footnote omitted).

The execution of a 16 year old is "unusual" and in violation of Article I, Section 17.[1] 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. IB 56-59.

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

POINT XIII DEATH IS DISPROPORTIONATE.

Appellee concedes that the trial court erred in failing to find the statutory mitigator of age as well as several non-statutory mitigating circumstances. AB 39.

> With due respect to the trial court, there was nonstatutory evidence which he "rejected," when in fact it should have been placed on the mitigating scale because it had some mitigating value, whether directly linked to the crime or not. The defendant had a learning disability, was illiterate at the time of the offense, was only sixteen and, in this regard, there was no evidence he was wise beyond his years so as to justify outright rejection of this mitigating factor. His parents fought over his father's drinking, and there were two or three instances of sexual abuse by an uncle.
>
> AB 39.

Appellee also agrees that there are (at most) only two aggravators (HAC and during a felony). AB 38. Appellee also states "one could certainly envision a vote for life, i.e. a fact-finder giving greater weight to the mitigation." AB 40.

However, Appellee urges this Court to affirm James Morgan's death sentence. Appellee asserts that Brown v. State, 565 So. 2d 304 (Fla. 1990), controls this case. AB 40. Brown is significantly different. Brown was convicted of attempted first degree murder on another victim. Id. at 305. This involves substantially more violence as well as an additional aggravator. Brown also involves the aggravating circumstance that the homicide was committed in a cold, calculated, and premeditated manner. Id. at 308.

This is in stark contrast to the current case which even the prosecution's expert characterized as an uncontrollable rage reaction. R 1492-1493. Brown involves three aggravating circumstances: CCP, during a felony, and prior violent felony (an

attempted first-degree murder). The present case only involves two aggravating factors. Both cases involve the same statutory mental mitigating circumstance. Id. at 309. However, Appellee has conceded the trial court should have also found the statutory mitigating circumstance of age as well as several non-statutory mitigating circumstances. The age mitigator is extremely powerful in a 16-year-old. This case involves substantially less aggravation and far more powerful mitigation then Brown, supra.

Appellee ignores the case that most closely resembles this case. Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1990). 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. 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 Livingston. (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.

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.

Appellee concedes that the trial court erred as a matter of law in failing to find the statutory mitigator of age. AB 41. It also agrees that the trial court improperly relied on the jury's guilt phase verdict to reject the statutory mental mitigator pursuant to Fla. Stat. 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). AB 41. It also agrees that the trial court erred in relying on the jury's guilt phase verdict in rejecting two non-statutory mitigating circumstances (use of intoxicants at the time of the offense

and that the offense is a product of an uncontrollable, irrational rage). AB 41-42.

Appellee's sole argument is that all of these errors are harmless. Appellee cites no cases in support of this proposition. Appellee's position is hard to understand, given its position in the prior point. Appellee states:

> Taking the balance as a whole one could certainly envision a vote for life, i.e., a fact finder giving greater weight to the mitigation.

AB 40.

Indeed, four jurors did vote for life.

The failure to find the age mitigator alone is harmful error. 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. 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). In a case with only two aggravators, the failure to consider the age of 16 in mitigation clearly can not be held to be harmless beyond a reasonable doubt.

The trial court's reliance on the jury's guilt phase verdict in rejecting one of the statutory mental mitigating circumstances is also harmful error.

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 v. State, 390 So. 2d 332, 337 (Fla. 1980) and Ferguson v. State, 417 So. 2d 639, 644-645 (Fla. 1982). 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. Mr. Morgan presented extensive mental health testimony. The trial court's failure to exercise independent judgment or to use the proper standard is prejudicial. Here, there are only two aggravators involving one homicide and no prior violence. In Ferguson, supra, this Court found a similar error to be harmful,

in a case involving six murders, three other prior violent felonies, and four valid aggravators. 417 So. 2d at 643-647. This error is clearly harmful. The trial court's improper reliance on the jury's guilt phase verdict to reject two non-statutory mitigators is also harmful.

Appellant would argue that lack of independent determination of mitigation renders this order fatally defective and requires the imposition of a life sentence. Bouie v. State, 559 So. 2d 1113 (Fla. 1990). At the very least, resentencing is required as in Mines, supra, and Ferguson, supra.

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."

Appellee relies on Gaskin v. State, ___ So. 2d ___, 18 Fla. L. Weekly S161 (Fla. March 18, 1993), to argue to that this issue is not preserved. In Gaskin, there was neither an objection nor a requested jury instruction. In the present case, Appellant objected to the instruction on the precise grounds adopted by the United States Supreme Court in Espinosa v. Florida, 112 S.Ct. 2926 (1992). R 1743-1744. The trial court overruled the objection. There was nothing in Gaskin that states that once the objection is overruled, a defendant must also submit a written special instruction. Indeed, such would be a useless act, as the judge has already ruled that the defendant's objection is overruled.

In determining whether Espinosa claims have been waived or preserved, this Court has consistently relied on the fact as to whether there was an objection or not. This Court held the issue waived in the following cases and only discussed the lack of

objection, without any mention of whether or not a special instruction was requested. Thompson v. State, ___ So. 2d ___, 18 Fla. L. Weekly S212, S214 (Fla. April 1, 1992) (We note that Thompson did not object to the instruction read to the jury and thus failed to preserve the issue for appeal); Davis v. State, ___ So. 2d ___, 18 Fla. L. Weekly S238 (Fla. April 8, 1993) (There was no objection at trial made to the wording of the "heinous, atrocious, or cruel" instruction); Koon v. Dugger, ___ So. 2d ___, 18 Fla. L. Weekly S201 (Fla. March 25, 1993) (There was never any objection to the wording of the instruction); Rose v. State, 18 Fla. L. Weekly 152, 155 (Fla. March 11, 1993) (He made no objection to the wording of the instruction); Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989) (We note that Smalley did not object to the standard jury instruction). In all of these cases this Court only discussed the lack of objection in holding the issue to be barred. In contrast, this Court held the issue to be properly preserved in James v. State, ___ So. 2d ___, 18 Fla. L. Weekly S139 (Fla. March 4, 1993). This Court laid out the requirements for preserving this issue:

> Claims that the instructions on the heinous, atrocious, or cruel aggravator is unconstitutionally vague are procedurally barred unless a specific objection on that ground is made at trial and pursued on appeal.

Id. at S139.

This is precisely what was done in this case. Appellant specifically objected that the instruction is unconstitutionally vague and cited Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). R 1743-1745.

An analysis of Florida Rule of Criminal Procedure 3.390 supports this Court's language in James, supra.

> (c) **Written Request.** At the close of the evidence, or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action on the request and of the instructions that will be given prior to their argument to the jury.
>
> (d) **Objections.** No party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection. Opportunity shall be given to make the objection of the presence of the jury.

Fla.R.Crim.P. 3.390.

This rule is clear. A party may file written requested instructions. There is nothing that makes this mandatory. The objection is what is required to raise the issue on appeal. In Austin v. State, 406 So. 2d 1128 (Fla. 4th DCA 1981), the Court interpreted Rule 3.390(d) as follows:

> The rule is to be applied literally where the trial court expresses an intention to give the instruction which counsel believes should not be given. This would most often occur at a separate charge conference or, more often, at a side bar conference. Counsel is obligated to object and to state the specific grounds for objection.

Id. at 1131-1132.

This is precisely what counsel did in this case. This issue is properly preserved.

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.

The error here is harmful as in James, supra. In James, this Court found the error to be harmful, due to the prosecutorial emphasis in closing argument, despite the fact that there were four other aggravators. 18 Fla. L. Weekly at S139. Here, there was the same emphasis, only one other aggravator, substantial mitigation, and a close jury vote of eight to four. This error can not be said to be harmless beyond a reasonable doubt. Reversal 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.

Appellee concedes that the trial court erred in failing to find at least four non-statutory mitigating circumstances which were unrebutted. AB 39. However, Appellee argues that this Court should affirm this death sentence because James Morgan was sentenced four months before this Court's opinion in Campbell v.

State, 572 So. 2d 415 (Fla. 1990) (February 22, 1990, versus June 14, 1990). This result would be contrary to other decisions of this Court.

Campbell, supra, outlines the trial court's duty to consider all non-statutory mitigating factors and find those that are reasonably established by the greater weight of the evidence. This Court relied on Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and Rogers v. State, 511 So. 2d 526 (Fla. 1987). Both cases were decided before this sentencing.

This Court has subsequently applied these principles to pre-Campbell sentencings. In Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992), this Court applied these principles to a post-conviction case previously affirmed in 1983. In Santos v. State, 591 So. 2d 160 (Fla. 1991), this Court applied these principles to a 1989 sentencing. This Court stated:

> Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence. *Hardwick v. State*, 521 So. 2d 1071, 1076 (Fla.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988). In *Rogers* we set forth an extensive discussion of the federal cases from which this limitation derives. *Rogers*, 511 So. 2d at 534 (citing *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion)). Distilling this case law, we then enunciated a three-part test:
>
> > [T]he trial court's first task ... is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual findings has been make, the court then *must* determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e, factors that, in fairness or in the totality of the defendant's life or character may be considered as extenu-

> ating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer *must* determine whether they are of sufficient weight to counterbalance the aggravating factors.

*Id.* (emphasis added). *Accord Campbell v. State*, 571 So. 2d 415, 419-20 (Fla. 1990); *Cheshire*, 568 So. 2d at 912; *Hardwick*, 521 So. 2d at 1076.

> The requirements announced in *Rogers* and continued in *Campbell* were underscored by the recent opinion of the United States Supreme Court in *Parker v. Dugger*, ___ U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). There, the majority stated that it was not bound by this Court's erroneous statement that no mitigating factors existed. Delving deeply into the record, the *Parker* Court found substantial, uncontroverted mitigating evidence. Based on this finding, the *Parker* Court then reversed and remanded for a new consideration that more fully weighs the available mitigating evidence. Clearly, the United States Supreme Court is prepared to conduct its own review of the record to determine whether mitigating evidence has been improperly ignored.
>
> Based on the record at hand, we are not convinced that the trial court below adhered to the procedure required by *Rogers* and *Campbell* and reaffirmed in *Parker*. As noted earlier, the trial court also erred in its findings on aggravating factors. Accordingly, we vacate the sentence and remand for a new sentencing hearing before the trial court in compliance with this opinion, *Rogers*, *Campbell*, and all other applicable law.

Id. at 164.

Santos makes clear that Campbell merely continued the requirements announced in Rogers. Rogers was well before this sentencing.

The error was harmful as the judge failed to find at least four substantial non-statutory mitigating circumstances and there were only two aggravators as well as one statutory mitigator found by the judge and another age which Appellant concedes should have been found. A life sentence or a resentencing is required.

## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to RALPH BARRIERA, Department of Legal Affairs, 401 N.W. 2d Avenue, Suite N921, P. O. Box 013241, Miami, FL 33101, 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 25th day of May, 1993.

Richard B. Greene
Of Counsel